



**IN THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG DIVISION, PRETORIA**

CASE NO: 10026/2019

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
<p>pp <i>[Signature]</i> 29.06.20</p>	

ESKOM HOLDINGS LIMITED  
AND

APPLICANT

NATIONAL ENERGY REGULATOR OF SOUTH AFRICA

RESPONDENT

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**JUDGMENT**

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**KOLLAPEN, J**

- [1] This is an application in which the applicant seeks to have reviewed and set aside the process and the determination made by the respondent in respect of what is termed the Regulatory Clearing Account of the applicant for the financial years of 2014/15 , 2016/16 and 2016 /17.
- [2] While the respondent filed a Notice to Oppose the relief sought, it did not file an Answering Affidavit and prior to the date scheduled for the hearing of the application advised through its attorneys that it did not persist with its opposition to the application.
- [3] The applicants filed Heads of Argument and given the restrictions imposed as a result of the Covid-19 pandemic, the Court with the concurrence of the parties dispensed with the need for a hearing.
- [4] Notwithstanding the absence of opposition the Court is not simply entitled to automatically grant the relief sought on the basis that it is unopposed but must consider separately whether a proper case has been advanced for the relief sought.

See : *Airports Company South Africa v Big Five Duty Free (Pty) Limited and Others (CCT257/17) [2018] ZACC 33; 2019 (2) BCLR 165 (CC); 2019 (5) SA 1 (CC)*

### **The Regulatory Framework against which the relief is sought**

- [5] NERSA was established in terms of the National Energy Regulator Act 40 of 2004 (“**the NERA**”), with the mandate, inter alia, to regulate the generation, transmission and distribution of electricity. NERSA must undertake the functions set out in section 4 of the Electricity Regulations Act 4 of 2006. One of these functions is the consideration for the application for licences and issuing of licences for the operation of generation, transmission or distribution facilities and the regulation of electricity prices and tariffs.
- [6] Section 14(1) of the ERA, under the title ‘Conditions of licence’ provides, *inter alia*:

*“(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”.*

- [7] The Multi-Year Price Determination Methodology (“**the MYPDM**”) is the methodology developed by NERSA to determine the allowable tariffs and tariff increases to be charged by licensees to consumers. The methodology applicable to the present application is MYPDM3. The first multi-year determination for Eskom business activities (i.e. generation, transmission and distribution of electricity) was from 1 April 2006 to 31 March 2009. The second MYPD was for the period 1 April 2010 to 31 March 2013. The RCA applications at issue in the present case were governed by MYPD3 which ran from 1 April 2013 to 31 March 2018.
- [8] MYPDM3 provides for a “cost-of-service” system of tariffs. Tariffs are to be set to recover Eskom’s “allowable revenue” on the basis of projected electricity consumption. The formula in MYPDM3 for determining “allowable revenue” is set out in section 3.2 which states the following:

*“The following formula must be used to determine the AR:*

$$AR = (RAB \times WACC) + E + PE + D + R\&D + IDM \pm SQI \pm L\&T \pm RCA$$

*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 generation)*

*D = Depreciation*

*TNC = Transmission and Network Costs*

*R&D = Costs related to research and development  
programmes/projects*

*IDM = Integrated Demand Management costs (EEDSM, PCP,  
DMP, etc.)*

*SQI = Service Quality Incentives related 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)".*

- [9] The last element in the allowable revenue formula is the balance in the RCA, or more accurately the amount of the RCA balance that is allowed to be recovered or paid back in a particular financial year. The RCA is a crucial element of the methodology for determining Eskom tariffs. It is a risk management device which ensures that Eskom (and consumers) are protected against the consequences of projection-based tariffs that prove to be inappropriate in the light of actual experience. The RCA provides for allowable revenue to be adjusted ex post facto on the basis of a retrospective comparison of actual financial facts in respect of a particular financial year with the projections upon which the tariff for that year was determined.
- [10] The aggregate amount for which Eskom applied in the three RCA applications was R66.6 billion. NERSA delayed unconscionably before it finally took its decisions in respect of the RCA applications on 14 June 2018. It awarded Eskom R32.69 billion, just under half of what Eskom had applied for. For the reasons given below, Eskom submits that NERSA's decisions were

unjustifiable and fall to be set aside under PAJA. Eskom also seeks declaratory relief that NERSA's undue delay in deciding the RCA applications was unconstitutional and invalid. This declaratory relief is motivated below.

**The grounds of review include the following**

[11] It has been demonstrated in the founding affidavit that the bulk of the disallowed amounts claimed by Eskom fall under four headings:

11.1 Disallowed recoveries owing to lower than forecasted revenue;

11.2 Disallowed coal costs;

11.3 Disallowed costs of procuring energy from independent power producers ("IPPs"); and

11.4 Disallowed amounts claimed in respect of capital expenditure.

[12] There is in respect of each of these grounds a proper case advanced in on the papers which in each instance suggest that the Respondent disallowed costs that should not have been disallowed.

[13] In respect of forecasted sales by way of example it disallowed R 12.711 billion in respect of the variance between actual and forecast sales on the basis that any variance in respect of proportional primary costs would not be recoverable. While there is a logic in what it purported to do in that if there is less electricity generated, the primary energy would reduce, what it overlooked however was that Eskom had already deducted such primary energy costs and it was therefore impermissible for NERSA to do it again.

[14] It appears to that extent that the decision was premised on a fundamental factual error.

[15] With regard to coal costs, NERSA disallowed the sum of R 3.1 billion and it did so on the basis that Eskom should have purchased coal under cost plus

contracts rather than short and medium term contracts and it deducted what it considered to be the difference between what it says Eskom should have spent as opposed to what it actually spent.

[16] Eskom says that it was unable to procure coal via cost plus contracts because of the under investment in cost plus mines which occurred as a result of a government request. It therefore argues that it was not open to it under these circumstances to procure from cost plus mines for this reason. The decision to disallow such costs was therefore not rational.

[17] I do not propose to deal with the other grounds of review, satisfied that on what is before me and on the grounds I have dealt with, a proper case for relief has been advanced.

I make the following order:-

1. It is declared that the respondent ("NERSA")
  - a) Failed to process Eskom's application for approval of Regulatory Clearing Account ("RCA") balance for the 2017/15, 2015/17 financial years within a reasonable time; and
  - b) In so doing, acted in a manner that was inconsistent with the Constitution;
2. The decisions taken by NERSA on 14 July 2018 ("the NERSA RCA DECISIONS") to approve RCA balances
  - a) Of R12.577 billion for the 2014/2015 financial year;
  - b) Of R12.058 billion for the 2015/2016 financial year; and
  - c) Of R8.055 billion for the 2016/2017 financial year;are hereby reviewed and set aside.
3. It is declared that the orders in prayer 2 above shall not affect the validity of the decision of NERSA on 26 September 2018 authorising Eskom to liquidate particular amounts of the RCA balance over the 2019/20 to 2023/24 financial years.
4. NERSA is ordered to pay costs of the application including the cost of two counsel.

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**NJ. KOLLAPEN**

**JUDGE OF THE HIGH COURT,  
PRETORIA**

**APPEARANCES:**

Applicant:

Matthew Chaskalson SC

Adv Adrian Friedman

Respondent:

None

**DATE OF HEARING:**

**17 JUNE 2020**

**DATE OF JUDGMENT:**

**29 JUNE 2020**