IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case No: 74870/2019

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES:

N KOLLAPEN — DATE: 10/2/2020

In the matter between:

ESKOM HOLDINGS SOC LIMITED	**Applicant**
and	
NATIONAL ENERGY REGULATOR OF SOUTH AFRICA	**First Respondent**
MINISTER OF MINERAL RESOURCES AND ENERGY	**Second Respondent**
MINISTER OF FINANCE	**Third Respondent**
SOUTH AFRICAN LOCAL GOVERNMENT ASSOCIATION	**Fourth Respondent**

JUDGMENT

KOLLAPEN, J

Introduction and the relief sought

[1] This is an application for urgent relief ("Part A") by the applicant ("Eskom") pending an application in terms of the Promotion of Administrative Justice Act[1] ("PAJA") for judicial review and setting aside of a decision taken by the first respondent (National Energy Regulator of South Africa ("NERSA")) in relation to an application by Eskom for electricity tariff increases for the 2019/2020, 2020/2021 and 2021/2022 financial years ("Part B").

[2] In its Notice of Motion Eskom seeks the following interim order:

1. Condonation for non-compliance with the Rules of Court relating to service and time periods and Part A be heard on semi-urgent basis in terms of Rule 6(12).

2. An order directing that, pending the finalisation of the review in Part B:

a. Eskom be authorised to increase each of its standard tariffs for 2020/2021 financial year, excluding the Homelight tariff, by 16,60% over the corresponding tariffs for the 2019/2020 financial year;

b. Eskom is authorised to increase each of its standard tariffs for 2021/2022, excluding the Homelight tariff, by 16,72% over the corresponding tariffs for 2020/2021 financial year;

[1] Act 3 of 2000.

c. Eskom is authorised to impose on municipalities in the 2020/2021 and 2021/2022 financial years, the tariffs increased in accordance with a. and b. above, provided that these tariffs are tabled before Parliament on or before 15 March 2020.

3. Costs in Part A to be costs in Part B.

Background

[3] In 2006, the Energy Regulatory Act[2] ("ERA") was enacted establishing NERSA as well as a tariff regime which would apply to all electricity licensees (including Eskom). In accordance with this regime all electricity licensees will be entirely self-financing and will cover the reasonable cost of their licensed operations (including capital costs and a reasonable return on capital) through their tariffs. The ERA also set as one of its objectives the need to facilitate a fair balance between the interests of customers and end users, licensees, investors and the public.

[4] The regime contained in ERA, succeeded a very different regime in which Eskom tariffs were maintained at artificially low levels by pricing electricity without adequately accounting for the costs of generating, transmitting and distributing electricity.

[5] Since 2006, Eskom tariffs have been determined by NERSA under a system of multi-year price determination ("MYPDs") governed by NERSA's own MYPD methodologies ("MYPDMs"). This application applies to the MYPDM4

[2] Act 4 of 2006.

determination made by NERSA for the 2019/2020 to 2021/2022 financial years. The MYPDMs are discussed herein below.

[6] On 14 September 2018, Eskom applied to NERSA for approval of electricity tariffs for the financial years 2019/2020, 2020/2021 and 2021/2022 and sought the following tariff increases:

i. 2019/2020 – 15% increase on standard tariffs amounting to R219 billion;

ii. 2020/2021 – 15% increase on standard tariffs amounting to R252 billion;

iii. 2021/2022 – 15% increase on standard tariffs amounting to R291 billion.

[7] NERSA made its determination on 7 March 2019, allowing for the following tariff increases for the financial years 2019/2020, 2020/2021 and 2021/2022:

i. 2019/2020 – 9.41% amounting to a total allowable revenue of R206 billion;

ii. 2020/2021 – 8.1% amounting to a total allowable revenue of R222 billion;

iii. 2021/2022 – 5.22% amounting to a total allowable revenue of R233 billion.

Given the difference in the increase applied for and that granted, Eskom contends that it results in a shortfall in its revenue of some R102 billion over the three financial years in question and that the decision by NERSA stands to be reviewed and set aside on a number of grounds.

The issue for determination

[8] While the determination of the tariff by NERSA is the subject of a detailed process, the sole issue that arises in this part of the application is the treatment

by NERSA of an annual government equity injection of R 23 billion per year in the calculation of Eskom's annual allowable revenue.

The Regulatory Framework

[9] NERSA in terms of the National Electricity Regulatory Act[3] ("NERA") has the mandate to *inter alia,* regulate the generation, transmission and distribution of electricity. NERSA's functions are set out in section 4 of the NERA and include the consideration of applications for licences and issuing of licenses for the operation of generation, transmission or distribution facilities and the regulation of electricity prices and tariffs.

[10] The legal regime governing electricity prices and tariffs comprises the ERA, the Electricity Pricing Policy[4] ("the EPP") and the MYPDMs. These three components operate within a clear legal hierarchy.

[11] ERA, which is the only Parliamentary legislation governing the determination of electricity tariffs is at the apex of the legal hierarchy. The EPP is a policy instrument and subordinate to ERA. The MYPDMs are instruments issued by NERSA setting out the methodology to be applied by NERSA in determining Eskom's tariffs and are subordinate to ERA and the EPP.

[12] The MYPD methodology however provides that NERSA is not precluded from 'applying reasonable judgment on Eskom's revenue after due consideration of what may be in the best interest of the overall South African economy and the public.'

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[3] 40 of 2004.

[4] Government Gazette 31741 of 19 December 2008.

Energy Regulator Act

[13] Section 2 of the ERA sets the following objectives:

> ***"2 Objects of Act***
>
> *The objects of this Act are to-*
>
> *(a) achieve the efficient, effective, sustainable and orderly development and operation of electricity supply infrastructure in South Africa;*
>
> *(b) ensure that the interests and needs of present and future electricity customers and end users are safeguarded and met, having regard to the governance, efficiency, effectiveness and long-term sustainability of the electricity supply industry within the broader context of economic energy regulation in the Republic;*
>
> *(c) facilitate investment in the electricity supply industry;*
>
> *(d) facilitate universal access to electricity;*
>
> *(e) promote the use of diverse energy sources and energy efficiency;*
>
> *(f) promote competitiveness and customer and end user choice; and*
>
> *(g) facilitate a fair balance between the interests of customers and end users, licensees, investors in the electricity supply industry and the public."* (Emphasis added)"

[14] Section 14 of the ERA provides as follows:

> "***14 Conditions of licence***
>
> *(1) The Regulator may make any licence subject to conditions relating to-…*
>
> *(d) the setting and approval of prices, charges, rates and tariffs charged by licensees;*
>
> *(e) the methodology to be used in the determination of rates and tariffs which must be imposed by licensees;"*

[15] Section 15 of the ERA set out the "Tariff principles" as follows:

> "***15 Tariff principles***
>
> *(1) A licence condition determined under section 14 relating to the setting or approval of prices, charges and tariffs and the regulation of revenues-*
>
> *(a) must enable an efficient licensee to recover the full cost of its licensed activities, including a reasonable margin or return;*

(b) must provide for or prescribe incentives for continued improvement of the technical and economic efficiency with which services are to be provided;

...

(2) *A licensee may not charge a customer any other tariff and make use of provisions in agreements other than that determined or approved by the Regulator as part of its licensing conditions."* (Emphasis added)."

The MYPDM

[16] The MYPDM is the methodology developed by NERSA to determine the allowable tariffs and tariff increases to be charged by licensees to consumers.

[17] MYPDM4 lists the following objectives in section 2.2:

"2.2 In developing the MYPD Methodology, the following objectives were adopted:

2.2.1 to ensure Eskom's sustainability as a business and limit the risk of excess or inadequate returns; while providing incentives for new investment;

2.2.2 to ensure reasonable tariff stability and smoothed changes over time consistent with socio-economic objectives of the Government;

2.2.3 to appropriately allocate commercial risk between Eskom and its customers'

2.2.4 to provide efficiency incentives without leading to unintended consequences of regulation on performance;

2.2.5 to provide a systematic basis for revenue/tariff setting; and

2.2.6 to ensure consistency between price control periods."

[18] The MYPD methodology is intended to provide for a "cost plus" system of tariffs. The tariffs are to be set to recover Eskom's "allowable revenue" on the projected consumption of electricity. The formula in MYPDM4 for determining "allowable revenue" ("AR") is set out in section 5.2 of the MYPD methodology and provides as follows:

"The following formula must be used to determine the AR:

AR= (RABxWACC) +E+PE+D+R&D+IDM±SQI+L&T±RCA

Where:

AR = Allowable Revenue

RAB = Regulatory Asset Base

WACC=	*Weighted Average Cost of Capital*
E=	*Expenses (operating and maintenance costs)*
PE=	*Primary Energy costs (inclusive of non-Eskom)*
D=	*Depreciation*
R&D=	*Costs related to research and development programmes/projects*
IDM=	*Integrated Demand Management costs (EEDSM, PCP, DMP, etc.)*
SQI=	*Service Quality Incentives related to costs*
L&T=	*Government imposed levies or taxes (not direct income taxes)*
RCA=	*The balance in the Regulatory Clearing Account (risk management devices of the MYPD).”*

[19] The MYPDM4 methodology in turn provides the details and content of how each one of these costs components and the projected sales volumes are to be determined so that there is a detailed system for projecting the total revenue upon which the tariffs will be based.

The tariff application and the NERSA process

[20] On 14 September 2018, Eskom submitted a multi-year application under MYPDM4 for tariffs to apply from 2019 to 2022. On 2 October 2018, NERSA confirmed that Eskom's application complied with the Minimum Information Requirement for Tariff Applications and the MYPD4 methodology.[5]

[21] On 19 October 2018, NERSA published Eskom's application on its website and invited comments by 30 November 2018. Representations from interested organisations were accepted by NERSA in December 2018 and between 14 January 2019 and 5 February 2019 NERSA held public hearings in respect of Eskom's 2019-2022 application in the major centres around South Africa.

[22] NERSA made its decision on 7 March 2019 and its reasons for the decision was published on 9 October 2019.

[23] Eskom launched the present application on 10 October 2019.

[5] Page 37 para [75] of the Founding Affidavit.

The case for the Applicant

[24] The applicant locates the relief it seeks in what it describes as a deep financial crisis that has the potential to impact with great devastation on the South African economy. It argues that even though inefficiencies, mismanagement and State Capture have impacted on its current liquidity problems they have but been a relatively minor cause of those problems. It characterises inadequate electricity tariffs approved by NERSA over the years as one of the more significant contributors to its liquidity crisis. Eskom in this regard relies on a report published by the World Bank in August 2016[6] conducted on the financial viability of electricity sectors in Sub-Saharan Africa. The study concluded under Chapter 6 in regard to so called "hidden costs" which translates to prudent and efficient costs "hidden" from consumers by virtue of it no being reflected in the consumer prices that Eskom's financial situation is 81% attributable to inadequate tariff increases. It says that it has been in a downward spiral for more than a decade having no other choice than to incur debt in order to stay afloat. This cycle of resorting to debt has snowballed out of control and currently stands at some R441 billion in debt securities and loans.[7]

[25] Statistics[8], however, shows that historically the average price per kilowatt has increased with considerably from 2006 to 2018, from 17.91c/kWh in 2006 to 93.79c/kWh in 2018.

Year	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
Tariff increase	5.10	5.90	27.5	31.3	24.8	25.8	16	8.0	8.0	9.4	2.2	2.2	5.23
Average Price (c/kWh)	17.91	18.09	25.24	33.14	41.57	52.3	60.66	65.51	70.75	79.73	87.23	89.13	93.79
GDP growth	5.6	5.4	3.2	-1.5	3	3.3	2.2	2.5	1.8	0.6	1.3	1.3	0.7

[6] Page 35 para [63] of the Founding Affidavit.
[7] Page 24 para [47] of the Founding Affidavit.
[8] Table 148, page 243, volume 1 of the Court bundles.

This table prepared by NERSA included in its reasons the decision reflects both the percentage increase as well as the actual increase over the period 2006-2018.

[26] The starting point for determination of allowed revenue is the basic formula that is applied by energy regulators worldwide when regulating electricity prices in terms of a "cost-of-service" methodology:

"Allowed revenue = Primary energy costs[9] *+ operating and maintenance costs*[10] *+ depreciation*[11] *+ return on capital*[12]*".*

[27] The average electricity tariff may then be calculated as:

"Average tariff per kWh = Allowed revenue + sales volumes (kWh)".

[28] NERSA reached its decision on the quantification of Eskom's allowable revenue by deducting from each of the three years' total allowable revenue amounts of R23 billion per year which amounts constitute annual equity injections that the Government had committed to Eskom[13]. Eskom's stance is that these amounts were earmarked as equity injections and that NERSA misappropriated them and converted them into tariff subsidies by deducting them from Eskom's total allowable revenue.

[29] In addition it argues that issues of affordability and the impact of tariffs on consumers and the economy are as a matter of law not relevant in the determination of a tariff as section 15(1) of the NERA provides that a license

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[9] Provides for revenue with which to pay for the fuel – such as coal, diesel and uranium.
[10] Provides for revenue with which to pay for the maintenance, employee costs, insurance costs and others operating expenditure.
[11] Provides the revenue, in instalments spread over the full operational life of the assets.
[12] Represents the cost of debt and equity capital – such as interest expense.
[13] In terms of the Appropriation Bill B6 of 2019 tabled on 2 April 2019 with the long title *"appropriate money from the National Revenue Fund for the requirements of the State for the 2019/2020 financial year."* In effect an amount of R17.652 billion was appropriated for: *"Eskom: debt obligations and recapitalisation".* In terms of the Appropriation Bill B10 of 2019 tabled on 23 July 2019 with the long title *"[T]o appropriate and additional amount of money for the requirements of the Department of Public Enterprises to assist Eskom Holdings SOC Limited with its financial obligations and to provide for matters connected therewith".*

condition must enable a licensee to recover the full cost of its licensed activities including a reasonable margin or return.

[30] To this end it contends that NERSA's decision that it seeks to have reviewed in Part B, is in conflict with the principle of legality , is *ultra vires*, irrational, unreasonable and procedurally unfair on the basis *inter alia* that:

30.1 NERSA's decision was unlawful and falls to be reviewed and set aside in terms of section 6(2) (i) of PAJA and the legality principle enshrined in section 1(c) of the Constitution. Section 15(1) (a) of ERA provides that conditions imposed by NERSA on licensees in relation to tariffs:
"must enable an efficient licensee to recover the full cost of its licensed activities, including a reasonable margin or return". ERA nor any other Act of Parliament makes provision for NERSA to subsidise Eskom tariffs by including Government equity injections in its allowable revenue;

30.2 NERSA's decision is procedurally unfair and falls to be reviewed and set aside in terms of section 6(2)(c) of PAJA due to NERSA's decision to include the R23 billion being inconsistent with MYPDM4 and the EPP;

30.3 NERSA failed to consult Eskom and Government before taking the R23 billion into consideration as part of Eskom's allowable revenue;

30.4 NERSA's decision is unreasonable and contrary to what can be expected from a reasonable administrator under the circumstances. NERSA failed to take into account certain relevant consideration and took into account irrelevant consideration when it arrived at its decision.

30.5 NERSA's decision was irrational in the following manner:
30.5.1 It did not have consideration to the purpose of the R23 billion, as was announced by President Ramaphosa in his February 2019 state of the nation address as well as in the Appropriation Bill B6 of 2019 and Special Appropriation Bill B10 of 2019;

30.5.2 NERSA ignored the goal of Government policy (both as reflected in the EPP and the statements by the President and Minister of Finance).

The case for the Respondent

[31] On the limited issue of how it treated the R23 billion committed by Government, NERSA's stance is that it was entitled to independently assess and verify the figures and projections presented by Eskom and apply reasonable judgment to Eskom's determination of its allowable annual revenue or any component thereof. This it did in respect of various components of the Eskom calculation but none of them require further consideration in this part of the application. They may well arise in Part B.

[32] It says further that it took note that the shareholder injection was intended to assist Eskom with debt repayments but that its view was that if the cash injection was not taken into account (one assumes in determining allowable revenue) it would have caused excess returns to Eskom. NERSA then goes on to say that in balancing excess returns, as required by the MYPD4 methodology, the R23 billion Government assistance was used to reallocate risks between Eskom and its customers in accordance with the MYPD methodology. In brief NERSA took the R23 billion into reckoning in the determination of Eskom's allowable revenue which Eskom calls an impermissible misappropriation.

[33] NERSA also maintains that in coming to its decision it was required to and did in fact seek to balance both Eskom's interest and those of the public in line with section 2(g) of the ERA.

[34] Finally it also argues that in substance the relief Eskom seeks is not interim but final in nature and therefore the Court should subject Eskom's case to the requirements of final as opposed to interim relief.

Analysis

[35] In *National Energy Regulator of South Africa v Borbet SA (Pty) Ltd*[14], the Supreme Court of Appeal summarised the legal regime governing NERSA in the determination of tariffs as follows :-

> *"[12] The provisions set out above create a situation where licensees are the ones empowered to charge a tariff for electricity consumption within parameters set by the Regulator. Licences, as can be seen from the provisions of s 14(1)(d) and (e) of ERA, may contain conditions relating to the setting and approval of prices, charges, rates and tariffs to be charged by licensees. Licences may be made subject to conditions relating to the methodology to be used in the determination of rates and tariffs which must be imposed by licensees (s 14(1) (e)). NERSA is therefore responsible for determining whether a licence should be granted; the terms of the licence; the methodology by which tariffs and charges are to be determined and the imposition of that methodology on the licensee by way of a licence condition; and the tariffs and charges that the licensee may recover from its customer. All of these are embodied directly or indirectly in the licence and the obligation to adhere to them flows from the licence. "*

The relationship between Eskoms' sustainability and the consumer and the exercise of reasonable judgment by NERSA

[36] It was contended on behalf of Eskom that to the extent that section 15(1) of ERA required that a license condition 'must enable an efficient licensee to recover the full cost of its licensed activities, including a reasonable return', there was no scope in this process to consider questions of affordability or the impact of tariffs on the consumer. Accordingly they argued that reasonable judgment and the MYPDM afforded NERSA no discretion when it came to matters of affordability and the impact of a tariff on the consumer.

[14] [2017] ZASCA 87; 2017 JDR 1121 (SCA).

[37] In *Borbet* (*supra*) the Court made reference to what it described as the balance to be struck between Eskoms' sustainability and the impact on the consumer and the South African economy and expressed itself as follows :-

> *"[3] Electricity tariff increases affect all South Africans. They impact the business world as well as domestic households. Thus, there is a statutory framework to ensure fairness so that tariff increases have the result that electricity infrastructure remains sustainable while at the same time ensuring that undue hardships are not imposed on consumers."*

[38] This appears to be in line with the objectives of the ERA[15] which provides for a fair balance to be struck amongst others between consumers and licensees.

[39] Accordingly to interpret section 15(1) in isolation without regard to the context of the ERA as a whole would have the effect of distorting the objectives of the Act and it must be that even in seeking to ensure a licensee is able to recover the full cost of its activities and a reasonable return, the issues of affordability and impact on the consumer remain relevant and are required to be factored into such a determination. The process of determining tariff increases is not only a matter of calculation but also involves reasonable judgment and a balancing of what may well be conflicting interests – those of licensees as against those of end users.

[40] In addition PAJA in section 4(1) and (2) obliges an administrator when taking an administrative action that affects the public to afford the public the opportunity to be heard.[16] This obligation means that the views and the impact

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[15] Section 2(g).

[16] "**4 Administrative action affecting public**

(1) In cases where an administrative action materially and adversely affects the rights of the public, an administrator, in order to give effect to the right to procedurally fair administrative action, must decide whether-

(a) to hold a public inquiry in terms of subsection (2);

...

(2) If an administrator decides to hold a public inquiry-

(a) the administrator must conduct the public inquiry or appoint a suitably qualified person or panel of persons to do so; and

(b) the administrator or the person or panel referred to in paragraph *(a)* must-

(i) determine the procedure for the public inquiry, which must-

of the decision on the public are relevant considerations in the decision to be then taken. To insulate questions of affordability and impact on the consumer from the decision to be taken will have the effect of undermining PAJA in this respect and will largely negate the public participation element that preceded the decision that Eskom seeks to have reviewed.

[41] However reasonable judgment does not afford NERSA a license to use its discretion as it pleases. Its actions remain open to review in terms of PAJA and the exercise of reasonable judgment must occur within the framework of PAJA and the law developed in terms thereof by our Courts.

[42] This is an important matter in the determination of this part of the relief as I understand Eskom's case to be that a tariff must be arrived at by application of section 15(1) and the MYPD methodology to the exclusion of considerations of affordability and impact on the consumers of electricity. For the reasons given above, I do not agree with that approach.

NERSA's treatment of the R 23 billion equity injection

[43] It appears not to be in dispute that the equity injection that the South African Government committed to Eskom in the amount of R 23 billion per year over three years', was intended to assist Eskom with its debt repayments.

[44] NERSA says that it noted that Eskom's application was based on negative returns for 2019/2020 and 2020/2021 which is contra the MYPD methodology.

(aa) include a public hearing; and
(bb) comply with the procedures to be followed in connection with public inquiries, as prescribed;
(ii) conduct the inquiry in accordance with that procedure;
(iii) compile a written report on the inquiry and give reasons for any administrative action taken or recommended; and
(iv) as soon as possible thereafter-
(aa) publish in English and in at least one of the other official languages in the *Gazette* or relevant provincial *Gazette* a notice containing a concise summary of any report and the particulars of the places and times at which the report may be inspected and copied; and
(bb) convey by such other means of communication which the administrator considers effective, the information referred to in item *(a)* to the public concerned.

This is admitted by Eskom however Eskom submits that in doing this it was attempting to close the gap between too-low tariffs and cost-reflective tariffs, in a manner that was as gradual as possible for the sake of electricity consumers as well as the country's economy. The three year plan of Eskom resulted in a negative returns of R16 687 million and R2 765 million for 2019/2020 and 2020/2021, respectively before yielding a positive return of R20 314 million for the year 2021/2022. This plan says Eskom is part of an attempt to achieve long term sustainability, taking into consideration the affordability to consumers of electricity.

[45] Eskom argues that the tariff fixed by NERSA will result in a negative return to Eskom over the full period covered by MYPDM4. Indeed in NERSA's reasons for decision in showing how it arrived at the allowable revenue there are negative returns forecast for all three years covered by the MYPDM4 of respectively R8.7 billion, R9.3 billion and R9.8 billion. When NERSA, in its reasons says it decided to reverse the negative returns that Eskom reflected and grant it a positive return, it is difficult to see how the projected negative returns set out above could be characterised as positive returns.

[46] It appears from Eskom's application to NERSA that it established a Weighted Average Cost of Capital ("WACC") return at 9.1%. NERSA assessed this at 7.1% which would have resulted in a price increase of 53% in order to provide a cost reflective tariff. Because this would have led to a too high tariff, it then fixed the WACC at 1.5% which would have then translated into a tariff increase of 22.59%. This was still too high for NERSA and it then took into account the R23 billion equity injection to reduce the tariff increases to 9.4 %, 8.1 % and 5.2 %, respectively over the three year period.

[47] NERSA's stance is that the MYPD methodology provides that it may apply reasonable judgment on Eskom's revenue or any component of thereof and in light thereof it was entitled to treat the R23 billion as it did and that a Court should be slow to intervene when it acts within a margin of appreciation of what the methodology allows. It further states that its action are therefore not *ultra*

vires nor are they irrational as ultimately there is a rational relationship between the means used (the utilisation of the R 23 billion injection) and the end sought to be achieved (affordable tariffs).

[48] While indeed the MYPDM does afford NERSA the right to apply reasonable judgment on Eskom's revenue, I am not sure if that allows NERSA in the determination of allowable revenue to take into consideration an equity injection that was intended to be used to pay Eskom's debts, to offset a high tariff increase and by doing so treating the R23 billion as revenue. If ultimately the exercise is about determining the cost to the licensee of its licensed activities, an equity injection cannot have the effect of reducing those costs as NERSA has purported to do. It also violates basic principles of accounting by treating an equity injection as revenue.

[49] In my view the reasonable judgment that NERSA is allowed to exercise cannot translate into an open ended discretion that insulates it from scrutiny and judicial review. It must accordingly be arguable that the decision by NERSA in its treatment of the R23 billion equity injection is open to review and possible attack.

The requirements for interim relief (final relief)

[50] NERSA has complained that even though the relief in part A is characterised by Eskom as interim relief, in truth and reality it constitutes final relief and therefore they say Eskom should satisfy the requirements for a final interdict. In this regard it says a Court imposed tariff which Eskom seeks as interim relief will have final effect in that if granted, it will be implemented, have immediate effect on consumers and even if revisited later, those consequences cannot necessarily be reversed in so far as it relates to individual consumers.

[51] It is so that the characterisation of the relief sought cannot always be dispositive of the nature of the relief in question. It is the effect of the relief that must be considered and in the context of these proceedings what is sought in Part A is the imposition of an electricity tariff pending the determination of Part B. The

relief sought in part A is of a temporary nature which a Court dealing with Part B is free to revisit and make a final determination upon. It cannot therefore be said that the relief sought in part A is anything other than interim relief. See *Cipla Agrimed (Pty) Ltd v Merch Sharp Dohme Corporation and Others*[17]

[52] For the applicant to succeed in Part A it must satisfy the requirements for interim relief which are:-

a) A *prima facie* right (even one open to some doubt);
b) A well-grounded apprehension of irreparable harm, if interim relief is not granted and final relief is ultimately granted;
c) The balance of convenience must favour the granting of interim relief;
d) There must be no other ordinary remedy that is available to give adequate redress to the applicant.

[53] In addition to the above the caution expressed by the Constitutional Court in *National Treasury and Others v Opposition to Urban Tolling Alliance and Others*[18] ("OUTA") may well be apposite in this matter when it said that:-

> *"[44] The common-law annotation to the Setlogelo test is that courts grant temporary restraining orders against the exercise of statutory power only in exceptional cases and when a strong case for that relief has been made out. Beyond the common law, separation of powers is an even more vital tenet of our constitutional democracy. This means that the Constitution requires courts to ensure that all branches of government act within the law. However, courts in turn must refrain from entering the exclusive terrain of the executive and the legislative branches of government unless the intrusion is mandated by the Constitution itself.*
>
> *[45] It seems to me that it is unnecessary to fashion a new test for the grant of an interim interdict. The Setlogelo test, as adapted by case law, continues to be a handy and ready guide to the bench and practitioners alike in the grant of interdicts in busy magistrates' courts and high courts. However, now the test must be applied cognisant of the normative scheme and democratic principles that underpin our Constitution. This means that when a court considers whether to grant an interim interdict it must do so in a way that promotes the objects, spirit and purport of the Constitution.*

[17] 2018 (6) SA 440 (SCA).
[18] 2012 (6) SA 223 (CC).

[54] In these proceedings the interim relief sought would indeed not only have the effect of restraining the exercise of NERSA's statutory powers but go beyond that in seeking to have a tariff other than the one determined by NERSA imposed by this Court. Under those circumstances I would take the view that arising out of the remarks in *OUTA* that such relief though competent should only be granted in the clearest of cases and when a strong case has been made out.

[55] I proceed to deal with the requirements for interim relief:

a) A *prima facie* right (even one open to some doubt)

[56] In the analysis above which deals with how NERSA treated the R23 billion Government equity injection it does appear that even though NERSA is allowed some latitude in applying reasonable judgment in dealing with Eskom's revenue, the appropriation of the R23 billion equity injection in the reduction of Eskom's annual allowable revenue may have been beyond the powers of NERSA as it cannot be said that it constitutes reasonable judgment but rather that it constitutes the erroneous treatment of an equity injection as constituting allowable revenue. It may well contravene the provisions of section 15(1) as the determination of the costs of licensed activities is somewhat distorted by the allocation of R23 billion toward revenue and finally it also may constitute an impermissible departure from the MYPD methodology in how allowable revenue is to be determined.

[57] Mindful that on this leg of the test all that Eskom's has to show is a *prima facie* right, even one open to some doubt, I must conclude that this aspect of the test for interim relief has been established.

b) A well-grounded apprehension of irreparable harm if the relief is not granted and final relief is granted

[58] It is largely Eskom's case that it stands on a financial precipice and the refusal of interim relief will be catastrophic not just for Eskom but for the South African

economy and the long term interests of the South African state. It argues that the determined tariffs of 9.4 % for 2019/2020, 8.1% for 2020/2021 and 5.22% for 2021/2022 will result in a loss of at least R102 billion, in revenue. This it says will impact on its ability to service its debt of some R441 billion of which R318 billion is guaranteed by the South African Government. It thus argues that if it defaults in its debt repayments, it will trigger the obligation of Government in terms of the guarantees Government has issued and that if Government defaults in meeting the Eskom debt, it will have the domino effect of rendering other Government debts of close to some R980 billion also immediately payable. All of this it says is likely scenarios if the interim relief is not granted.

[59] Eskom also submitted that NERSA's approach has the effect of raising concerns amongst lenders and investors about Eskom's ability in future to repay its debts. This concern is also directly linked to Government and Governments ability to guarantee portions of Eskom's debt as well as its own. Eskom says that if the interim relief is not granted it will not be able to service old debt whilst being unable to obtain new debt including project specific loans.

[60] While the financial situation at Eskom is indeed grave, it has been so as a result of a number of factors that have arisen over a number of years. Eskom itself says that tariffs approved by NERSA have historically not enabled it to meet its costs and enjoy a return. At the same time it concedes that mismanagement, inefficiencies and State Capture may have also had a negative impact on its operations and its liquidity. These are also factors to be considered at this stage of the test.

[61] The scenario Eskom has portrayed is based on a projection of its operations, costs, sales and the interim relief that is sought is in substance for a single year of its operation namely 2020/2021. The relief sought does not apply to the financial year 2019/2020 and my view is that no interim relief needs to be considered for the year 2021/2022, as part B will in all probability have been disposed of by then.

[62] What one is then left with is an approved increase of 8.1% (as opposed to a sought interim increase of 16 .60%) which if interim relief is not granted will be the tariff increase for 2020/2021. It is not clear what the impact of that will be on Eskom's position, how the Government will respond thereto, what the Finance Ministry's stance will be in the event that Eskom faces the kind of financial crisis that it anticipates. Even if one accepts that on Eskom's version it will face dire consequences if interim relief is not granted, it is not clear what the political response to that situation may be.

[63] Ultimately the financial health and the survival of Eskom is a matter that falls squarely within the remit of the political sphere of government, influenced by the prevailing economic realities as well as the legitimate demands of the developmental state. It cannot be that a tariff determination for effectively a single year should be elevated to determining the survival or the demise of a significant state owned entity and nor is it desirable to leave that determination to a Court.

[64] To that extent and in the light of the myriad of considerations that must ultimately be brought to bear on the operations and the future of Eskom it cannot be said that there exists a well-grounded apprehension of irreparable harm if the interim relief is not granted.

[65] In *Cape Gate (Pty) Ltd and Others v Eskom Holdings (SOC) Ltd and Others*[19] the applicants bought their electricity from the Emfuleni Municipality, which in turn bought it in bulk from Eskom. When Emfuleni defaulted on its Eskom debt (over R1 billion), Eskom decided to interrupt its electricity supply, which in turn threatened the survival of the applicants' businesses. In considering the requirements for an interim order the Full Bench considered the following in regard to irreparable harm:

"[154] If the interruption is proceeded with, the applicants, and potentially other consumers in similar positions, will shut down. That will render their review right moot.

[19] 2019 (4) SA 14 (GJ).

Yet Eskom will not be destroyed if the interruption decision is not implemented. It may have to wait before national treasury devises a recovery plan that will ensure payment for it, but that is a far lesser fate than awaits the applicants."

c. The balance of convenience favours the grant of interim relief

Eskom's stance on this part of the test is that:-

[66] The loss totalling R69 billion[20] over three years under NERSA's decision will cause massive financial prejudice to it and threatens the countries' economy as a whole in that:

66.1. It would affect significant portions of existing drawn down debt that are project specific and subject to warranties in relation to Eskom's ability to complete relevant projects;

66.2 Due to Eskom's and the South African state debt being interlinked default on one facility can trigger default on other facilities causing the outstanding capital and interest amounts to become potentially payable immediately;

66.3 As long as NERSA's decision stands without interim relief, Government has no means of addressing the Eskom liquidity crisis and the crisis has the potential to become a national financial crisis.

[67] Eskom says that the relief it is seeking provides for a balance of minimising consumer shock while remedying the consequences of NERSA's decision:-

67.1 The R69 billion does not get allocate all at once; Eskom has done this to avoid shock to the consumer should an immediate jump take place. Eskom has instead crafted the relief to be based on

[20] R23 billion per year for three years.

an assumption that it should be entitled to an additional revenue allocation of R15.5 billion in 2020/2021 and R43 billion in 2021/2022;

67.2 This will improve Eskom's income statement from a R17.6 billion loss to a R4.7 billion loss with the long term plan being to improve Eskom's income to a positive balance;

67.3 Eskom submits that there will be no material risk to the consumer should the interim relief be granted as NERSA already determined that consumers owe Eskom an aggregate amount of R36.7 billion in respect of 2014/2015 to 2017/2018 financial years which amount must be included in subsequent tariff increases.

[68] In *OUTA* the following was held in regard to the requirement for balance of convenience:

> *"[47] The balance of convenience enquiry must now carefully probe whether and to which extent the restraining order will probably intrude into the exclusive terrain of another branch of government. The enquiry must, alongside other relevant harm, have proper regard to what may be called separation of powers harm. A court must keep in mind that a temporary restraint against the exercise of statutory power well ahead of the final adjudication of a claimant's case may be granted only in the clearest of cases and after a careful consideration of separation of powers harm. It is neither prudent nor necessary to define 'clearest of cases'. However, one important consideration would be whether the harm apprehended by the claimant amounts to a breach of one or more fundamental rights warranted by the Bill of Rights. This is not such a case.*
>
> ...
>
> *[55] A court must be satisfied that the balance of convenience favours the granting of a temporary interdict. It must first weigh the harm to be endured by an applicant, if interim relief is not granted, as against the harm a respondent will bear, if the interdict is granted. Thus a court must assess all relevant factors carefully in order to decide where the balance of convenience rests.*
>
> ...

[63] There is yet another and very important consideration when the balance of convenience is struck. It relates to separation of powers. In ITAC we followed earlier statements in Doctors for Life and warned that —

'(w)here the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric.'

[64] In a dispute as the present one, this does not mean that an organ of state is immunised from judicial review only on account of separation of powers. The exercise of all public power is subject to constitutional control. In an appropriate case an interdict may be granted against it. For instance, if the review court in due course were to find that SANRAL acted outside the law then it is entitled to grant effective interdictory relief. That would be so because the decisions of SANRAL would in effect be contrary to the law and thus void.

[65] When it evaluates where the balance of convenience rests, a court must recognise that it is invited to restrain the exercise of statutory power within the exclusive terrain of the executive or legislative branches of government. It must assess carefully how and to what extent its interdict will disrupt executive or legislative functions conferred by the law and thus whether its restraining order will implicate the tenet of division of powers. While a court has the power to grant a restraining order of that kind, it does not readily do so, except when a proper and strong case has been made out for the relief and, even so, only in the clearest of cases.

[66] A court must carefully consider whether the grant of the temporary restraining order pending a review will cut across or prevent the proper exercise of a power or duty that the law has vested in the authority to be interdicted. Thus courts are obliged to recognise and assess the impact of temporary restraining orders when dealing with those matters pertaining to the best application, operation and dissemination of public resources. What this means is that a court is obliged to ask itself not whether an interim interdict

against an authorised state functionary is competent but rather whether it is constitutionally appropriate to grant the interdict."

[69] As indicated, the relief sought, if granted, will result in an effective electricity increase of close to 17% in the coming financial year (as opposed to the 8.1% that NERSA has approved). A principled difficulty that arises for the Court is what to make of the almost 17% proposed increase. While NERSA has in its reasons for decision dealt with the consequences of what an increase of that proportion will have on the economy, employment, electricity sales and inflation, the determination of what an appropriate increase should be is ideally left in the hands of the regulator. Indeed the relief sought in Part B of a setting aside and a remittal is precisely for that reason where the regulator and not the Court is required to make the determination.

[70] What is sought in this part of the proceedings is that the Court set the tariff pending the determination of Part B. This presents significant problems of both principle and substance. At the one level the principle of the separation of powers militates strongly against the Court responding to such an invitation to set a tariff. The determination of a suitable tariff is a complex matter and requires a careful weighing and balancing of a number of factors. The legislature has appointed a specialist body with the necessary expertise to do precisely that and a Court should respect the carefully crafted boundaries of its powers. Beyond the principled reluctance to do so this Court is also not equipped to make the kind of determinations that Part A of the relief requires of it. Whether an increase of about 17% is consistent with the case advanced, whether it strikes a fair balance between users and licensees and its overall impact on the economy are all complex matters that is for obvious reasons best left to agencies with the necessary expertise.

[71] In this regard NERSA says it took into account the analysis of the financial information tested by the prudency of all costs presented by Eskom, while the economic impact assessment depicted the potential impact of the electricity tariff increase on inflation, economic growth, job creation (employment) and income distribution, international trade, and the responsiveness of demand for

electricity. The economic factors considered the economic impact assessment directly related to the potential impact on the economy and the public at large, while the financial analysis focussed on the sustainability of Eskom and its ability to continuously provide electricity to the public within the confines of efficiency standards. It also took into account the issues raised in public hearing which centred around affordability (access to electricity due to loss of income) and loss of employment opportunities.[21]

[72] In *Borbet* the Supreme Court of Appeal held the following:

"[117]...

This is a case in which there has to be a degree of judicial deference to a specialised administrative body engaged in an administrative action. In this regard the words of the Constitutional Court in Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others[22] 2004 (4) SA 490 (CC), are apposite:

> *'[48] In treating the decisions of administrative agencies with the appropriate respect, a Court is recognising the proper role of the Executive within the Constitution. In doing so a Court should be careful not to attribute to itself superior wisdom in relation to matter entrusted to other branches of government. A Court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a Court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the Courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a Court should pay due respect to the route selected by the decision-maker. This does not mean, however, that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a Court may not review that decision reasonably. A Court should*

[21] Page 20 para 7.6-7.9 of NERSA's reasons for decision.

not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker.'

The following part of an article by Professor Hoexter, cited with approval by the court in Bato Star, bears repeating:

'[A] judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretations of fact and law due respect, and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinize administrative action, but by a careful weighing up of the need for – and the consequences of – judicial intervention. Above all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies; not to cross over from review to appeal.'

[73] It is for all these reasons that I conclude that the balance of convenience also does not favour the granting of interim relief.

[74] Under these circumstances the relief sought in Part A must be refused. At the same time I am mindful that the issues raised in this application are of great significance and that it would be in the interests of all concerned that the Part B be dealt with and determined expeditiously. To this end I would support efforts on the part of the parties to have the hearing of Part B expedited.

Costs

[75] While this part of the proceedings were characterised by various delays on the part of the Respondent which resulted in the hearing date having to be adjusted on two occasions, I am not satisfied that such conduct warrants an adverse costs order. Costs of this part of the proceedings should be held over for determination in Part B.

Order

[76] It is ordered that:

76.1 The application under Part A is dismissed.

76.2 Costs are reserved for determination in Part B.

N KOLLAPEN
JUDGE OF THE HIGH COURT

Appearance:

Applicant's Counsels	: Adv M Chaskalson SC
	A Friedman
Applicant's Attorneys	: Gildenhuys Malatji Inc.
First Respondents' Counsels	: Adv M Dewrance SC
	S Magardie
	B Rowjee
First Respondents' Attorneys	: Prince Mudau Attorneys
	c/o Dabishi Nthambeleni Inc.
Date of hearing	: 15 January 2020
Date of judgment	: 10 February 2020