REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / ~~NO~~ (2) OF INTEREST TO OTHER JUDGES: YES~~/NO~~ (3) REVISED. …… ……	**CASE NO: 51765/17**
SIGNATURE **DATE**	

In the matter between:

THE CITY OF CAPE TOWN **APPLICANT**

and

NATIONAL ENERGY REGULATOR OF SOUTH AFRICA **FIRST RESPONDENT**

MINISTER OF ENERGY **SECOND RESPONDENT**

JUDGMENT

WINDELL J:

INTRODUCTION

[1] The applicant, the City of Cape Town ("the City") purchases approximately 99.3% of its electricity from Eskom. It purchases the remaining 0.7% from Darling Wind

Project, a wind power generation project in Darling, Western Cape.[1] The City wants to purchase more renewable energy from independent power producers ("IPPs), without first seeking the consent of the second respondent, the Minister of Energy, ("the Minister"), as is currently the practice under section 34 of the Electricity Regulations Act 4 of 2006 ("ERA").[2] The City believes that buying electricity from IPPs is in the best interest of its community, because it will diversify its sources of electricity

[1] Darling Wind Project (DWP) was the first wind project established in South Africa. It began producing clean wind power for the City from 1 May 2008. In or about 2016, the City renegotiated its Power Purchase Agreement (PPA) with DWP. The PPA between the City and DWP did not require a section 34 determination before it could be concluded or implemented because it was negotiated and concluded prior to 1 August 2006, when the current Electricity Regulation Act came into force.

[2] Section 34(1) of ERA reads as follows:

The Minister may, in consultation with the Regulator-

(a) determine that new generation capacity is needed to ensure the continued uninterrupted supply of electricity;

(b) determine the types of energy sources from which electricity must be generated, and the percentages of electricity that must be generated from such sources;

(c) determine that electricity thus produced may only be sold to the persons or in the manner set out in such notice;

(d) determine that electricity thus produced must be purchased by the persons set out in such notice;

(e) require that new generation capacity must-

(i) be established through a tendering procedure which is fair, equitable, transparent, competitive and cost-effective;

(ii) provide for private sector participation.

(2) The Minister has such powers as may be necessary or incidental to any purpose set out in subsection (1), including the power to-

(a) undertake such management and development activities, including entering into contracts, as may be necessary to organise tenders and to facilitate the tendering process for the development, construction, commissioning and operation of such new electricity generation capacity;

(b) purchase, hire or let anything or acquire or grant any right or incur obligations for or on behalf of the State or prospective tenderers for the purpose of transferring such thing or right to a successful tenderer;

(c) apply for and hold such permits, licences, consents, authorisations or exemptions required in terms of the Environmental Conservation Act, 1989 (Act 73 of 1989) or the National Environmental Management Act, 1998 (Act 107 of 1998), or as may be required by any other law, for or on behalf of the State or prospective tenderers for the purpose of transferring any such permit, licence, consent, authorisation or exemption to a successful tenderer;

(d) undertake such management activities and enter into such contracts as may be necessary or expedient for the effective establishment and operation of a public or privately owned electricity generation business;

(e) subject to the Public Finance Management Act, 1999 (Act 1 of 1999), issue any guarantee, indemnity or security or enter into any other transaction that binds the State to any future financial commitment that is necessary or expedient for the development, construction, commissioning or effective operation of a public or privately owned electricity generation business.

(3) The Regulator, in issuing a generation licence-

(a) is bound by any determination made by the Minister in terms of subsection (1);

(b) may facilitate the conclusion of an agreement to buy and sell power between a generator and a purchaser of that electricity.

(4) In exercising the powers under this section the Minister is not bound by the State Tender Board Act, 1968 (Act 86 of 1968).

and thus enhance its security of supply. The City is also of the view that it will be more environmentally friendly and cost effective to purchase electricity from IPPs as opposed to purchasing the electricity generated by Eskom.

[2] Any IPP would have to be licensed by the first respondent, the National Energy Regulator of South Africa ("NERSA"), in terms of ERA to operate a power plant and sell its output to the City.[3] NERSA says that it may not licence a new power plant unless the Minister has first determined that such a new facility is needed and may be established as provided for in s 34 of ERA. The IPP or IPPs have not been identified by the City and there is no application for such a license pending before NERSA.

[3] This is an application in which the City seeks an order declaring that a s 34 ministerial determination is not required for an IPP to establish a new power plant and supply electricity to the City. If it is held that such a determination is required, then the City seeks, by way of the first alternative, an order declaring s 34 unconstitutional and invalid because it impermissibly trenches upon the constitutional powers and functions of local government. The City's application is supported by the *amicus curiae*, the Centre for Environmental Rights.

[4] The City contends that s 34, properly construed, is a permissive, enabling provision that clothes the Minister with a discretion to determine whether new generation capacity is required and, if it is so required, to take steps to ensure that the required generation capacity is established. It contends that the section does not, however, preclude the City from establishing new generation capacity and procuring power so

[3] Section 7(1) of ERA reads as follows:

(1) No person may, without a licence issued by the Regulator in accordance with this Act-

(a) operate any generation, transmission or distribution facility;
(b) import or export any electricity; or
(c) be involved in trading.

established directly from IPPs. It follows that the consent of the Minister under s 34 is not required for the City to contract with one or more IPPs for the establishment of new power plants for the supply of electricity to the City. The City's argument, in a nutshell, is that it has a constitutional right to procure energy in any manner it deems best without a determination by the Minister.

[5] Be that as it may, the City also initially believed that it required a ministerial determination in terms of s 34. It therefore applied to the Minister for such a determination in November 2015. The Minister has not yet determined the City's application as she has decided in May 2017, after the judgment in *Earthlife Africa Johannesburg v Minister of Energy*[4] (in which the Minister's determination in the procurement of nuclear power in accordance with s 34 of the ERA was successfully reviewed) to place all applications for s 34 determinations "on hold". The City therefore seeks, in the second alternative, that if it is held that a s 34 determination is required and that s 34 is valid, an order compelling the Minister to determine its application for a s 34 determination.

[6] The Minister raises a procedural challenge to the motion. She contends that the dispute the court is asked to adjudicate upon constitutes an intergovernmental dispute between organs of State and that the application is premature because the City has not complied with the requirements of s 41 of the Constitution and the provisions of the Intergovernmental Relations Framework Act 13 of 2005 ("the Framework Act"). The City submits that this is not an intergovernmental dispute subject to those requirements, but asks, in the alternative, that the City's failure to comply with those requirements be condoned.

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[4] 2017 (5) SA 227 (WCC).

THE BACKGROUND FACTS

[7] On 3 November 2015, the Mayor of the City requested the Minister to make a determination in terms of s 34 to allow the City to purchase up to 150MW solar power and up to 280MW wind power from “an IPP”. The Department of Energy asked the City for particulars of its plan which were provided to the Department on 1 December 2015.

[8] Despite several enquiries from the City and a meeting between the Minister and the Mayor on 16 November 2016, the Minister had not responded by the end of January 2017. In early February 2017, the City sought legal advice on the matter and subsequently received legal opinion from senior counsel that the City does not require a ministerial determination in terms of s 34 to implement its plan to purchase renewable energy from one or more IPPs. The Mayor addressed a letter to the Minister on 5 May 2017, together with a copy of senior counsel's opinion, and asked the Minister to provide the City with the determination it had requested on 3 November 2015 because, although not necessary, such determination "will assist the City with the practical implementation of its plan". The Mayor also sent a copy of counsel's opinion to NERSA on 5 May 2017. She simultaneously asked NERSA to indicate whether it adhered to its view that a ministerial determination in terms of s 34 was required for NERSA to issue a licence to an IPP for the creation of new generation capacity. In the letters the City expressed its willingness to meet with the Minister and NERSA to discuss the details of the City’s plan to purchase power from IPPs and advised that if no response was received within 20 days the City would approach the court for “appropriate relief”.

[9] The newly appointed Minister of Energy responded in a letter of 24 May 2017. She said that she was not aware of the City's application but had in any event issued a directive placing on hold all further determinations under s 34, seemingly for an indefinite period. In her response the Minister did not deal with the legal opinion obtained from senior counsel nor did she express any view on the interpretation issue. NERSA responded on 7 June 2017 and set out, in brief terms, its view on the interpretation of s 34. NERSA concluded that it was of the view that it could not license an IPP to establish new generation capacity without a ministerial determination in terms of s 34 that permitted it, but expressed its willingness to engage with the City on the issue.

[10] There was, however, no further engagement between the City and the Minister and/or NERSA on any of these issues. The City contends that, through no fault of its own and despite its best efforts, it accordingly found itself at a dead end. The Minister has failed for more than two years to respond to its application for a s 34 determination and has now indefinitely suspended her consideration of it. Moreover, NERSA will not license an IPP to create new generation capacity without a ministerial determination. It consequently decided to institute this application for a declarator on 26 July 2017. The Minister contends that the City's non-adherence to dispute resolution mechanisms under the Framework Act before the launching of the application is fatal, and the court should refuse to entertain the application.

PRINCIPLES OF CO-OPERATIVE GOVERNMENT

[11] Chapter 3 of the Constitution (s 40-41) lays down the principles of co-operative government. Section 40(1) provides that government *"is constituted as national, provincial and local spheres of government which are distinctive, inter-dependent and*

inter-related." Section 41(1)(h) specifically provides that all spheres of government and all organs of State within each sphere must-

> *(h) co-operate with one another in mutual trust and good faith by-*
>
> *(i) fostering friendly relations;*
>
> *(ii) assisting and supporting one another;*
>
> *(iii) informing one another of, and consulting one another on, matters of common interest;*
>
> *(iv) co-ordinating their actions and legislation with one another;*
>
> *(v) adhering to agreed procedures; and*
>
> *(vi) avoiding legal proceedings against one another."*

[12] Section 40(2) of the Constitution states that all spheres of government must observe and adhere to the principles laid down in chapter 3 and must conduct their activities within its parameters. Section 41(3) states that an organ of State involved in an intergovernmental dispute "*must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute."* Section 41(4) concludes by providing that, if a court is not satisfied that the parties to a dispute have complied with the requirements of s 41(3), then it may refer the dispute back to them.

[13] Section 41(2) of the Constitution requires an Act of Parliament to establish or provide for structures and institutions to promote and facilitate intergovernmental relations, and to provide for appropriate mechanisms and procedures to facilitate the settlement of intergovernmental disputes. As a result the Framework Act was enacted.

[14] Chapter 4 (s 39 to 45) of the Framework Act deals with intergovernmental disputes. Section 45 (1) of this Act reads as follows:

> *"No government or organ of state may institute judicial proceedings in order to settle an intergovernmental dispute unless the dispute has been declared a*

formal intergovernmental dispute in terms of section 41 and all efforts to settle the dispute in terms of this Chapter were unsuccessful."

[15] Section 1 of the Framework Act defines "government" as - (a) the national government; (b) a provincial government; or (c) a local government, and defines an "organ of state" as defined in s239 of the Constitution. Section 239 of the Constitution defines an "organ of state" as-

"(a) any department of state or administration in the national, provincial or local sphere of government; or

(b) any other functionary or institution-

(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer;"

[16] In s1 of the Framework Act "intergovernmental dispute" means a dispute between *"different governments or between organs of state from different governments"* concerning a matter-

(a) arising from-

(i) a statutory power or function assigned to any of the parties; or

(ii) an agreement between the parties regarding the implementation of a statutory power or function; and

(b) which is justiciable in a court of law, and includes any dispute between the parties regarding a related matter;"

[17] The City argues that there are two reasons why the dispute between the parties is not an intergovernmental dispute and why the Framework Act and chapter 3 of the Constitution is not applicable in this matter. Firstly, so it contends, the main dispute is not between "different governments or between organs of State **from different governments"** and secondly, the first alternative dispute concerning the constitutional validity of legislation is not a dispute **"arising from a statutory power or function assigned."** (Emphasis added). The argument goes as follows: NERSA is not an organ of State within the sphere of government as it is an independent statutory body created by s 3 of the National Energy Regulator Act 40 of 2004 ("NERA"). As the City's primary dispute (the interpretation of s 34) is with NERSA and not with the Minister, it is not an intergovernmental dispute subject to chapter 3 of the Constitution and chapter 4 of the Framework Act. NERSA will not entertain an application for the establishment of a new power plant without the Minister's consent under s 34. Accordingly, the first hurdle the City must overcome is NERSA's adherence to the City's interpretation of s 34. If NERSA was to be persuaded to entertain an application for the establishment of a new power plant without a ministerial determination under s 34, the City's problem will be solved. It would not matter how the Minister interprets s 34. The City's first alternative dispute, the constitutional validity of s 34, is a dispute with the Minister but arises only if the court should determine its main dispute in favour of NERSA. But, so it is argued, the first alternative dispute is clearly not one *"arising from ... a statutory power or function assigned to any of the parties".* It is thus also not an intergovernmental dispute subject to the Framework Act. The City's second alternative dispute arises only if this court should determine its main dispute in favour of NERSA and its first alternative dispute in favour of the Minister. The City then asks for an order compelling the Minister to determine its application for a s 34 determination. This

dispute is however contingent upon this court's determination of the main and first alternative disputes. It is not capable of settlement between the parties because it does not arise for as long as their main and first alternative disputes remain unresolved. It is accordingly merely ancillary to the main and first alternative disputes which are properly before the court.

ORGANS OF STATE FROM DIFFERENT GOVERNMENTS

[18] It is common cause that the City, the Minister and NERSA are all organs of State. The City is an "organ of state" as described in s 239(a) of the Constitution and the Minister is an "organ of state" as envisaged in s 239(b)(i) of the definition as it is "*exercising a power or performing a function in terms of the Constitution or a provincial constitution."* NERSA is an organ of State because it is *"exercising a public power or performing a public function in terms of any legislation"* as provided for in para (b)(ii) of the definition. An intergovernmental dispute is defined as a dispute, *"between different governments or between organs of state from different governments",* and it therefore does not include a dispute with an organ of State that falls outside the national, provincial and local spheres of government.[5] The City submits that NERSA is not an organ of State in government.

[19] In *Independent Electoral Commission v Langeberg Municipality*[6] the Constitutional Court ("CC") had to determine whether the Independent Electoral Commission ("the Commission") was an organ of State in the "sphere of government". In this matter the Municipality instituted proceedings against the Commission concerning voting stations for local government elections. The court held that the

[5] Section 2(2)(g) of the Framework Act specifically states that the Framework Act does not apply to *"any public institution that does not fall within the national, provincial or local sphere of government".*
[6] 2001 (3) SA 925 (CC).

Commission was an organ of State, but that it does not fall within national sphere of government as contemplated in chapter 3 of the Constitution for mainly three reasons: Firstly, the Commission was not a department or administration within the national sphere of government in respect of which the national executive has a duty of co-ordination in accordance with s 85 (2) of the Constitution. Section 85 of the Constitution reads as follows:

> *"**85 Executive authority of the Republic***
>
> *(1) The executive authority of the Republic is vested in the President.*
>
> *(2) The President exercises the executive authority, together with the other members of the Cabinet, by-*
>
> *(a) implementing national legislation except where the Constitution or an Act of Parliament provides otherwise;*
>
> *(b) developing and implementing national policy;*
>
> *(c) co-ordinating the functions of state departments and administrations;*
>
> *(d) preparing and initiating legislation; and*
>
> *(e) performing any other executive function provided for in the Constitution or in national legislation."*

Secondly, the Commission is a chapter 9 State institution that strengthens constitutional democracy, and nowhere in chapter 9 is there anything from which an inference may be drawn that it is a part of the national government. Thirdly, under s 181(2) of the Constitution the Commission is independent, subject only to the Constitution and the law. In conclusion, the court held that the use of the word "independent" in the name of the Commission, is intended to refer to independence

from the government, whether local, provincial or national, and the Constitution has created institutions such as the Commission that perform their functions in terms of national legislation but are not subject to national executive control.

[20] In *Minister of Education, Western Cape, and Others v Governing Body, Mikro Primary School, and Another*,[7] the Supreme Court of Appeal had to determine whether a public school together with the school governing body, which is an organ of State, falls within a 'sphere of government' for purposes of chapter 3 of the Constitution. The court held that it did not and concluded as follows:

> "[22] The first respondent is, insofar as the determination of a language and admission policy is concerned, not subject to executive control at the national, provincial or local level and can therefore, like the Electoral Commission, insofar as the performance of those functions is concerned, not be said to form part of any sphere of government. For the same reason, its dispute with the first and second appellants in respect of the language and admission policy determined by it, is not an intergovernmental dispute as contemplated in s 41(3) of the Constitution. The argument based on s 41 of the Constitution was therefore correctly rejected by the Court *a quo*."

[21] The question therefore is whether NERSA is a department or administration within the national sphere of government in respect of which the national executive has a duty of co-ordination in accordance with s 85(2) of the Constitution and consequently subject to executive control. In my view it is. NERSA, as stated, is a national regulatory authority established as a juristic person in terms of s 3 of the NERA. The preamble to ERA records that its purpose, *inter alia*, is to establish a national regulation framework for the electricity supply industry and to make NERSA the custodian and enforcer of the national electricity regulatory framework. The structure of NERSA

[7] 2006 (1) SA 1 (SCA).

consists of nine members (four full-time and five part-time members), all of whom are appointed by the Minister of Energy in terms of s 5 of NERA. In terms of s 5(2) it is the Minister who must designate one of the part-time members as chairperson of NERSA and another part-time member as deputy chairperson and must designate one of the full-time members as the Chief Executive Officer of NERSA. Section 5(7) stipulates that the members of NERSA must be paid for their services *"such remuneration and allowances as the Minister may determine with the concurrence of the Minister of Finance"* and s 11(3) states that *"employees of the Energy Regulator must be paid such remuneration, allowances, subsidies and other benefits as the Energy Regulator may determine with the approval of the Minister and the Minister of Finance".*[8] Section 11(4) provides that the Minister may, *"where he or she determines a need exists, instruct the Energy Regulator to make use of persons employed by or contracted to the Department or another licensing or regulatory authority falling under the Minister's jurisdiction."* Importantly, s 14 requires NERSA to furnish an annual report,[9] as required of public entities in terms of the Public Finance Management Act, 1 of 1999, which report must, in respect of electricity, piped-gas and petroleum pipeline matters, include information on-

(a) licences granted, amended or withdrawn;

(b) regulations made and directives issued by the Minister;

(c) the envisaged strategies of the Energy Regulator;

(d) the existing position and envisaged commercial developments with respect to the electricity, piped-gas and petroleum pipeline industries;

(e) the position regarding health, safety and environmental matters;

[8] See also s 7(1)(c) and 7 (1)(e) of NERA.
[9] See also s 13(5) of NERA that states that the financial records of NERSA must be audited by the Auditor-General.

(f) access to network infrastructure; and

(g) tariffs or tariff structures set or approved.

[22] In terms of s 4 of NERA, NERSA must not only undertake the functions set out in section 4 of ERA, but it must also undertake the functions of the Gas Regulator as set out in s 4 of the Gas Act 48 of 2001 ("the Gas Act") and that of the Petroleum Pipelines Regulatory Authority as set out in s 4 of the Petroleum Pipelines Act 60 of 2003 ("the Petroleum Pipelines Act"). The Gas Act as well as the Petroleum Pipelines Act require NERSA to consult, where necessary, "*with Government Departments and other bodies and institutions regarding any matter contemplated in these Acts."* ERA, the Gas Act and the Petroleum Pipelines Act give the Minister the power to make Regulations in terms of which NERSA must discharge its mandate. On a proper reading of these Acts, the Minister and the Department of Energy clearly have a duty of co-ordination with NERSA in accordance with s 85(2) of the Constitution and NERSA is subject to its executive control. In *National Gambling Board v Premier, Kwazulu-Natal, and Others*,[10] the CC held that the National Gambling Board and the Kwa–Zulu Natal Gambling Board were organs of State in the national and provincial spheres respectively, and in *Recycling and Economic Development Initiative of South Africa NPC v Minister Of Environmental Affairs,*[11] the SCA accepted that the applicant, the Recycling and Economic Development Initiative of South Africa NPC ("Redisa"), was an organ of State to which the Minister owed a duty to avoid legal proceedings as contemplated in the Framework Act and chapter 3 of the Constitution. NERSA is a similarly situated national regulatory body and its position is, in my view, no different from the position of these two entities.

[10] 2002 (2) SA 715 CC at [19].
[11] 2019 (3) SA 251 (SCA) at [144].

[23] But even if I am wrong in this regard, the City's attempt to limit the dispute to one that exists only between the City and NERSA is an over-simplification of the nature of the issues between the parties. The dispute relating to s 34 concerns the full extent of the powers that the Minister may exercise in terms of s 34 of the Act. The primary relief sought by the City is a declarator that "*a determination by the Minister of Energy in terms of s 34 of the Electricity Regulation Act 4 of 2006 ("the Act") is not required for an independent power producer to create new capacity for the generation of electricity; To produce electricity by the capacity so created; and to sell the electricity so produced to the applicant."* The relief sought impugns the extent of the Minister's powers to determine new energy capacity for IPPs. It is therefore primarily a dispute between the City and the Minister. The City and the Minister are both organs of State in the government. That makes this an intergovernmental dispute. They would therefore be bound by the obligation to co-operative government provided for in chapter 3 of the Constitution and the provisions of the Framework Act.

THE NATURE OF THE DISPUTE

[24] The second reason advanced by the City as to why the Framework Act is not applicable concerns the first alternative dispute, which it concedes is a dispute with the Minister. The City contends that for the Framework Act to apply, the dispute must be one *"concerning a matter ... arising from .. a statutory power or function assigned to any of the parties, or, ...an agreement between the parties regarding the implementation of a statutory power or function",* and a dispute about the constitutional validity of legislation is not such a dispute.

[25] The constitutional validity of s 34 is only pleaded in the alternative to the main dispute which concerns the interpretation of s 34. It is important to note that the City

does not contend that the interpretation of legislation falls outside the definition of intergovernmental dispute as contemplated in the Framework Act and in chapter 3 of the Constitution, and rightly so. In the *National Gambling Board* matter, the CC expressly included a dispute about the interpretation of national and provincial legislation as an intergovernmental dispute. The court held that the parties' failure to comply with the obligations of chapter 3 of the Constitution was sufficient ground for refusing direct access and (at paragraph [36]) held as follows:

> "[36] The parties have made no meaningful effort to comply with their constitutional obligation of cooperative government. The dispute primarily raises questions of interpretation. Such disputes can be resolved amicably, however. Moreover, organs of State's obligation to avoid litigation entails much more than an effort to settle a pending court case. It requires of each organ of State to re-evaluate its position fundamentally. In the present context, it requires of each of the organs of State to re-evaluate the need or otherwise for a single CEMS, to consider alternative possibilities and compromises and to do so with regard to the expert advice the other organs of State have obtained."

[26] It is also not the City's case that the second alternative dispute, an order compelling the Minister to determine the application, is not an intergovernmental dispute. In fact, the City has recognised that it is an intergovernmental dispute already in November 2015 when the Mayor stated, in a letter to the Minister, that she would welcome the opportunity to engage with the Minister directly so that they can find a resolution, and that the Minister was welcome to declare an intergovernmental dispute. So, the only issue raised by the City is in regard to the first alternative dispute, the constitutional validity of s 34. Although this argument will only become relevant if the court decides the main dispute in favour of NERSA and the Minister, I will nevertheless deal with it.

[27] In support of its contention that a dispute about the constitutional validity of legislation is not an intergovernmental dispute, the City relies on the matter of *City of Johannesburg Metropolitan Municipality v Chairman of the National Building Regulations Review Board and Others*.[12] In this matter the High Court, *inter alia*, declared s 9 of the National Building Regulations and Building Standards Act No 103 of 1977 invalid to the extent that it empowered the National Building Regulations Review Board (Board) to exercise appellate powers over municipal decisions. The tenth respondent, the Minister of Trade and Industry, raised non-compliance with the Framework Act. The High Court rejected the argument and held that the dispute did not concern "two organs of State or different governments" and that the matter was about "the unconstitutionality of portions of a piece of legislation".

[28] When the matter came before the CC for confirmation of a declaration of invalidity made by the High Court, the Minister did not participate in the proceedings before it and the application was unopposed. The CC merely noted the High Court's finding on the non-compliance with the Framework Act and the issue was not pertinently raised nor was it considered by the CC. The judgment is therefore no authority for the proposition that an intergovernmental dispute excludes declaration of invalidity. Moreover, the CC had, on more than one occasion, in matters where the constitutional validity of legislation had to be confirmed, refused to entertain it because the Framework Act and chapter 3 of the Constitution have not been complied with. In *Uthukela District Municipality and Others v President of the Republic of South Africa and Others*[13] the CC had to confirm an order from the High Court declaring a provision of an Act of Parliament to be constitutionally invalid after the Act had already been

[12] (58705/2015) [2017] ZAGPPHC 580 (29 June 2017).
[13] 2003 (1) SA 678 (CC).

repealed. The CC stated that if the parties who may be affected by confirmation proceedings are organs of State they have the constitutional duty to foster co-operative government as provided for in chapter 3 of the Constitution. The court held that this entails that organs of State must "avoid legal proceedings against one another" and that courts must ensure that the duty is duly performed, and if it is not satisfied that this duty has been performed, refer a dispute back to the organs of State involved.[14]

[29] To sum up, the City's argument that a dispute about constitutional validity does not constitute an intergovernmental dispute, is without merit. All three disputes are clearly inter-governmental disputes and the parties herein were required to cooperate to resolve the dispute before turning to the court.

CONDONATION

[30] In *Uthukela supra* the court stated that apart from the general duty to avoid legal proceedings against one another, s 41(3) of the Constitution places a twofold obligation on organs of State involved in an intergovernmental dispute: First, they must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for. Second, they must exhaust all other remedies before they approach a court to resolve the dispute.[15] Section 40(1) of the Framework Act echoes s 41(3) of the Constitution. It provides that organs of State must make every reasonable effort to avoid intergovernmental disputes when exercising their statutory powers or performing their statutory functions and to settle intergovernmental disputes without resorting to judicial proceedings. The Framework Act sets out, in great detail,

[14]At [12] and [13].
[15] At [19].

the steps that must be followed before parties approach court. Section 41(2) provides that, *"the organ of state in question must, in good faith, make every reasonable effort to settle the dispute, including the initiation of direct negotiations with the other party or negotiations through an intermediary."* That should be done even before a dispute is declared in terms of s 41(1) of the Framework Act. After the efforts in s 40 and 41 have been exhausted, s 42 and 43 set out the terms in which the parties, assisted by a facilitator, must go about resolving the dispute. Section 44 of the Framework Act ensures that an appropriate Minister or an MEC will take ultimate responsibility for resolving the dispute through political compromise. Only when the various mechanisms outlined in the Framework Act have failed, from the implementation protocols identified in s 35 of the Framework Act to the dispute resolution mechanisms set out in s 39 to 44, may a party seek judicial intervention to resolve the dispute.[16]

[31] The City embarked in this litigation without taking any of the steps provided for in the Framework Act to settle any of the disputes before launching the present proceedings. The Minister contends that the court should refer the disputes back to the parties to follow the procedures in terms of s 45 of the Framework Act. The City asks the court to condone its non-compliance with the provisions of s 45 of the Framework Act and to interpret s 34 of ERA.

[32] In *City of Cape Town v Premier, Western Cape & Others,*[17] the court had the occasion to consider whether non-compliance with the provisions of the Framework Act can be condoned. The salient facts were the following: The applicant, the City, had

[16] Constitutional Law in South Africa, 2nd Edition, Juta Chapter 14 Co-operative Government & Intergovernmental Relations at 14.5.

[17] 2008 (6) SA 345 (C).

received information that one of the councillors on the City council was guilty of certain misconduct and, as a consequence, had engaged the services of a private investigation firm to probe the allegations. The probe culminated in a finding by the City's disciplinary committee that the councillor had been guilty of misconduct, and a request by the City council that the MEC be requested to remove him from office. In response, the MEC launched an investigation into the lawfulness of the City's investigation of the councillor's conduct. As an adjunct to this investigation, the Premier of the province established, by proclamation, two commissions of enquiry into the conduct of the City, and appointed a serving judge as their chair. The City, which was later joined by the Democratic Alliance, approached the High Court for orders declaring the MEC's decision to establish the investigation and the Premier's decision to establish the first and second commissions of inquiry to be unconstitutional.

[33] The court found that although s 45(1) of the Framework Act is couched in peremptory language, it has to be read consistently with the provisions of s 41(3) and (4) of the Constitution. It therefore concluded that s 41(4) of the Constitution, which provides that a court may refer a dispute back to the organs of State involved if it is not satisfied that the requirements of s 41(3) have been met, vests in a court a discretion to hear a matter even if not satisfied that the parties have made every reasonable effort to settle the dispute.

[34] In *Minister of Police and Others v Premier Western Cape and Others,*[18] a matter that dealt with the power of the Premier to appoint a commission of inquiry, the CC confirmed that s 41(4) of the Constitution does not preclude a court from hearing the dispute,[19] but added the following precursor:

[18] 2014 (1) SA 1 (CC).
[19] At [58].

> "[64] It must be added that *spheres of government and organs of state are obliged to respect and arrange their activities in a manner that advances intergovernmental relations and bolsters co-operative governance. If they do not do so, they breach peremptory requirements of the Constitution.* And yet, more and more disputes between or amongst spheres of government or organs of state end up in courts and in this court, in particular. The litigation is always at the expense of the public purse from which all derive their funding. That is true of the present dispute between the province, the commissioner and the minister. Often litigation of that order stands in the way or delays sorely needed services to the populace and other activities of government. ..... *Courts must be astute to hold organs of state to account for the steps they have actually taken to honour their co-operative governance obligations well before resorting to litigation."*

[35] This court therefore has a discretion to entertain the matter even if the parties had failed to exhaust internal remedies before approaching the court to resolve their dispute. But, in the exercise of its discretion, the court must be mindful of the duty of organs of State to comply with their obligations to co-operative government and the peremptory language of the Constitution and Framework Act.

[36] What are the relevant factors that this court should consider in the exercise of its discretion in the present matter? It is trite that condonation is granted on "good cause" shown.[20] Relying on the judgment in *City of Cape Town,* referred to above, the City contends that it has shown good cause in that it had made every reasonable effort to resolve the matter with the Minister and NERSA. The City contends that after repeatedly entreating the Minister and NERSA for almost two years to bring the matter

[20] See *Madinda v Minister of Safety and Security* 2008 (4) SA 312 (SCA) para 10; *MEC for Education, Kwa- Zulu Natal v Shange* 2012 (5) SA 31S (SCA).

to a conclusion, the City could not reasonably have been expected to take the steps envisaged in the Framework Act before instituting the present proceedings.

[37] Firstly, the facts and circumstances under which the court granted condonation in the *City of Cape Town* matter are wholly distinguishable from the facts in the present matter. The applicant in that matter was faced with the imminent commencement of the commission's proceedings and that played a significant role in the decision of the court. But in that matter, even despite the time constraints, there was a meeting between the Mayor and the Premier at which the Mayor declared that the meeting was a formal contact in terms of s 41 of the Constitution and the Framework Act. The court took into consideration that it was unlikely that the Premier would abandon his course of conduct in relation to the Second Erasmus Commission, and as the procedures contemplated in the Framework Act for dispute resolution are time-consuming, the City would have been denied effective redress if it held back on legal proceedings while following the framework processes. As the MEC and the Premier were found to have acted in bad faith the court exercised its discretion in favour of the applicant and proceeded to find that the City *"could not reasonably have been expected to take the steps envisaged in the Framework Act before instituting the present proceedings",* and that the court accordingly *"had the power to entertain the proceedings in terms of s 41(4)."*

[38] Secondly, the City's excuse, namely that they had been waiting for the Minister's determination for over two years and that they can, for that reason, not be expected to comply with the Framework Act, holds no water. The failure by the Minister to determine the City's application is the second alternative dispute that, as stated before, will only become applicable if the court find against the City on the main and first alternative disputes. In any event, in *Recycling and Economic Development Initiative*

of South Africa NPC v Minister of Environmental Affairs supra, the SCA held that even when the dispute between the parties arose long before the Minister resorted to liquidation proceedings against Redisa, the Minister had a constitutional and a statutory duty to avoid judicial proceedings by attempting to settle the dispute.

[39] Thirdly, in the present matter there were no time constraints and no urgency to rush to court after the legal opinion was received. In fact, the application, which was instituted in July 2017, was only set down for hearing in May 2020. The City wrote one letter, dated 5 May 2017, to which it attached a copy of senior counsel's opinion on whether a s 34 determination is required by the Minister. The Minster responded to this letter on 24 May 2017 and stated that she was not even aware of the City's application and that she has placed all s 34 determinations on hold. The legal opinion was not mentioned at all. The City did not engage with the Minister after receiving her letter and summarily instituted the current application. This was done well-knowing that the dispute with the Minister on her failure to determine the application was one falling within the ambit of the Framework Act. No request in relation to the main relief sought in this application was made to the Minister prior to the City approaching the court and what was sought from the Minister during November 2015 and what is sought now is completely different.

[40] The City finally submits that the papers filed by the Minister and NERSA reflect a hardened stance, devoid of any reason to think that the negotiation and facilitation process could have delivered a different or positive result. It submits that no settlement or agreement to which the City, the Minister and NERSA might have come, by following the chapter 4 process, would in any event have brought certainty about the meaning of s 34 or its constitutionality, and therefore avoided the litigation. For the same reason it would have been pointless to seek such settlement or agreement. The

court should therefore exercise its discretion in favour of the City and entertain the matter.

[41] Although it is a tempting proposition, an organ of State's failure to comply with the peremptory provisions of the Constitution and the Framework Act cannot be condoned just because it is of the opinion that it would in any event have been unsuccessful in its efforts to settle a dispute. It would have been a consideration had the City made some effort to engage with the Minister and NERSA in the spirit of co-operative government, but there was no such effort. As alluded to above, there was no immediate urgency to institute the application after the legal opinion was received. NERSA in its response to the City's letter of 5 May 2017 indicated that it was willing to engage with the City and briefly set out its interpretation of s 34 and the extent of a municipality's powers. The City however did not make any attempt to engage with NERSA or the Minister on this issue. Organs of State have a duty to avoid legal proceedings against each other. This duty requires each organ of State to re-evaluate its position fundamentally and to consider alternative possibilities and compromises and *"to do so with regard to the expert advice the other organs of State have obtained".*[21]

[42] The Framework Act is constitutionally mandated and in the Preamble of the Act it is recognised that one of the most pervasive challenges facing our country as a developmental state, is the need for government to redress poverty, underdevelopment, marginalisation of people and communities and other legacies of apartheid and discrimination and that this challenge is best addressed through a *"concerted effort by government in all spheres to work together and to integrate as far*

[21] *National Gambling Board supra* at [36].

as possible their actions in the provision of services, the alleviation of poverty and the development of our people and our country". This matter unfortunately exemplifies the failure of organs of State to adhere to the Constitutional discipline and restraint required of them. The City has failed in its duty as organ of State to avoid litigation and has only paid lip service to this obligation. It made no reasonable effort to follow the steps provided for in the Framework Act to settle the dispute before launching the present proceedings and has offered no valid or reasonable excuse for its failure. In *Uthukela,* the court held that in view of the important requirements of co-operative government, a court, will "rarely decide" an intergovernmental dispute unless the organs of State involved in the dispute have made every reasonable effort to resolve it at a political level. This is not one of those rare occasions. It follows that the City failed to show good cause in order for this court to condone the non-compliance with s 45(1) of the Framework Act.

[43] I am aware that the application is of great importance and interest to the City and its citizens. But, as it was stated in *Economic Freedom Fighters v Gordhan and Others; Public Protector and Another v Gordhan and Others*,[22] it must at all times be remembered "*that courts must show fidelity to the text, values and aspirations of the Constitution. A court should not be moved to ignore the law and the Constitution, and merely make a decision that would please the public. The rule of law, as entrenched in the Constitution, enjoins the judiciary, as well as everyone within the Republic, to function and operate within the bounds of the law. This means that a court cannot make a decision that is out of step with the Constitution and the law of the Republic. It*

[22] CCT 232/19; CCT 233/19) [2020] ZACC 10 (29 May 2020).

must impartially apply the law to the prevailing set of facts, without fear, favour or prejudice."

[44] In the result the following order is made:

ORDER:

1. The application is postponed *sine die.*
2. The disputes between the parties are referred back to the parties in terms of s 41(3) of the Constitution.
3. In the event of any such disputes having been declared a formal intergovernmental dispute in terms of section 41 of the Intergovernmental Relations Frameworks Act, 2005, and all efforts to settle the dispute in terms of Chapter 4 of that Act were unsuccessful, any party may apply to this Court for leave to re-enroll this application for hearing on the same papers and on such conditions as the Court may determine.
4. The costs of the hearing on 11 and 12 May 2020 (including the costs relating to heads of argument for the hearing) are to be paid by the applicant. Such costs will include the cost consequent upon the employment of three counsel.
5. All other costs are reserved.

_____

L. WINDELL
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances

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	N de Jager
	C Tabata
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	I Goodman
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	M Makoti;
	N Kekana
Instructed by:	State Attorneys Pretoria
Counsel for the Amicus Curiae:	A Hassim
Instructed by:	Gildenhuys Malatji Inc
Date of Hearing:	11 & 12 May 2020
Date of Judgment:	11 August 2020