REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 74870/2019

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

28 JULY 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

KATHREE-SETILOANE J,

[1] This is a review application in terms of the Promotion of the Administrative Justice Act 3 of 2000 ("PAJA") for the review and setting aside of a decision taken by the First Respondent, the National Energy Regulator of South Africa ("NERSA") in relation to an application made by the Applicant, Eskom Holdings SOC Limited ("Eskom") on 14 September 2018, for the approval of allowable revenue that would be reflected in electricity tariffs for the financial years of 2019/20, 2020/21 and 2021/22 ("the 2019/2022 application"). In this application, Eskom sought approval of:

1.1 Total Allowable Revenue of R219bn for financial year 2019/20, which would have translated into a tariff increase of approximately 15% to standard tariff customers.

1.2 Total Allowable Revenue of R252bn for financial year 2020/21, which would have translated into a tariff increase of approximately 15% to standard tariff customers.

1.3 Total Allowable Revenue of R291bn for financial year 2021/22, which would have translated into a tariff increase of approximately 15% to standard tariff customers.

[2] On 9 October 2019, NERSA published its reasons for its decision ("the 2019/2022 decision"). NERSA approved:

2.1 Total Allowable Revenue of R206bn for financial year 2019/20, which translates into a 9.41% tariff increase to standard tariff customers.

2.2 Total Allowable Revenue of R222bn for financial year 2020/21, which translates into an 8.1% tariff increase to standard tariff customers.

2.3 Total Allowable Revenue of R233bn for financial year 2021/22, which translates into a 5.22% tariff increase to standard tariff customers with an average standard tariff of R116.72.

[3] Eskom was dissatisfied with the decision and launched this application. It contended, in its founding affidavit, that in making the 2019/2022 decision, NERSA misappropriated R69bn in equity injections that government (as the sole shareholder of Eskom) made to Eskom for the three financial years covered by the 2019/2022 decision. NERSA deducted R23 billion from Eskom's allowable revenue for each of the three financial years.

[4] Government made the equity injection to stem a liquidity crisis which affects Eskom so severely that it has a knock-on effect on the country as a whole. Eskom contends that NERSA's decision effectively negated the governmental intervention and left the liquidity crisis unaffected, but the fiscus R69 billion lighter.

[5] Eskon alleged, in its founding affidavit, in the review application that NERSA's decision to deduct the R23bn equity injections was unlawful

because neither section 15 of the Electricity Regulation[1] ("the ERA"), the Multi-Year Pricing Methodology ("MYPDM4") in terms of which NERSA took its decision nor any other law make provision for the deduction of equity injections from the return of assets or any other allowable revenue item that NERSA takes into account when making its revenue decisions. This notwithstanding, NERSA deducted the R23bn equity injections from the return of assets in respect of each of the revenue decisions for the financial years covered by the 2019/2022 decision.

[6] Eskom launched this application a day after NERSA published the reasons for its decision. In part B of the application Eskom seeks an order reviewing and setting aside the NERSA decision on the grounds that it is *ultra vires,* irrational and procedurally unfair. In Part A of the application Eskom sough interim relief which was directed at staving off the financial crisis, which it claimed NERSA has exposed it and the South African State to. Kollapen J dismissed that application on 10 February 2020.

[7] As is apparent from Eskom's supplementary affidavit, the Rule 53 record includes a full set of draft reasons in support of a recommendation to be placed before the NERSA meeting of 7 March 2019. This is NERSA's original reasons (NERSA's orginal reasons. They are described in the Index to the Rule 53 Record as "Draft RfD MYPD 4 Special ELS". They thus appear to be the draft reasons that were tabled at the Special Electricity

[1] No. 4 of Act 4 of 2006.

Sub-Committee Meeting of 6 March 2020, which was to finalise the MYPDM4 recommendation for NERSA's meeting the following day.

[8] Eskom explains that the original NERSA reasons run to over 150 pages, and, for the most part, were incorporated verbatim into the final reasons adopted by NERSA. However, the original NERSA reasons differed from the final NERSA reasons in one crucial respect — although they provided for no return to Eskom, they did not provide for the misappropriation of the annual R23 billion equity injections from government. Thus, the original NERSA reasons were in support of a recommendation for a decision by NERSA on 7 March 2020 that would provide Eskom with:

8.1 allowable revenue of R225.062 billion, R241.342 billion and R253.714 billion for the 2019/20, 2020/21 and 2021/22 financial years respectively (including carried over RCA amounts of R8.173 billion for each of the three financial years as appears);

8.2 projected annual sales to tariff customers of 186 064GWh, 184 898GWh and 183 856 GWh over the 2019/20, 2020/21 and 2021/22 financial years respectively;

8.3 an aggregate price increase (including the 3.9% RCA price increase) of 20.12% for the 2019/20 tariff year, with this tariff then serving as the base for increases of 7.82'/o and 5.3% increases over the next two tariff years (p 1415), and thus

8.4 average standard tariffs of R112.66, R121.48and R127.94 over the three tariff years.

[9] The Special Electricity Sub-Committee meeting of 6 March 2019 was open to the public and representatives of Eskom were present at the meeting to observe it. There was no mention at that meeting of the R23 billion annual equity injections from government, still less any suggestion that these could be misappropriated to subsidise the Eskom tariff. Hasha Tlhotlhalemaje, who was one of the Eskom employees present at the meeting, confirmed the correctness of these facts in her confirmatory affidavit.

[10] Between 6 March 2019, when the Special Electricity Sub-Committee meeting considered the original NERSA reasons and 2 April 2020, when a revised draft of the reasons was prepared for the Electricity Subcommittee meeting of 10 April 2020, someone within NERSA raised the idea of misappropriating the annual R23 billion equity injections to reduce the average standard tariffs (without the 3.9'/o RCA increase) to R102.62, R110.93 and R116.72 with the same projected annual sales to tariff customers. There is, however, nothing in the Rule 53 Record that casts light on inter alia who came up with the idea of misaapropriating the annual R23 billion equity injection amd when it was mooted.

Departure from the Part B notice of motion

[11] NERSA has now conceded the merits of this application (Part B). Thus, the only remaining issue for determination is the question of the appropriate remedy to be ordered in this case.

[12] In its notice of motion in Part B of this application, Eskom simply sought to review and set aside NERSA's 2019/2022 decision and remit it to NERSA for redetermination. However, it now seeks the relief set out in its draft order. The relief sought in the draft order differs substantially from the relief sought in the Part B of the notice of motion. Eskom now seeks substituionary relief in the following terms:

1. The decision taken by NERSA on 7 March 2019 in respect of the Eskom allowable revenue and tariffs for the years 2019/2020 to 2021/22 decision of NERSA is reviewed and set aside.

2. A sum of R23bn will be added to the allowable revenue already determined by NERSA for the 2021/2022 financial year.

3. The average standard Eskom tariffs approved by NERSA for the 2021/2022 financial year will be increased by from 116.72 c/kwh to 128.24 c/kwh.

4. After such time as NERSA has determined the allowable revenue for Eskom in respect of the 2022/23 and 2023/24 financial years, NERSA is directed to add a sum of R23bn to the allowable revenue in respect of each of those years.

5. NERSA is precluded from making any adjustment or compensation to offset the R23bn from the allowable revenue determined for these financial years or otherwise to deduct, directly or indirectly, the R23bn equity injection from the allowable revenue for those financial years.

6. NERSA is to pay Eskom's costs of this application, including the costs of two counsel and including the costs of the Part A application.'

[13] Why does the draft order differ from the notice of motion in Part B of this review application. Eskom submits that this is because the application, as launched, anticipated that immediate tariff increases would be provided to Eskom in Part A of the application (interim relief). It contends that this Court's (Kollapen J) refusal to grant the interim relief sought in Part A of the application, means that Eskom now seeks the relief in Part B which is designed to put back the equity injection which was removed by NERSA from the allowable revenue in its 2019/2022 decision.

[14] Eskom relies, in the review application, on both section 6(2)(f) of PAJA as well as the legality principle reflected in section 1(c) of the Constitution. In a PAJA review a court has the power to grant just and equitable relief under section 8(1). Similarly, in a legality review in terms of section 1(c) of the Constition, a court has the power to grant just and equitable relief under s 172(1)(b) of the Constition.

[15] In *Economic Freedom Fighters (2)*, the Constitutional Court held that the power to grant a just and equitable order is so wide and flexible that it allows courts to formulate an order that does not follow prayers in the notice of motion or some other pleading. This power enables courts to address the real dispute between the parties by requiring them to take steps aimed at

making their conduct consistent with the Constitution.[2] It is clear from a survey of the caselaw, that the Constitutional Court, including other courts, regularly exercise their remedial powers under section 172 of the Constitution to grant orders that differ from the terms of those sought in the notice of motion of the successful litigant.[3] By the same token, a court exercising its remedial powers to grant just and equitable relief under section 8(1), may grant orders that differ from the relief sought in the notice of motion.

[16] I am accordingly of the view that this Court has the rememdial power to grant the substitutionary relief which Eskom seeks in the draft order; provided it can demonstrate that it is appropriate in the circumstances of this case.

The Regulatory Framework

[17] Although NERSA has conceded the merits of this application, the regulatory framework remains relevant to the question of remedy. I accordingly set out the pertinent aspects of the regulatory framework below.

[18] NERSA was established in terms of the National Energy Regulator Act[4] ("the NERA"). Its mandate is to, inter alia, regulate the generation,

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2 *Economic Freedom Fighters v Speaker of the National Assembly 2018* (2) SA 571 (CC) at para 211 ("*Economic Freedom Fighters (2)*"); *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (2) SA 415 (CC) para 211.

3 *Economic Freedom Fighter (2)* at paras 211 and 222. See also: *Eskom Holdings Soc Limited v NERSA* 2020 JDR 0629 (GP) at paras 90-91.

4 No. 40 of 2004.

transmission and distribution of electricity. Section 4 of the NERA, inter alia, provides that NERSA must undertake the functions set out in section 4 of the Electricity Regulation Act 4 of 2006 ("the ERA"). One of its core functions under the ERA is the consideration of applications for licences and issuing of licences, for the operation of generation, transmission or distribution facilities, and the regulation of electricity prices and tariffs.

[19] Section 2 of the ERA sets out its objects. Two central objects of the ERA are to:

19.1 achieve the efficient, effective, sustainable and orderly development and operation of electricity supply infrastructure in South Africa; and

19.2 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 South Africa.[5]

[20] Section 14(1) of the ERA entitled 'Conditions of licence' provides, *inter alia* that:

> '(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;

[5] Section 2(a) and (b) of the ERA.

(e) the methodology to be used in the determination of rates and tariffs which must be imposed by licensees".

[21] Section 15 of the ERA sets out the 'Tariff principles'. It provides:

'(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.'

[22] The Suprme Court of Appeal described the effect of these provisions in the *Borbet* judgment:[6]

"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 ss 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

6 *NERSA v Borbet SA (Pty) Ltd; Eskom Soc Ltd v Borbet SA (Pty) Ltd* [2017] 3 All SA 559 (SCA) at para 12.

> directly or indirectly in the licence and the obligation to adhere to them flows from the licence."

NERSA is bound by section 15(1)(a) of the ERA when determining what tariffs a licensee may charge. Any tariff which it determines "must enable an efficient licensee to recover the full cost of its licensed activities, including a reasonable margin or return".

The MYPDM

[23] NERSA has, since 2006, been determining Eskom tariffs under a system of multi-year price determinations ("MYPDs"). The MYPDs are governed by a methodology, developed by NERSA, to determine the allowable tariffs as well as their increases to be charged by licensees to consumers ("MYPDMs"). MYPDM1 applied from 1 April 2006 to 31 March 2009. MYPDM2 applied from 1 April 2010 to 31 March 2013 and MYPDM3 applied from 1 April 2013 to 31 March 2018. MYPDM4 applies to the latest cycle which commenced on 1 April 2018. Although MYPDM4 governs the 2018/19 to 2021/22 financial years, NERSA allowed Eskom to make a discrete tariff application for the 2018/19 financial year before making the tariff application for the 2019/2022 financial years, which relate to the present proceedings.

[24] As explained in Eskom's founding affidavit, MYPDM4 provides for a "cost plus" system of tariffs. Tariffs are to be set to recover Eskom's "allowable revenue" on the basis of projected electricity consumption. The formula in MYPDM4 for determining "allowable revenue" is set out in section 5.2 thereof which reads:

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

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

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*

$R\&D$ = *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)".*

[25] The MYPDM4 methodology sets out how each one of these cost components, and the projected sales volumes, are to be determined. This ensures that there is a detailed system for projecting the total revenue upon which the tariffs will be based.

[26] The last element in the allowable revenue formula is the balance in the Regulatory Clearing Account ("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.[7] The RCA 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. As explains in its founding affidavit, 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. Any "under recovered" revenue that is not attributable to negligence on the part of Eskom is then recoverable by Eskom through additional increases to tariffs in subsequent years. Conversely, if the allowable revenue is shown to have been excessive, tariffs in subsequent years will be adjusted downwards to reverse this effect.

[27] As emphasised by counsel for Eskom at the hearing, the RCA does not afford Eskom the opportunity of recovering the misappropriated R23 billion equity injections that are the subject matter of the present proceedings. This is because the misappropriations would not be covered by any of the RCA recovery categories.

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7 This is addressed in paragraph 17, and in particular paragraph 17.2, of MYPDM4.

The Context

[28] The context in which NERSA decided the 2019/2022 tariff application is germane to the assessment of the appropriateness of the remedy sought by Eskom in this application.

[29] NERSA's provided reasons for its decision on 9 October 2019. The reasons confirm that NERSA deducted from the Total Allowable Revenue for each of the three years covered by the 2019/2022 decision the amount of R23 billion. These amounts correspond to annual equity injections that Government first announced in the Minister of Finance's Budget speech of 20 February 2019. This announcement was made barely 2 weeks prior to the NERSA decision.

[30] Government provided the equity injections to Eskom against the following background:

30.1 Historically electricity prices in South Africa were maintained at artificially low levels by pricing electricity without adequately accounting for the cost of generating, transmitting and distributing electricity.

30.2 The dire implications of this position began to be felt over the last ten years because Eskom has had to embark on an ambitious build program with the construction of 3 large-scale power stations, and the upgrading of its transmission network. Eskom's balance sheet

weakened over this period owing to prices, approved by NERSA, which did not cover its prudent and efficient costs.

30.3 Notably, the World Bank has concluded that 81% of Eskom's inability to achieve cost recovery is due to inadequate tariffs.

30.4 The five year tariff proposals put forward by the electricity consumer groups, Business Unity of South Africa and the Energy Intensive User Group for MYPD3 which ran to 2017/18 would have led to electricity prices in 2018 which, in real terms, were significantly less than those sought by Eskom in MYPD4. Neither the EIUG nor BUSA has a vested interest in seeing an increase in electricity prices. Indeed, the opposite is true. But both, quite responsibly, made submissions based on a realistic assessment of what was needed for Eskom to be sustainable. They reveal the inadequacy of NERSA's approach.

30.5 In downgrading the credit ratings of Eskom, all three ratings agencies have repeatedly stressed the uneconomic nature of Eskom's tariffs.

30.6 The harm caused by NERSA's inadequate revenue determinations has been compounded by egregious delays by NERSA in applying the RCA mechanism which, as pointed out above, is designed to remedy inadequate revenue determinations. NERSA only decided the RCA applications for the financial years 2014 to 2017 in June 2018. And the R32.69 billion which NERSA acknowledged was due

to Eskom in respect of underallowed revenue for those three financial years, will not be fully recovered until the end of the 2022/23 financial year.

30.7 Moreover, NERSA has recently conceded that its decision to grant only R32.69 billion to Eskom in relation to these RCA applications is one which falls to be reviewed and set aside. In making this concession, it acknowledges that it must now reconsider Eskom's application for an additional R33.91 billion rands in respect of the 2014 to 2017 financial years. The full extent of the additional amounts found to be due to Eskom may only be capable of being recovered after the 2022/23 financial year. This is will be 8 to 10 years after the relevant amounts should have been paid to Eskom in tariffs.

30.8 Eskom's revenue shortfall caused by a decade of inadequate NERSA revenue determinations that do not cover costs and return on capital has grown steadily since 2012 and exceeded R300 billion by 2018/19. Eskom states that with no other options open to Eskom, these shortfalls have had to be funded by raising additional debt.

30.9 At the time of the launch of this application, Eskom's debt burden stood at R441 billion. It states that much of this debt is interlinked. So, default on one facility can trigger default on other facilities with full outstanding capital and interest amounts becoming immediately payable on demand by lenders.

30.10 Eskom points out that its debt imperils the finances of the State because R350 billion of that debt is guaranteed by the South African State. Moreover, since much of the South African national debt is itself interlinked, a failure by the State to meet any demand made on it as guarantor of Eskom, would potentially trigger acceleration of the full liability of national debt. This will expose the State to demands for immediate repayment of $68 billion which was over R980 billion at the exchange rate of 14.5 R/$ at the launch of this application. At the date of finalisation of this judgment, this figure increased to over R1.116 trillion at the prevailing exchange rate of 16.42 R/$.

[31] According to Eskom, the equity injections of R23 billion per annum were, therefore, implemented by Government to stave off a crisis in Eskom's finances that presents a material risk to the finances of the Republic as a whole. In his two State of the Nation addresses of 7 February 2019 and 20 June 2019, President Ramaphosa explained the need for these equity injections in the following terms:

> 'Eskom is in crisis and the risks it poses to South Africa are great. It could severely damage our economic and social development ambitions. We need to take bold decisions and decisive action. The consequences may be painful, but they will be even more devastating if we delay."
>
> '[Government accordingly decides that it] will support Eskom's balance sheet.'
>
> 'The utility's financial position remains a matter of grave concern. With the current committed funding from government, outlined in the 2019 Budget, Eskom has sufficient cash to meet its obligations until the end of October 2019. For Eskom to default on its loans will cause a cross-default on its remaining debt and would have a huge impact on the already constrained fiscus. We will, therefore, have to address this matter by tabling a Special

> Appropriation Bill on an urgent basis to allocate a significant portion of the R230 billion fiscal support that Eskom will require over the next 10 years in the early years. This we must do because Eskom is too vital to our economy to be allowed to fail.'
>
> 'It is imperative that we undertake these measures without delay to stabilise Eskom's finances, ensure security of electricity supply, and establish the basis for long-term sustainability.'

[32] Eskom contends that in its decision, NERSA unilaterally misappropriated these equity injections aggregating to R69bn and converted them into tariff subsidies for electricity consumers. By so doing, it placed the finances of Eskom and the South African State in jeopardy.

[33] Eskom goes onto explain that NERSA's decision simply ignores that Government came to the assistance of Eskom because it appreciated that, were it not to do so, the finances of Eskom and the country as a whole would be in dire jeopardy. To the contrary, the effect of NERSA's decision is to pull the rug from under government's feet by neutralising the effect of the government assistance.

[34] Eskom states that the reason why government support was necessary was because NERSA's tariffs decisions resulted in cash from operations being insufficient to service Eskom's debt (taking into account the principal debt and interest), which required government to intervene. The Government support was to assist Eskom in servicing debt. NERSA's decision to deduct the R23bn means that the R23bn support has no impact on debt servicing. It has been nullified by NERSA's decision.

[35] The government intervention, so it explains, was designed to put Eskom on the path to sustainability and stabilise Eskom's finances. Most importantly

and urgently, it was designed to save Eskom (and therefore the country) from the catastrophic implications of default. NERSA's decision expressly undercuts these imperatives by neutralising the effect of the government intervention. It contends that NERSA's decision also undermines Eskom's ability to meet its debt commitments going forward, and thus imperils Eskom and the country. In doing so, the decision violates basic accounting principles by treating the equity injection as revenue.

[36] The question of remedy must be determined within this context as it is trite that the remedy adopted by the Court in this case must fit the injury.

Scope of the Relief Sought by Eskom

[37] Eskom's primary motivation for the adoption, by this Court, of the substitutionary relief is that it is directed at correcting the unlawful act of NERSA (in removing Governments R23 billion per annum equity injection from Eskom's allowable revenue) by returning that R23 billion per annum into Eskom's allowable revenue (albeit without any increase for two years' lost interest on that revenue). The thrust of Eskom's contention is that it does not ask this Court to usurp NERSA's expert function, but rather to only correct a patently unlawful act of NERSA, that had precise liquidated consequences in terms of Eskom's allowable revenue.

[38] Eskom submits that NERSA's regulatory function was to use its expert knowledge to determine the allowable revenue of Eskom under the MYPDM4 formula (an expert regulatory function that a Court would be reluctant to second guess). Having done so, it then unlawfully deducted

from the allowable revenue an amount of R23 billion per annum corresponding to the equity injections of government.

[39] As concerning the doctrine of the separation of powers, Eskoms argues that by restoring the 3 amounts of R23 billion unlawfully deducted, this Court will not be tresspassing on any expert regulatory function of NERSA, but that the Court will be merely correcting NERSA's unlawful removal of R23 billion per annum from Eskom's allowable revenue.

[40] NERSA, on the other hand, argues that the doctrine of separation of powers demands that the Court should remit the decision to NERSA for redetermination because, as the Regulator, is it best placed to deal with it. Its primary motivation for remittal, is premised on NERSA's reasons for the 2019/2022 decision which relate specifically to the negative returns demonstrated by Eskom in its application for the 2019/2022 tariff determinations. NERSA argues that it should be given an opportunity to deal with these returns and whether they be adjusted upwards.

[41] In its reasons for the decision, NERSA explains that because "the negative returns" posed potential risks for Eskom and the industry, it gave Eskom an opportnunity to mitigate the risk reflected in its application. NERSA goes onto explain that Eskom then adjusted its figures and decreased the negative return by R394m in 2019/20 instead of closing the gap and mitigating the risk. NERSA says that this caused it to conclude that:

‘Given that most of Eskom’s efficiencies are systematic in nature and within the control of Eskom, NERSA was of the view that, it would not be fair that consumers be held responsible for such costs relating thereto.

…

NERSA took note of the R23bn shareholder injection to assist Eskom with debt repayments and saw fit to consider the said injection when determining Eskom’s application. NERSA was of the view that if the cash injection was not taken into account, it would have caused excess returns to Eskom. In balancing excess returns, as required by the MYPD4 Methodology, the R23bn government assistance was used to reallocate risks between Eskom and its customers in accordance with section 2.2.1 of the MYPD4 Methodology.’

[42] Eskom responded as follows in its replying affidavit:

‘NERSA's ultimate decision was to allow Eskom a negative return only, except that it widened the gap between what would constitute a reasonable return and the tariff to be charged over the three-year period.

Moreover, as explained by Eskom in its founding affidavit (and as well known by NERSA), Eskom's application was based on the need to move smoothly towards sustainability and avoid shock to the consumer. It was designed to provide for a sustainable tariff over the full course of the MYPD4 cyde. It was not reached as a result of any "superficial mathematical calculation".

The bizarre feature of NERSA's reasoning — and this is most evident in the last sentence of paragraph 239- is that it criticises Eskom for its use of the balancing

mechanism (which, as already mentioned, was designed to facilitate a smooth transition to more reasonable returns) because it says that it is inconsistent with the methodology, and it responds to that by departing from the methodology. Or, to put it differently, it criticises Eskom for providing for a negative return and then responds by imposing a more extreme negative return. This is self-evidently irrational.

It is simply false for NERSA to say, as it does in paragraph 241, that it granted Eskom a positive return. This may be a reference to the WACC decision of 1.5%, but as shown in the founding affidavit, the reduction of the equity injection had the effect of reducing the allowable revenue to a negative return. The ultimate decision reflects a negative return of approximately -1%.

The return allowed before the R23 billion adjustment is 1.5% compared to a WACC of 7.1%% (as calculated by NERSA). By deducting the R23 billion the return is negative and therefore the risk is shifted to the shareholder (which, in essence, is the tax-payer).'

[43] As I see it, the question of the "negative returns" raised by NERSA is aimed to distract from the issue at hand. What's more is that NERSA cannot have its cake and eat it. On the one hand, it concedes that its decision to decrease the 2019/2020 tariff determination by the equivalent of R23bn for the three years was irregular and falls to be set aside. Whilst, on the other hand, it seeks to justify the correctness of the decision with reference to the *ex post facto* reasons for its decision, which it provided in justification of its decision, seven months subsequent to arriving at the decision. In my view, once NERSA conceded the merits of the application for review, it was not open

to NERSA to place reliance on its reasons for decision in relation to the appropriateness of the remedy now sought by Eskom.

The Law on Remedy

[44] In *Allpay* the Constitutional Court stated:

> "Logic, general legal principle, the Constitution and the binding authority of this court all point to a default position that requires the consequences of invalidity to be corrected or reversed where they can no longer be prevented. It is an approach that accords with the rule of law and principle of legality."[8]

This is a well-accepted starting point when it comes to the determination of judicial reviews.

[45] The remedies of remittal[9] and substitution[10] are widely recognised remedies in judicial reviews. The remedy of substitution would be appropriate in "exceptional circumstances" only. Eskom submits that the remedy proposed by Eskom in its draft order envisages only "partial" substitution by the Court, as only a component of NERSA's decision will require substitution if the relief sought in the draft order is accepted.

[46] In *Trencon*,[11] the Constitutional Court had occasion to consider the issue of substitution. It was mindful of the doctrine of separation of powers which requires a court not to trespass on the terrain of the other arms of state

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8 *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* 2014 (4) SA 179 (CC) at para 30

9 Section 8(1)(c)(i) of PAJA.

10 Section 8(1)(c)(ii)(aa) of PAJA.

11 *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* 2015 (5) SA 245 (CC)

when exersing its powers. In doing so, it referred to several factors that it considered relevant to whether substitution should be ordered:

> 'The first is whether a court is in as good a position as the administrator to make the decision. The second is whether the decision of an administrator is a foregone conclusion. These two factors must be considered cumulatively. Thereafter a court should still consider other relevant factors. These may include delay, bias or incompetence of an administrator.'

[47] The Constitutional Court emphasised in *Trencon* that:

> "[The] ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties. It is prudent to emphasise that the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances."[12]

[48] In *Aquila Steel*,[13] a decision of the High Court confirmed on appeal by the Constitutional Court,[14] the court pointed out that substitution is only appropriate as a remedy in exceptional circumstances and where it would be fair, just and equitable to order it.[15] In that case, the inordinate delay of the administrators in making the relevant administrative decision, coupled

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12 *Trencon* at para 47

13 *Aquila Steel (SA) Ltd v Minister of Mineral Resources* 2017 (3) SA 301 (GP)

14 *Aquila Steel (SA) Ltd v Minister of Mineral Resources* 2019 (3) SA 621 (CC)

15 *Aquila Steel* at para 106

with a long history of administrative incompetence, motivated the court to grant substitution.[16]

[49] In *Director-General, Department of Home Affairs v Link*,[17] the High Court ordered substitution because the decision was a foregone conclusion – "there was only one proper and inevitable conclusion that the court could come to" – and there was no "further information or factual or technical enquiry" that was needed before one inevitably arrived at this conclusion.[18]

Appropriateness of Substitution

[50] As I understand it, the proposed order is designed to ensure that the R23bn that was taken out of Eskom's allowable revenue for each of the three relevant financial years, is put back into its allowable revenue in the first three available financial years going forward. I see the need to highlight that this determination cannot apply to two of the three financial years covered by the 2019/2022 decision because of the passage of time.

[51] I consider the draft order to strike the ideal balance between providing just and equitable relief, on the one hand, and preserving the separation of powers[19] on the other. The proposed order will require NERSA to put back the R23bn per annum that it unlawfully removed when making the 2019/22 decision. In relation to the 2021/2022 financial year NERSA will be required

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16 *Aquila Steel* at paras 111-112

17 *Director-General, Department of Home Affairs v Link* 2020 (2) SA 192 (WCC)

18 *Link* at para 68

19 See: *Minister of Home Affairs v Saidi* 2017 (4) SA 435 (SCA) at para 43

to add, to the allowable revenue that it has already determined, the sum of R23bn that it illegitimately removed. Although in respect to the 2122 to 2024 financial years, this will amount to a species of substitution, as the Court would be imposing on NERSA a portion of its decision on allowable revenue, it would be a very limited form of substitution. This is because NERSA will retain the power to determine the rest of the allowable revenue on the normal basis, with the caveat, of course, that it must add the sum of R23bn that it illegally removed.

[52] As concerning the limited issue of restoring the R23 billion illegitimately removed, I conclude that the Court is in as good a position as NERSA to make the decision because the R23 billion that was unlawfully removed is a liquidated amount. This means that its restoration is a legal question, not an expert regulatory question.

[53] I am of the considered view that the aspect of NERSA's decision that will be substituted is a foregone conclusion. There is simply no way for the harm caused by NERSA's 2019/22 decision, to be rectified other than by reinstating the misappropriated R23bn in each of the next three available financial years. The limited question of how to rectify the misappropriated R23bn per annum, is also not a technical question within the regulator's specialist expertise. It is a simple mechanism to return what was unlawfully removed.

[54] The substitutionary order is also necessary to avoid undue delay in remedying NERSA's unlawful act. NERSA's lenghty delay in furnishing its

reasons (seven months after making the decision) coupled with conceding that it unlawfully misappropriation of the R23 billion per annum, some eight months later (on 5 June 2020), has meant that Eskom has already been deprived of R23 billion per annum in two of the three years to which MYPDM4 applied, namely the 2019/2020 and 2020/2021 financial years. As alluded to earlier in the judgment, these delays have compounded NERSA's existing delays in deciding the 2014 to 2017 RCA decisions. What this means, is that in 2023 Eskom will still be recovering tariff revenue due to it from the period 2014 to 2017.

[55] Significantly NERSA's tariff decision for 2018/19 was reviewed and set aside by Kollapen J earlier this year. Kollapen J has also set aside NERSA's June 2018 decision on the RCA application for the 2014 to 2017 financial years. As in this case, NERSA conceded the merits in both the abovementioned decisions. Needless to say, NERSA has taken irregular decisions in three consecutive applications made by Eskom. This, to my mind, points to a modicum of incompetence on the part of NERSA in relation to Eskom's tariff applications.

[56] Counsel for NERSA argued that NERSA was allowed to get the 2019/2022 decision wrong, and then concede the merits, and that the Court should not draw an inference of incompetence on its part for doing so. I have difficulty with this argument. The point is that NERSA got it wrong on three separate occasions. An in this event, it got it horribly wrong as it was not allowed to treat Government's equity injection as a subsidy. To the contrary, the equity injection was made to obviate Eskom's debt burden.

[57] It is clear from these considerations that each of the four grounds for substitution specified by the Constitutional Court in *Trencon* is present in this case. Eskom has, in addition, also successfully demonstrated that the circumstances of this case are exceptional. In its founding affidavit, Eskom has provided extensive detail about Eskom's liquidity crisis, government's timely interventions to address it, and the grave threat to State finances if NERSA's decision to misappropriate government's equity injection is not reversed. This evidence, in context, pertinently illustrates the injury that the remedy of substitution is designed to assuage in this case.

[58] Given NERSA's numerous delays described above, coupled with failure to properly apply its mind to the legal framework and supporting information provided by Eskom in its 2019/2022 tariff application, I am inclined to the view that the ordinary remedy of remittal does not constitute effective relief. Of greater concern, is that it may inevitably result in a national economic crisis. As aptly illustrated by Eskom, in its founding affidavit, the government equity injection was made in 2019 because, at that stage, Eskom's was facing a financial crisis that posed a serious risk to the finances of the State. Lamentably, R46 billion of that equity injection has already been lost to Eskom.

[59] In the circumstances, I have grave misgivings that should this Court consider it appropriate to remit the matter to NERSA for redetermination, there is every likelihood that the R23 billion equity injection for 2021/2022 will also be lost, before Eskom is granted additional allowable revenue to recover that which was rightly due to it from 2019. Without the proposed

substitution order, there will accordingly be an increased risk of a collapse of Eskom's finances with catastrophic consequences for the finances of the South African State.

[60] In the circumstanes, I am satisfied that the substitutionary relief sought by Eskom is appropriate in the context of this case.

[61] For all these reasons, I conclude that Eskom has made out a case for the relief set out in its draft order.

Costs

[62] Eskoms seeks a costs order against NERSA in both Part A and B of this application. NERSA submits that in view of its concession in Part B of the application, the Court should order each party to pay its own costs in both Part A and B.

[63] In relation to the question of costs in Part A of the application, Kollapen J stated at paragraph 75 of the judgment: "While this part of the proceedings were characterised by various delays on the part of [NERSA] 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."

[64] Eskom argues that because NERSA delayed the hearing of Part A of the application on two occasions and filed its answering affidavit late it is not entitled to costs in Part A of the application and nor should the Court make

an order that each party pays its own costs in that application. I agree. This is not a matter where NERSA made a simple concession to the merits in Part B of the application. It's delay in filing its answering affidavit resulted in the court hearing having to be changed on two occasions. In this regard, the notice of motion provided for NERSA to file its answering affidavit by 15 November 2019. On that day, NERSA's attorneys sought an extention to 25 November 2019. Eskom granted NERSA the indulgence. This resulted in the hearing being moved to 9 December 2019. However, NERSA did not file its affidavit on 25 November 2019. At a case management conference on 26 November 2019, NERSA undertook to file its answering affidavit by 6 December 2019. NERSA did not comply with this deadline either. That resulted in the hearing date being moved to 13 January 2020.

[65] On 13 December 2019, NERSA provided Eskom with an unsigned affidavit, but then reserved the right to make changes to it. At a further case management meeting on 19 December 2019, NERSA confirmed that it intended to make changes to the unsigned verion of the affidavit. After Eskom's counsel recorded its prejudice at this turn of events, Kollapen J directed NERSA to file its answering by 23 December 2019. Although NERSA complied by filing its answering affidavit on 23 December 2019, its delay once again caused the hearing date to be moved from 13 January to 15 January 2020.

[66] NERSA's delay in filing its answering affidavit on time meant that the timetable for the hearing of the Part A application had been compressed to the inconvenience of the Court and Eskom. While papers ought to have

been finalised in November 2019, they were only finalised two days before the hearing and Eskom had to prepare its replying affidavit and heads of argument whilst counsel were away on holiday.

[67] In the ordinary course, NERSA would be entitled to costs because it has had substantial success in Part A of the application. But in view of NERSA's unquestionably prejudicial conduct described above, I exercise my discretion in favour of awarding costs to Eskom in both Part A and B of this application.

Order

[68] In the result, I make the following order:

1. The decision taken by NERSA on 7 March 2019 in respect of the Eskom allowable revenue and tariffs for the years 2019/2020 to 2021/22 decision of NERSA is reviewed and set aside.

2. A sum of R23bn will be added to the allowable revenue already determined by NERSA for the 2021/2022 financial year.

3. The average standard Eskom tariffs approved by NERSA for the 2021/2022 financial year will be increased by from 116.72 c/kwh to 128.24 c/kwh.

4. After such time as NERSA has determined the allowable revenue for Eskom in respect of the 2022/23 and 2023/24 financial years, NERSA is

directed to add a sum of R23bn to the allowable revenue in respect of each of those years.

5. NERSA is precluded from making any adjustment or compensation to offset the R23bn from the allowable revenue determined for these financial years or otherwise to deduct, directly or indirectly, the R23bn equity injection from the allowable revenue for those financial years.

6. NERSA is to pay Eskom's costs of this application, including the costs of two counsel and including the costs of the Part A application.

F KATHREE-SETILOANE
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

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Date of Hearing: 24 June 2020

Date of Judgment: 28 July 2020