IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 24365/2016

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

08-APRIL-2016 .....

DATE SIGNATURE

In the matter between:

THE ORGANISATION UNDOING TAX ABUSE ("OUTA")	Applicant
and	
THE NATIONAL ENERGY REGULATOR OF SOUTH AFRICA	First Respondent
ESKOM HOLDINGS SOC LIMITED	Second Respondent
THE MINISTER OF THE DEPARTMENT OF PUBLIC ENTERPRISES N.O	Third Respondent
THE MINISTER OF ENERGY N.O	Fourth Respondent
MINISTER OF FINANCE N.O	Fifth Respondent

Date of Hearing and Order	:	31 March 2016
Date of Reasons for Order	:	08 April 2016

JUDGMENT (REASONS AND ORDER)

MANAMELA AJ

Introduction

[1] This matter was enrolled on an extremely urgent basis for hearing on 31 March 2016.[1] After hearing oral argument by counsel, I handed down an order, in terms of which, the application was dismissed with costs.[2] I also made an order in respect of an interlocutory application.[3] I undertook to provide these reasons, for the order(s) made, on 08 April 2016.

[2] The hearing of this matter was preceded by an order by agreement between the parties in another related matter.[4] Although, the other matter had been brought by different applicants against the first, second and fourth respondents herein, the substance of the issues in the two matters were virtually the same. This comparison is significant for the interlocutory application - in the form of an application to strike out contents of affidavit by one of the respondents - by the applicant referred to above. More will follow on this, after a brief discussion of the relevant background of this matter.

Background

[3] The National Energy Regulator of South Africa (NERSA), the first respondent in this matter, was established in terms of section 3 of the National Energy Regulator Act 40 of 2004 (NERA).[5] NERSA is mandated to "regulate the electricity, piped-gas and petroleum pipeline

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[1] The application was issued on 24 March 2016 and the respondents given until 29 March 2016 to file opposing papers. However, none of the respondents was able to comply with the time periods stipulated in the notice of motion and their affidavits reached the court file literally minutes before the scheduled hearing of the matter.
[2] See par 63 below.
[3] See par 25 below.
[4] The matter of *Borbet SA (Pty) Ltd and Others v National Energy Regulator of South Africa and Others*, Case Number 24364/16 was also enrolled for hearing as an urgent application on 31 March 2016. By agreement of the parties it was postponed to a date in the future for hearing only as review proceedings.
[5] The National Energy Regulator Act or NERA was assented to on 30 March 2005 and commenced on 15 September 2005.

industries; and to provide for matters connected therewith".[6] Its mandate and operations are governed by a raft of legislation, including NERA, as already indicated and the Electricity Regulation Act 4 of 2006 (ERA). In terms of section 4(a)(ii) of ERA, as part of its duties and powers, NERSA must, among others, regulate prices and tariffs of electricity. NERSA says it is committed to execute its mandate and operate under the regulatory principles of transparency, neutrality, consistency and predictability, accountability, integrity, efficiency and independence.[7] However, the current application represents a challenge of NERSA's regulatory role and its conduct seen from provisions of NERA[8] in particular, and generally, ERA.

[4] The purpose or objects of ERA (i.e. Electricity Regulation Act 4 of 2006) are set out in its long title and section 2,[9] but of current greater significance is its section 15. It sets out these tariff principles:

> "(1) A licence condition determined under section 14 relating to the setting or approval of prices, charges and tariffs and the regulation of revenues—
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> *(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;

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[6] See long title and section 4(1) of NERA. The latter reads: "The Energy Regulator must— (*a*) undertake the functions of the Gas Regulator as set out in section 4 of the Gas Act; (*b*) undertake the functions of the Petroleum Pipelines Regulatory Authority as set out in section 4 of the Petroleum Pipelines Act; and (*c*) undertake the functions set out in section 4 of the Electricity Regulation Act, 2006." See pars 57-59 of the founding affidavit on indexed pp 21-22.

[7] See annexure "IH15" to the founding affidavit on indexed pp 130-131; pars 59-62 of the founding affidavit on indexed pp 22-23.

[8] See par 33onwards.

[9] The objects of ERA in terms of its section 2 include: "(*a*) achieve the efficient, effective, sustainable and orderly development and operation of electricity supply infrastructure in South Africa; (*b*) ensure that the interests and needs of present and future electricity customers and end users are safeguarded and met, having regard to the governance, efficiency, effectiveness and long-term sustainability of the electricity supply industry within the broader context of economic energy regulation in the Republic; (*c*) facilitate investment in the electricity supply industry; (*d*) facilitate universal access to electricity; (*e*) ... (*f*) ... and (*g*) facilitate a fair balance between the interests of customers and end users, licensees, investors in the electricity supply industry and the public."

(c) must give end users proper information regarding the costs that their consumption imposes on the licensee's business;

(d) must avoid undue discrimination between customer categories; and

(e) may permit the cross-subsidy of tariffs to certain classes of customers.

(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.

(3) Notwithstanding subsection (2), the Regulator may, in prescribed circumstances, approve a deviation from set or approved tariffs."

[I added underlining for emphasis]

My understanding of the underlined part in the above quotation is that NERSA, as the regulator is the only entity with legislative competence to determine or approve tariffs chargeable by ESKOM, the second Respondent in this matter, or any other licensee for that matter, to customers. Therefore, the relationship between NERSA and ESKOM is that of licensor[10] and licensee.

[5] In execution of its mandate, NERSA developed methodology (to determine the allowable tariffs to be charged by ESKOM to consumers and increases in tariffs) called the Multi Year Price Determination (MYPD). The period for an MYPD is 5 years. The first MYPD for ESKOM business activities (i.e. generation, transmission and distribution of electricity) was from 01 April 2006 to 31 March 2009.[11] Currently the MYPD process is in its third cycle, hence its reference as MYPD3. It (i.e. MYPD3) commenced on 01 April 2013 and will continue until 31 March 2018.

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[10] NERSA, as part of its regulatory role, issues licenses to entities like ESKOM, in terms of chapter III of ERA.
[11] See annexure "IH16" to the founding affidavit on indexed p 135.

[6] The MYPD methodology provides for a Regulatory Clearing Account (the RCA). The purpose of the RCA is explained partly as follows:

> "to debit or credit the allowable portion of coal costs variances as calculated through the PBR formula and all other costs variances that have not been dealt with in the MYPD mechanism ... as follows:
>
> i. the Regulatory Clearing Account will be created at the beginning of the year and continuously monitored. The evaluation of the account (for purposes of determining the pass-through) will be done towards the end of Eskom's financial year...with actuals for the 9 months and Eskom protections to year end...
>
> ...
>
> vii The adjustments to be included in the RCA will be approved by the Energy Regulator [i.e. NERSA] in terms of the MYPD mechanism."[12]

The RCA is a depository for qualifying variances between ESKOM's approved revenue and actual expenditure in the MYPD3 determination.[13]

[7] On 10 November 2015, ESKOM submitted to NERSA an RCA application in respect of the first year of the MYPD3 period (i.e. 2013/14 financial year) (the RCA Application).[14]

[8] According to the Organisation Undoing Tax Abuse (OUTA),[15] the applicant in this matter, previously known as the Opposition to Urban Tolling Alliance, the RCA Application

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[12] See annexure "IH16" on indexed pp 155-156. See further pars 68-73 of the founding affidavit on indexed pp 25-27.
[13] See annexure "IH4" to the founding affidavit on indexed pp 77-78.
[14] See annexure "IH3" to the founding affidavit on indexed pp 54-76.
[15] OUTA says its main purpose is "the promotion, protection and advancement of the Constitution of the Republic of South Africa by challenging taxation policy and/or the regulatory environment where the aforesaid is considered to be irrational unfit [sic] or ineffective for the purpose intended" and "seeks to promote a

is an attempt by ESKOM "to claw back R22.8 billion consisting of R11.723 billion for a short fall in projected sales and R11.066 billion for over expenditure, of which R8.024 billion was on diesel to run the Open Cycle Gas Turbines, in the 2013/2014 financial year".[16] Further, OUTA says that, the aim of ESKOM's RCA Application is to recoup the aforesaid money through the 16.4% tariff increase in the price of electricity in the 2016/2017 financial year. The tariff increase is effective from 01 April 2016 for ESKOM's direct consumers, like municipalities and 01 July 2016 for consumers buying electricity from municipalities. The price charged by municipalities for electricity consumption, will include the increased tariff, plus other recoupments permissible by law.[17]

[9] On the other hand, ESKOM says the RCA Application is "driven substantially by revenue under-recovery and higher primary energy costs to meet demand, whilst operating in a constrained electricity system. The determined RCA balance is motivated with evidence for prudent scrutiny by NERSA".[18]

[10] NERSA says that "ESKOM applied for an RCA balance of R22 789m in its favour.[19] In terms of the provisions of the MYPD Methodology, the Energy Regulator [i.e. NERSA]

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prosperous South Africa with effective, practical and enforceable taxation policies, and corrupt free conduct in the use of taxes collected". See pars 6-8 on indexed p 8; OUTA's constitution (i.e. annexure "IH2" to the founding papers) on indexed pp 41-53.

[16] See par 30 of the founding affidavit on indexed p 12.

[17] See par 31 of the founding affidavit on indexed p 12.

[18] See par 3 of the RCA Application (i.e. annexure "IH3" to the founding affidavit) on indexed p 68.

[19] NERSA decided that: "1. The RCA balance of R11 241m is recoverable from the standard tariff customers, local SPAs and international customers in the financial year 2016/17. 2. The amount of R10 257m is recoverable from standard tariff customers for the 2016/17 financial year only. 3. The amount of R983m is recoverable from Eskom's local SPA customers and international customers for the 2016/17 financial year only. 4. Eskom must submit a new MYPD application within three months, based on revised assumptions and forecasts that reflect the recent circumstances." See indexed p 106 (i.e. annexure "IH9"); par 44 of the founding affidavit on indexed pp 15-16.

has to, upon application by Eskom, assess certain qualifying allowed [sic] revenue and expenditure against actual revenue and expenditure".[20]

[11] On 14 November 2015 NERSA published a notice in terms of which members of the public were invited to furnish written comments on the RCA Application.[21] The same notice advised that the RCA Application was available on NERSA's website and gave details where written submissions were to be forwarded. It also provided details of when and where public hearings were to take place.[22] Some of the hearings were later extended, due to popular interest, whilst others were cancelled, due to lack of interest. Representatives of OUTA attended one of the meetings on 05 February 2016 in Midrand, Gauteng Province and later on, there were further engagements between NERSA and OUTA.[23]

[12] It is submitted by OUTA that NERSA committed during the abovementioned engagements to make an "informed decision" and to furnish "full reasons for decision" in respect of the RCA Application.[24] I hasten to say that reassuring as the commitment may have been, it wasn't necessary. NERSA had to act likewise. There is no room offered by the statutory regime it operates in, to do otherwise.

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[20] See annexure "IH9" to the founding affidavit on indexed p 106.
[21] See annexure "IH4" to the founding affidavit on indexed pp 77-78.
[22] *Ibid.*
[23] See pars 36- 41 of the founding affidavit on indexed pp 13-14; annexure "IH7" to the founding affidavit on indexed pp 97-100.
[24] See pars 39-41 of the founding affidavit on indexed p 14.

[13] On 01 March 2016 NERSA published its decision regarding the RCA Application (the Decision).[25] The essence of the Decision was that the standard tariff for ESKOM's customers is increased by 9.4% for the 2016/17 financial year.[26] NERSA stated in the same announcement that reasons for the Decision will be available in due course. This is the genesis of this matter and the other matter referred to above.[27]

[14] On 03 March 2016, OUTA sent correspondences to NERSA enquiring about the reasons for the Decision. There was no response by NERSA until 16 March 2016.[28] In its response NERSA advised that the reasons for the Decision will be furnished once the process of determining the confidential information[29] submitted by ESKOM has been concluded. From 17 to 19 March 2016, OUTA says it was seeking legal counsel. On 22 March 2016 OUTA demanded from NERSA and ESKOM an undertaking by 12h00 on 23 March 2016 that implementation of the scheduled tariff increase in terms of the Decision will be delayed until later, due to the absence of reasons and the imminence of the effective date of the tariff increase.[30] Evidently, no agreement was reached in this regard. Consequently, the application was issued and served on 24 March 2016. OUTA says it launched the application in the public interest[31] and as an electricity consumer within the metropolitan municipality of the City of Johannesburg. NERSA and ESKOM opposed the application, whilst the fourth

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[25] See annexure "IH9" to the founding affidavit on indexed pp 106-107.
[26] See pars 1-4 of annexure "IH9".
[27] Refer to par 2, in particular its footnote 4, above.
[28] See annexure "IH13" to the founding affidavit on indexed pp 113-115.
[29] NERSA or ESKOM or both, relied on section 10(2) of NERA regarding protection of information in terms of the Promotion of Access to Information Act 2 of 2000. See pars 50-52 of the founding affidavit on indexed pp 17-19.
[30] See annexure "IH14" to the founding affidavit on indexed pp 116-120. NERSA said that it responded to the letter of demand (i.e. annexure "IH14") just before the application was served on 24 March 2016 (see par 10.4 of NERSA's answering affidavit on indexed p 242, and annexure "MM1" thereto on indexed pp 249-251).
[31] See section 38(d) of *The Constitution of the Republic of South Africa, 1996* (the Constitution).

respondent observed the proceedings through legal representatives. The other respondents unaffected by the relief sought, played no part.

[15] However, on 29 March 2016 NERSA furnished reasons for the Decision.[32] This was before either of the respondents had filed opposing papers. As stated above, NERSA and ESKOM filed or may I rather say "handed up" their respective answering affidavits moments before the hearing commenced on 31 March 2016. Naturally, the reasons furnished for the Decision, had materially affected OUTA's case or submissions made in its papers. Therefore, there was always going to be very eventful consequences.

Application to strike out

[16] Due to the stringent time periods imposed in the notice of motion for filing papers and the public holidays, ESKOM could only prepare a detailed answering affidavit in the other related matter (the *Borbet matter)*, discussed above.[33] In this matter ESKOM's answering affidavit is a paltry 5 paragraphs. It sought to incorporate the answering affidavit in the *Borbet matter* through the following statements in the short answering affidavit for this matter:

> "1.3 I am the deponent to an answering affidavit brought [sic] in the related application by Bobert [sic] and Others, case number 24364/16, copy of which is attached for convenience. In the urgent circumstances in which I am obliged to depose, I confirm the contents of that affidavit and ask that same be regarded as incorporated herein.

[32] See indexed pp 207-234.
[33] See par 2 above.

1.4 For the reasons set out in that affidavit, I ask that the present application, too, either be struck from the roll on grounds of non-compliance with Rule 6(12), or dismissed, in either event with costs, including the costs of three counsel."[34]

[17] OUTA filed a replying affidavit. However, it objected to the incorporation of the answering affidavit in the *Borbet matter* by means of the above quoted paragraphs or submissions in ESKOM's answering affidavit. It applied for a striking out of the two paragraphs, in ESKOM's answering affidavit, quoted above.[35] The essence of OUTA's objection appears to originate from the old, but timeless, decision of *Stephens v De Wet*[36] cited in the following *dictum* of *Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v President of the Republic of South Africa and Others*[37]:

> "...a "vexatious" matter refers to allegations which may or may not be relevant but are so worded as to convey an intention to harass or annoy;[38] and "irrelevant" allegations do not apply to the matter in hand[39] and do not contribute one way or the other to a decision of that matter.[40]

[18] The essence of OUTA's complaint, as I understood it, is that it is difficult to adequately make out the nature and extent of the case or defence they had to meet from ESKOM due to the incorporated averments having been made in response to the facts in the *Borbet matter* and not in relation to the specific allegations in this matter.

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[34] See indexed pp 281-282.
[35] Rule 23 of the Uniform Rules of Court provides thus: (1) ... (2) Where any pleading contains averments which are scandalous, vexatious, or irrelevant, the opposite party may, within the period allowed for filing any subsequent pleading, apply for the striking out of the matter aforesaid..., but the court shall not grant the same unless it is satisfied that the applicant will be prejudiced in the conduct of his claim or defence if it be not granted."
[36] 1920 AD 279 at 282 (*Stephens v De Wet*).
[37] 2015 (1) BCLR 1 (CC) (*Helen Suzman Foundation*).
[38] See par 5 of the application to strike out on indexed p 355.
[39] See pars 1-5 of the application to strike out on indexed p 355
[40] See *Helen Suzman Foundation* at 14 par 28, quoted without footnotes.

[19] Mr RJ Raath SC (appearing with Mr E Van As) on behalf of OUTA submitted that there is nothing in Eskom's answering affidavit that applies to OUTA's case and relied on *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others*[41] in this regard. In *Swissborough* it was held that "it is not open to an applicant or a respondent to merely annexe [sic] to its affidavit documentation and to request the Court to have regard to it. What is required is the identification of the portions thereof on which reliance is placed and an indication of the case which is sought to be made out on the strength thereof."[42] Mr JJ Gauntlett SC (appearing with Mr SM Lebala SC and Ms EM Baloyi-Mere) on behalf of ESKOM, pointed out that the current authority on the issue was in the decision of *Minister of Land Affairs and Agriculture v D and F Wevell Trust*[43] in which the court said:

> "It is not proper for a party in motion proceedings to base an argument on passages in documents which have been annexed to the papers when the conclusions sought to be drawn from such passages have not been canvassed in the affidavits. The reason is manifest – the other party may well be prejudiced because evidence may have been available to it to refute the new case on the facts."[44]

[21] Be that as it may, I do not understand either *Swissborough* or *Minister of Land Affairs v Wevell Trust* to support OUTA's striking application. In both these decisions and others I am aware of,[45] documents were attached to affidavits as annexures and the deponents sought the wholesale reliance on annexures, without establishing the specific parts of the annexures they relied on and thereby establishing their probative value. In this matter there is a different

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[41] 1999 (2) SA 279 (T).
[42] *Swissborough* at 324E-F. See generally *Herbstein and Van Winsen The Civil Practice of the High Courts of South Africa* 5th ed (Juta Cape Town 2009) (*Herbstein and Van Winsen*) at 443-444.
[43] [2008] JOL 21213 (SCA); 2008 (2) SA 184 (SCA) (*Minister of Land Affairs v Wevell Trust*).
[44] *Minister of Land Affairs v Wevell Trust* [2008]JOL 21213 (SCA) 19 at par 43; 2008 (2) SA 184 (SCA) at 200.
[45] See *Lipschitz and Schwartz, NNO v Markowitz* 1976(3) SA 772 (W) at 775H; *Port Nolloth Municipality v Xhalisa and Others* 1991 (3) SA 98 (C) 111B-C.

factual matrix. The deponent to ESKOM's affidavit did not simply rely on a document attached to his affidavit. He relied on his own affidavit contemporaneously deposed to in a related matter.[46] The other matter, although premised on a slightly different background was precisely about the same subject matter, as in this matter: the Decision furnished without reasons. Therefore, not only was the material sought to be incorporated relevant, but the deponent of the impugned affidavit established the veracity of the otherwise "extrinsic" material. It is a different matter where reliance is on a "mass of material contained in the record of an enquiry"[47] or as a simple annexure to an affidavit.[48] But, I am not to be understood to be saying that, there were no problems with the reading of the incorporated material. I had particular problems with the cross-referencing which was essentially non-existent. However, I do not agree that the averments were vexatious or irrelevant.

[22] Essentially, an applicant for a striking out has to satisfy two requirements. Firstly that the matter sought to be struck out is scandalous, vexatious or irrelevant. Secondly, the adjudicating court ought to be satisfied that if such matter is not struck out, the complaining party would be prejudiced.[49] I have already found no existence of vexation or absence of relevance in the impugned material. Outstanding, is the determination of whether or not there was prejudice to OUTA.

[23] Mr Raath admitted that despite the difficulties posed by the format of ESKOM's submissions and therefore OUTA "not knowing what was coming", he indicated existence of

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[46] See pars 2 and 16 above.
[47] See *Lipschitz and Schwartz, NNO v Markowitz* 1976(3) SA 772 (W) at 775H.
[48] See *Port Nolloth Municipality v Xhalisa and Others* 1991 (3) SA 98 (C) 111B-C.
[49] See *Stephens v De Wet* 282 cited with approval in *Helen Suzman Foundation* at 14 par 27.

no prejudice on the part of his client. Tentative, as the concession may have seem at the time, there was indeed no prejudice. OUTA has essentially crafted its case and submissions in the form of legal argument premised on the interpretation of sections 10(2) and (3) of NERA. This may be the reason why it did not seek to supplement its papers, despite the intervening delivery by NERSA of the reasons for the Decision.

[24] Mr Gauntlett had actually submitted, correctly so in my view, that the courts invariably offers latitude in this regard when prevailing circumstances permit. In my view prejudice would lie in the rejection of ESKOM's affidavit attached to its answering affidavit, although again this would not have precluded ESKOM from raising legal argument in response to OUTA's case. At most ESKOM assumed a risk in approaching this matter as it did, as the form it used to advance its grounds of opposition may not have effectively shielded it from OUTA's challenges.

[25] It was suggested by Mr Raath and agreed to by all involved, including the court, that the ruling regarding the striking out application be made jointly with the ruling in respect of the main application. At the end, the application to strike-out was dismissed, with no order as to costs. I did not think that OUTA's conception and mounting of the application was ill-advised for it to be mulcted with costs of the application.

Relief sought

[26] The relief sought by OUTA, on an urgent basis in terms of this application, is:

> "2. That a declarator be granted that the furnishing of the reasons intended in section 10(2) of the Energy Regulation Act 40 of 2004 constitutes a jurisdictional fact and

condition precedent for the implementation of any new tariffs to be granted by the second respondent for the supply of electricity;

3. That the first respondent be ordered to deliver the reasons of decision as intended in section 10 of the National Energy Regulatory Act 40 of 2004 to the applicant within 14 calendar days from date of this order relating to the decision taken on the 1st of March 2016, permitting the second respondent to increase the standard electricity tariff chargeable to standard electricity tariff customers by 9.4% for the 2016/2017 financial year, which increase is to commence on the 1st of April 2016 for customers purchasing electricity directly from Eskom, per the *Regulatory Clearing Account (RCA) Application- third Multi Year Price Determination (MYPD3) Year 1* (2013/14) (the decision).

4. That the first respondent is interdicted from publishing and/or implementing the increase in the Government Gazette of the standard electricity tariff chargeable to standard electricity tariff customers of 9.4% for the 2016/2017 financial year as per the decision, which increase is to commence on the 1st of April 2016 for customers purchasing electricity directly from the second respondent.

5. That the second respondent is interdicted from implementing the increase to 9.4% of the standard electricity tariff, chargeable to standard electricity tariff customers of 9.4% or the 2016/2017 financial year as per the decision.

6. That the interdict in paragraphs 4 and 5 supra will apply for 30 days from date of publication of the reasons intended in section 10(2) of the National Energy Regulatory Act 40 of 2004 by the first respondent.

7. The Costs of the Application if opposed."[50]

[27] Prayer 3 of the relief became unnecessary due to delivery of the reasons by NERSA on 29 March 2016. OUTA sought and was granted a minor amendment to prayer 4.[51] There

[50] See notice of motion on indexed pp 1-3.
[51] An amendment substituting the word "to" for the word "of" in the phrase "of 9.4% for the 2016/2017 financial year" was granted at the beginning of the hearing on application from the bar by counsel on behalf of OUTA.

were to be other attempts to amend the number of days relating to the duration of the interdict in prayer 6. I will talk about this later below.

[28] No relief was sought against third, fourth and fifth respondents, although fourth respondent had counsel on a watching brief at the hearing.

[29] Although, the implications of all these would become clear when dealing with submissions relating to the issue of urgency, I think it is apposite to deal with some procedural aspects of this matter. From what is discussed above under background, it is clear there that, OUTA's application was precipitated by the absence of reasons for the Decision. The crafters of its founding papers sought, in terms of prayer 3, a direction by this Court for NERSA to furnish the reasons. A declarator is sought in terms of prayer 2 that the reasons should have or should always accompany decisions of NERSA contemplated in section 10 of NERA. Also, the urgency of the matter (in prayer 1) is grounded upon the absence of reasons. The reasons, as stated above, were furnished on 29 March 2016. However, despite the changed circumstances, OUTA did not seek formal supplementation of its papers. On the other hand, the opposing papers by NERSA and ESKOM (the latter with its patent shortcomings discussed above)[52] were well cognisant of the fact that the reasons had been furnished. The result is or was a mismatch of submissions located in different circumstances.

[30] However, OUTA ultimately and, perhaps as a cure to these patent defects, transformed its case to only legal submissions in respect of section 10 of NERA. Again, due

[52] See pars 16-25 above.

to the urgent circumstances of this matter, OUTA was the only party able to hand up heads of argument at the hearing of this matter. I will say more under the heading on urgency, but suffice for now that the enrolment of this matter was not fair to the administration of the roll of this Court. There was a different approach available.[53]

[31] I deal next with the submissions made on behalf of the contending parties and employ headings and subheadings along the lines of the relief sought herein.

Points in limine

[32] NERSA raised four points in *limine* in reaction to OUTA's papers and relief sought in terms thereof. One of these was that the 278 local authorities[54] should have been joined to these proceedings as they have direct and substantial interest. The other points in *limine* related to urgency; restraint of the exercise of statutory power and the incompetence of interim relief. There may be some merit in the objection of non-joinder of the municipalities, but I do not deem it warranted to make a finding on this. It had no bearing on the outcome of this matter. I will deal with the other objections as part of the submissions by NERSA below.

A declaratory Order or not? Interpretation of section 10 of the National Energy Regulation Act 40 of 2004 (NERA)

[33] It is stated above that NERA enabled the establishment of and set out the objectives for NERSA. Its section 10 is the most relevant for this matter and it reads:

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[53] See par 57 below.
[54] See par 79.2 of the founding affidavit on indexed p 29.

"**10. Decisions of Energy Regulator.**—(1) Every decision of the Energy Regulator must be in writing and be—

(*a*) consistent with the Constitution and all applicable laws;

(*b*) in the public interest;

(*c*) within the powers of the Energy Regulator, as set out in this Act, the Electricity Act, the Gas Act and the Petroleum Pipelines Act;

(*d*) taken within a procedurally fair process in which affected persons have the opportunity to submit their views and present relevant facts and evidence to the Energy Regulator;

(*e*) based on reasons, facts and evidence that must be summarised and recorded; and

(*f*) explained clearly as to its factual and legal basis and the reasons therefor.

(2) Any decision of the Energy Regulator and the reasons therefor must be available to the public except information that is protected in terms of the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000).

(3) Any person may institute proceedings in the High Court for the judicial review of an administrative action by the Energy Regulator in accordance with the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000)."

(4) (a) Any person affected by a decision of the Energy Regulator sitting as a tribunal may appeal to the High Court against such decision.

(b) The procedure applicable to an appeal from a decision of a magistrate's court in a civil matter applies, with the changes required by the context, to an appeal contemplated in paragraph (a)."

[I added underlining for emphasis]

[34] OUTA says that section 10(2) should be read to mean that a decision of NERSA, as the "Energy Regulator" is to be simultaneously accompanied by reasons, otherwise it is inchoate. It submitted that on a proper interpretation of section 10(2), read with section 10(3), the issuing of reasons by NERSA for its decision, is a jurisdictional fact or condition

precedent or both, for the implementation of any new tariffs approved by it.[55] According to OUTA, the corollary and direct implication thereof is that members of the public, ought to be afforded a reasonable opportunity to consider their positions regarding accessing the remedies contained in sections 10(3) and (4), if so minded or advised. OUTA applied for the granting of a declarator on the basis of its aforesaid interpretation: that the furnishing of reasons required in terms of section 10(2) of NERA constitutes a jurisdictional fact[56] and condition precedent for the implementation of any new tariffs to be charged by ESKOM for the supply of electricity.

[35] The following represents the crux of OUTA's submissions in this regard. It is hard to imagine an administrative action comparable to the Decision, which could impact upon the interests of the public at large. These powerful considerations inspired the creation of the special remedy in terms of sections 10(2) and (3) of NERA. Therefore, the making of a decision and giving of reasons ought to be "simultaneous, expeditious, current or immediate". This premised on interpretational exercise whose point of departure is in the *dicta* of the decision of *National Joint Municipal Pension Fund v Endumeni Municipality.*[57] Further, section 10 has to be given a purposive interpretation. The purpose "which is usually clear or easily discernible" in conjunction with the appropriate meaning of the language of the provision, is used as a guide to enable the interpreter to ascertain the intention of the

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[55] See par 1 on pp 1-2 of OUTA's heads of argument.

[56] See *SA Defence and Aid Fund v Minister of Justice* 1976 (1) SA 31 (C) at 34 *in fin* – 34B; *Democratic Alliance v President of the Republic of South Africa & others* 2012 (1) SA 417 (SCA); *Democratic Alliance v President of the Republic of South Africa & others* 2013(1) SA 248 (CC) at pars 20 and 24; *International Trade Administration Commission v SCAW SA* 2012 (4) SA 618 (CC) at par 108 quoting from Harms ADP 2008 (6) SA 540 (SCA) at par 8 for a discussion on what constitutes a "jurisdictional fact".

[57] 2012 (4) SA 593 (SCA) (*Endumeni*) at par 18. See further *Cross-Border RDA v Central African Road Surfaces* 2015 (5) SA 370 (CC) at par 22; *National Credit Regulator v Opperman* 2013 (2) SA 1 (CC) at footnote 105;

legislature.[58] Accordingly, it is clear from a reading of section 10(2) that the decision has to be accompanied by reasons therefor, as the legislature has mentioned decision and reasons in the same breath; section 10(2) is "intrinsically coupled" to section 10(3); the two subsections deal with the same subject-matter and are to be read together as a unitary enactment.[59] The primary reason or motivation for the simultaneous furnishing of reasons in terms of section 10(2) can only be to enable review or appeal proceedings, as contemplated by sections 10(3) and (4), by affected members of the public.

[36] Further, it was submitted on behalf of OUTA that, Parliament had intended for at least a brief period to be allowed for consideration of the reasons issued simultaneously with the decision for purposes of review proceedings. The ends and aims of the statutory design of section 10 would not be achieved if the reasons are only to be given at the time of implementation of the decision like it is the case in this matter. Also, the legislature harboured special intentions and purpose for NERSA through the requirements in section 10(3), notwithstanding the existing standards, rights and procedures designed for administrative justice by the Promotion of Administrative Justice Act 3 of 2000 (PAJA). All these enable an immediate review, capable of being mounted, from the moment the decision is made public. If the furnishing of the reasons was not to be simultaneous with the announcement of the decision made by NERSA, the provisions in PAJA would have sufficed and sections 10(2) and (3) would not be necessary.

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[58] See *Commissioner South African Revenue Service v Air World CC* 2008 (3) SA 335 (SCA) at par 25; par 3 on p 4 of OUTA's heads of argument.

[59] See *Executive Council Western Cape v Minister of Provincial Affairs and Constitutional Development* 2000 (1) SA 661 (CC) at 690A; *Aziz v Divisional Council, Cape* 1962 (4) SA 719 (A) at 726E; *S v Yolelo* 1981 (1) SA 1002 (A) at 1011A-B.

[37] Another question [rhetorical if you will] cropped into my mind rather belatedly: what would have been OUTA's stance, if NERSA had delayed the Decision until when the reasons were available to release same together? Doesn't the real question go to the substance of the decision made and the reasons therefor, rather than the timing? This is not to downplay the requirement of administrative fairness or justice inherent in NERSA's activities.

[38] When I enquired from him why the legislature would have placed NERSA in such onerous position, Mr Raath submitted that it was due to the critical or important nature of the mandate of NERSA. According to him the history of this matter explains the declaratory order sought. And that although OUTA has not yet decided on whether or not to review the Decision, there ought always to be an opportunity following the furnishing of reasons, for deciding and launching review proceedings, if so minded or advised. Therefore, as OUTA was entitled to reasons to the Decision, it should be restored to the position it would have been had the reasons accompanied the Decision. Some form of a restoration order as to time or time period, it is submitted. I was not referred to a specific authority nor am I aware of any, in regard.

[39] Mr D Fine SC (appearing with A Pamtazos) on behalf of NERSA, submitted that there was no immediacy in sections 10(2) and (3) or truncation of the time period. There is no requirement in NERA to furnish urgent reasons. It does not appear in its provisions and there was no need for the Legislature to place NERSA under a different time periods from those stipulated in PAJA. He also argued that the interpretation debate is academic as the reasons for the Decision have been furnished.

[40] Mr Gauntlett also submitted that the interpretation OUTA seeks to give to sections 10(2) and (3) of NERA is wrong. What OUTA is seeking is essentially to ask this Court, on an urgent basis, to read in (or "write in") the following between sections 10 (2) and (3): "furnished before any such decision is implemented". This is not permitted and the courts have long been wary of reading in words into statute.[60] In *National Director of Public Prosecutions and Another v Mohamed NO and Others*[61] the court said:

> "We have adopted the view, consistently enunciated over the years by the courts, that –
>
> "words cannot be read into a statute by implication unless the implication is a necessary one in the sense that without it effect cannot be given to the statute as it stands"[62]
>
> and that such implication must be necessary in order "to realise the ostensible legislative intention or to make the Act workable".[63]

[41] I agree that the interpretation given to section 10(2) by OUTA amounts to reading in the relevant words as generally suggested by Mr Gauntlett. There is no indication of the Legislature's intention in support of OUTA's interpretation. There is also nothing in the provision to suggest that a decision of NERSA has to be announced simultaneously with reasons therefor. In my view, there is no doubt that, reasons have to be made available to the public, but they may be made available at a later stage. As to the reasonableness of the intermission between the decision and the furnishing of reasons for the decision, that is, perhaps, a debate for another day elsewhere. Also, in my view, this will depend on the applicable factual matrix. One ought not to lose sight of the fact that, the reasons are subservient to the decision made. Although NERSA has to provide them, it is conceivable

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[60] See *Rennie NO v Gordon and Another NNO* 1988 (1) SA 1 at 22E-F, cited with approval in the decision of *National Director of Public Prosecutions and Another v Mohamed NO and Others* 2003 (5) BCLR 476 (CC) 477 at par 48.
[61] 2003 (5) BCLR 476 (CC) 477 at pars 48-49.
[62] See *Bernstein and Others v Bester NO and Others* 1996 (4) BCLR 449 (CC) / 1996 (2) SA 751 (CC) at para 105.
[63] See *Palvie v Motale Bus Service (Pty) Ltd* 1993 (4) SA 742 (A) at 749C.

that for some decisions by NERSA there may not even be a need to consider the reasons before an affected party challenges the particular decision.

[42] However, I find the declaratory unavailable for another reason. This has more to do with purposive interpretation urged by OUTA. In my view the interpretation by OUTA amounts to stretching of the legislative provision. The word "decision" is not defined in the provision or the Act itself (i.e. NERA). The word is included in section 10(4) of NERA. In the latter provision the word is not accompanied by any reference to "reasons therefor". In section 10(3) heavily relied upon by OUTA there is no mention of "decision" or "reasons therefor", but "an administrative action by the Energy Regulator", being NERSA. Section 1 of NERA says administrative action has the meaning ascribed to it in PAJA. This, in my view, makes the provision broader than the restricted meaning afforded it by OUTA. Therefore, the review proceedings availed in terms of section 10(3) of NERA are not only for decisions of NERSA but also its omissions or failure, in as far as they constitute its administrative action.[64] To borrow from parlance in the law of delict, NERSA's conduct, as manifested by its acts or omissions, is reviewable. Therefore, the relief alluded to in section 10(3) is not limited to the provisions of section 10(2) but the whole of NERA wherever NERSA's administrative action is involved. The purpose of section 10(3) is to avail a remedy for breach (to the extent that such would constitute administrative action) by NERSA of the provisions of NERA, including section 10 thereof and possibly the raft of other legislation applicable to NERSA. I am mindful of the heading to section 10 (i.e. "Decisions of Energy Regulator"), but refuse to be limited thereby in my aforesaid interpretation.

[64] Section 1 of PAJA says the following in the material part: ""**administrative action**" means any decision taken, or any failure to take a decision...".

[43] Besides, OUTA has other available remedies than a declarator,[65] including in terms of the provisions of PAJA. Further, the reasons for the Decision had already been furnished, therefore declaratory relief is or was unwarranted. PAJA provides for reasons and section 10(3) refers to PAJA. This, as Mr Gauntlett aptly puts it, signifies some "dovetailing" of the reasoning in the two statutory regimens.

[44] A submission was made by Mr Gauntlett to the effect that, a declarator on interpretation of legislation is not competent on an urgent basis. I couldn't find any authority for this. But, I loath to rule this impossible. Other circumstances may well justify the granting of declaratory relief on an urgent basis.

[45] For the above considerations I refused relief sought in terms of prayer 2 of OUTA's notice of motion.[66] Mr Raath had submitted that should the declarator not avail OUTA, he would accept that the remainder of the relief would also not be possible. However, for completeness, I will deal with submissions made relating to the granting of an interdict.

Requirements for final interdict

[46] OUTA sought prohibitory "final" interdict, although with a stated lifespan or duration. The Court was requested to impose an interdict, in terms of prayers 4 and 5 of OUTA's notice of motion for a period of 30 days from date of publication of the reasons for the Decision (i.e. 29 March 2016). However, during oral arguments, and actually in reply,

[65] See *Standard Bank of SA Ltd v Trust Bank of Africa Ltd* 1968 (1) SA 102 (T)105-106.
[66] See par 26 above.

counsel for OUTA tentatively made submissions aimed at reducing the 30 day period to 10 days or even shorter, but this was never consummated.[67] In my view - and I will explain this fully below - it would not have mattered to the outcome, whether or not the "final" interdict is for 30 days or 10 days.[68]

[47] According to OUTA the 30 day interdict is for the preservation of its and the public's rights, and to afford them "a reasonable opportunity to study the written reasons for the Decision in order to enable them to decide whether the reasons offered justify the institution of a review application as envisaged in section 10(3), or appeal in terms of section 10(4), of NERA".[69]

[48] NERSA denied that final relief is possible for 30 days and argued that, OUTA should have sought interim relief interdicting implementation of the Decision, pending a review application. This, I agree, is normally what a temporary or interim interdict entails.[70]

[49] The *locus classicus* regarding requirements for an interdict is still *Setlogelo v Setlogelo.*[71] They are: a clear right, injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy. I briefly deal with the

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[67] This was preluded by a submission in the heads of argument filed on behalf of OUTA indicating that an amendment to prayer 6 containing the third interdict will be sought in the light of delivery of the reasons for the Decision. See par 13 on p 15 of OUTA's heads of argument.

[68] There were references on behalf of the participating respondents during the hearing to this being "a legal absurdity".

[69] See par 23 of the founding affidavit on indexed pp 10-11.

[70] See generally *Herbstein and Van Winsen* at 1455.

[71] 1914 AD 221 at 227 whereat the court said: "the requisites for the right to claim an interdict are well known; a clear right, injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy."

submissions made by the parties in this regard and contemporaneously express my views thereon.

Clear right

[50] OUTA submitted that the public has "a constitutional right to administrative action that is lawful, reasonable and procedurally fair". The right to fair administrative action is inclusive of the right to written reasons and "the right to challenge decisions by administrators before they have effect of becoming practically reversible", it was submitted. Further, OUTA relied on what it calls "special rights" created in terms of section 10 of NERA. NERSA challenged the soundness of this submission. It argued that in terms of the principle of subsidiarity, where the legislature has legislated mechanisms for securing statutory rights those mechanisms have to be used. Therefore, OUTA has to follow PAJA enacted to give effect to constitutional right to fair administrative action.[72] Section 10 of NERA reinforces the applicability of PAJA by reference thereto. I agree.

Injury committed or reasonably apprehended

[51] OUTA expressed concerns regarding the reversal of the Decision at a later stage by the Court. It submitted that such reversal would create an administrative burden on ESKOM to adjust accounts of its customers, and exacerbate the billing systems problems manifested by inaccuracy or audit problems of the 278 municipalities countrywide. It was also submitted that there is case law supporting the contention that a court would be reluctant to reverse or order that recovery of monies paid, even when the Decision is set aside.[73] Both NERSA and

[72] See section 33 of the Constitution.
[73] See par 97 of the founding affidavit on indexed p 37/

ESKOM countered this by relying on the following *dicta* from the decision of *National Treasury and others v Opposition to Urban Tolling Alliance and others*[74], in which coincidentally OUTA was a party, albeit by its old name[75]:

> "The Court rejected as not persuasive enough the submission that should the review be successful SANRAL will be obliged to refund the millions of aggrieved motorists the toll charges. It is questionable why the harm motorists are likely to face is irreparable. Should the decision to impose toll on the roads be set aside by a court, I know no reason why the affected motorists would not have an enrichment claim to recover toll so paid to SANRAL or why the National Executive Government or SANRAL would validly resist repaying the toll charges".[76]
>
> [I added underlining for emphasis]

I see no reason for ESKOM to disobey with impunity a decision of a court of law ordering refund of its customers once the tariff increase is set aside following a successful review.

[52] Besides, OUTA failed to establish that "an injury will kick in" if not granted interdictory relief.

Alternative adequate remedy

[53] OUTA submitted that there will be problems with a review once the decision is implemented. Mr Raath on OUTA's behalf submitted that a review court retains a so-called "remedial discretion" not to grant remedial relief setting aside the impugned administrative

[74] 2012 (11) BCLR 1148 (CC) (*Sanral*).
[75] See par 8 above.
[76] See *Sanral* at par 54.

action even if found to be unlawful.[77] The exercise involves the striking of a balance between applicant's interests and those of the respondents, as it is impermissible for the court to confine itself to interests of only one side.[78] According to Mr Raath this resonates with the provision for a "just and equitable" order envisaged in section 8 of PAJA. I am not certain that I fully benefit from the purpose for these submissions. This is so, because OUTA has also submitted that due to the non-inclusion of the reasons when the Decision was announced, there is a material infringement of right to fair administrative action. Should this indeed be so, it would trigger remedies in terms of PAJA. NERSA submitted that judicial review is adequate alternative remedy and nothing in law stops OUTA from reviewing NERSA's decision as opposed to interdicting the tariff. I agree. In fact, this avenue has always been considered open by OUTA. The only impediment perceived by OUTA was its interpretation of sections 10(2) and (3) of NERA as discussed above. It should be borne in mind that, OUTA says it should have been afforded time (between the Decision and the furnishing of its reasons, and the implementation of the Decision) before considering whether or not to review the Decision. I have already rejected this interpretation above.

Balance of Convenience

[54] This is not a requirement for an interim interdict, wherein there is need to establish a *prima facie* right, as opposed to a clear right, required in final interdict.[79] However, due to the hybrid nature of the relief sought by OUTA, a brief discussion of this is necessary. It was submitted in this regard that ESKOM stands to suffer considerable financial losses due to

[77] See *Chairperson, Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd* 2008 (2) SA 638 (SCA) at par 28; *Moseme Road Construction CC v King Civil Engineering Contractors (Pty) Ltd* 2010 (4) SA 359 (SCA) at par 21; *Millenium Waste Management (Pty) Ltd v Chairperson Tender Board: Limpopo Province* 2008 (2) SA 481 (SCA) at par 23 and in particular par 34; *Bengwenyana Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC) at par 82.
[78] *Millenium Waste* at par 22.
[79] See *Herbstein and Van Winsen* at 1471onwards.

inability to collect tariff monies during the 30 days' period, should the interdict be granted. One need only refer to the reasons given for the Decision to determine why ESKOM required the tariff increase, in the first place, it was submitted.[80]

[55] Of critical importance, in my view, is that according to NERSA, should the tariff have been interdicted there would have been no tariff applicable at all as from 01 April 2016 onwards, as section 15(2) of ERA proscribes the charging of the tariff other than the one approved by NERSA.[81] Mr Raath retorted that the tariff which applied before 01 April 2016 would continue to apply. I disagree. My understanding of the tariff regulation regime applicable here is that, each tariff is borne by its own circumstances. So the previous tariff as approved by NERSA could never have been the default or fall-back position, when the increased tariff was set aside. The reason being that the justification of the tariff approved and imposed, is in terms of the realities of ESKOM's business, as approved by NERSA.

[56] ESKOM had actually submitted that the failure to implement the 9.4% price increase would have had the following consequences.[82] The RCA process is about money already spent, which ESKOM borrowed from external sources, and which ESKOM is now seeking to recover. ESKOM's credit rating would have been affected with ripple effect to the South African economy and directly affecting ESKOM's third party loan obligations. There would

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[80] See par 22 of NERSA's answering affidavit on indexed p 246; par 21 of the reasons for the Decision on indexed p 258; pars 118-123 of the reasons for the Decision on indexed pp 275-276.
[81] See par 4 above.
[82] See par 7.9 of ESKOM's answering affidavit on indexed pp 312-316. Further, it is also submitted that it was common cause that the Decision is of national importance. It affects the entire South African population, commerce and industry alike. Further that the current setting is one of international financial volatility and low economic growth. The amount in question here is R1.2 billion which is a significant amount, particularly for ESKOM's operations going forward. A failure to implement the Decision would result in "massive irrecoverable loss to Eskom" and trigger serious adverse macro-economic consequences for South Africa.

also have been a risk of power outages, colloquially called "load shedding". To the extent required, I found all these to militate for refusal of the interdictory relief sought by OUTA.

Urgency and prospects of success

[57] As indicated above, the application was set down for 31 March 2016. The relief sought was to interdict the tariff increase which took effect on 01 April 2016. I do not think it was all impossible for OUTA to issue and move the application earlier. With due respect to religious adherents, the time period for exchange of papers could have included the holidays and the Court given a few more days to have the full set of papers. The nature and magnitude of the matter deserved that kind of approach. The set down of the matter hours before the event sought to be interdicted, may have been befitting of the role played by NERSA and ESKOM in the Decision and the reasons,[83] but it did not bode well for administration of the urgent court roll of this Court. Further, there was no prior request to this Court or the senior judge on urgent court duty that this matter and the *Borbet matter* be heard together. The court files for the matters were not ready by the preceding Thursday in terms of the practice manual of this Court and there was no attempt to have them ready until the morning of the day of hearing. There was always a target date, being 01 April 2016, and therefore, the programming of the events herein by the parties should have been quite mindful of this possible deadline. Practitioners and their clients, must never lose sight of the fact that in the middle of every dispute and whatever prevailing atmosphere around the parties, the Court ought to be placed in the best possible situation in dispensing justice. These remarks should carry less

[83] Outa submitted that "NERSA and ESKOM are the architects of their own urgency in bringing the electricity tariff into effect almost two years after the requisite date in terms of the MYPD methodology" and that NERSA delayed the Decision from 25 February 2016to 01 March 2016.

disparaging connotation and rather be more encouraging of the best possible behaviour from practitioners, especially in the testing realities of our urgent courts.

[58] To conclude on this the following submissions were made regarding urgency, further to what appears above. OUTA submitted that, without the interdict even a well-grounded and entirely justifiable review may be rendered unattainable once the tariff increase is implemented, due to the disruptive effect of the reversal thereof. "The horse would have bolted", it is submitted. However, OUTA does not say anything about the disruptive effect of an interdict on ESKOM, particularly one imposed with no pending review proceedings. OUTA said that it instituted the application without delay, and that NERSA made everything worse by shifting the date of the Decision from 25 February 2016, as initially planned, to 01 March 2016. When the Decision was announced, OUTA had less than a month in which to request reasons; consider the reasons and institute review proceedings or an appeal in terms of section 10 of NERA. It had to institute the proceedings urgently as an application in the normal course wouldn't have been possible before 01 April 2016. It cannot be blamed for its proactive attempts to get NERSA to furnish the reasons for the Decision.

[59] NERSA and ESKOM bemoaned the amount of time they were given to file their papers. This they say, is despite OUTA having participated during the public hearings and thereafter,[84] and the Decision having been announced at an electricity sub-committee meeting open to the public. The sub-committee made a recommendation to NERSA.[85] NERSA said that as a matter of practice it gave ESKOM 14 days after publication of the Decision to make

[84] It is also submitted that OUTA should have sought access to the background documents when making its representations during the public participation process.
[85] See par 10.2 of NERSA's answering affidavit on indexed p 241.

submissions regarding confidentiality concerns. NERSA received the submissions, rejected some and accepted others, and published the reasons.[86] In their view OUTA engineered or self-induced the alleged urgency in this matter. There was no urgency from the start. It is pointed out in this regard that, OUTA's case is that there was a breach, as far back as 01 March 2016, when the Decision was announced without reasons. Therefore, there was no need for OUTA to wait for a month before launching the application. I disagree that there was no urgency at all. Perhaps, there was no urgency of the degree claimed by OUTA. But, the absence of reasons for the Decision and the imminence of the implementation date of the Decision, in my view, justified the enrolment of the matter on an urgent basis, particularly to obtain reasons for the Decision. Reasons were furnished less than 2 days before the hearing.

[60] Regarding prospects of success, further submissions were made as follows. It was submitted that OUTA did not give adequate reasons why it may need to review the Decision, except to state that there were large scale overruns on ESKOM's capital expenditure and media reports of mismanagement warranting close scrutiny of ESKOM.[87] There is no adequate foundation laid for a review of the Decision. No irregularities have been indicated and no one is better qualified than NERSA to make the Decision.[88] OUTA and the public will have an opportunity to review the Decision in the ordinary course in terms of PAJA. No case is made for the merits of any review. I agree. In my view OUTA elevated its perceptions about ESKOM to facts competent to set aside the Decision of NERSA. Yes, a review court may find something against the Decision, but for this matter there is no shred of evidence justifying a negative view of the Decision even on a *prima facie* basis. These considerations

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[86] See par 10.5 of NERSA's answering affidavit on indexed p 242.
[87] See par 11 of NERSA's answering affidavit on indexed p 243; par 75 of the founding affidavit on indexed p 28.
[88] See *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* 2014 (4) SA 179 (CC); 2014 (1) BCLR 1 (CC) at par 57.

weighed on my mind when I made the order. The considerations included those premised on the doctrine of separation of powers, briefly discussed next.

Separation of powers

[61] It is beyond argument, in my view, that the nature of the relief sought herein belongs to the "heartland of executive action".[89] There was no reason to interdict a decision of an independent regulatory body when there was no indication of illegality. Considerations relating to the doctrine of separation of powers harm require that an interdict in the form currently sought only be granted in the "clearest of cases" and after careful considerations of the separation of powers harm.[90]

Conclusion

[62] Against the backdrop of all of the above, I found no merit in OUTA's application. Regarding the issue of costs, Mr Raath argued that there was no reason for costs of three counsel, but appeared to accept that a cost order directing payment of costs for two counsel was appropriate. It is also my view that there is no justification for costs of the third counsel to be recoverable on a party and party basis in this matter.

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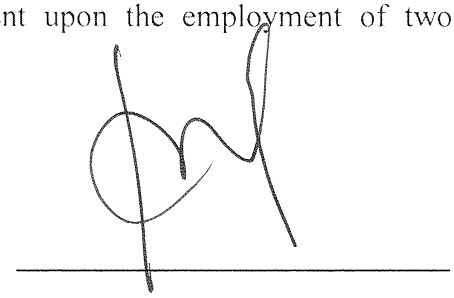
[89] See *Sanral* at par 67.
[90] See *Sanral* at pars 47, 65, 71 and 90, and generally *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11.

Order made

[63] For the abovementioned reasons, I made an order in the following terms:

(a) that, the application by the applicant to strike out the second respondent's answering affidavit is dismissed with no order as to costs; and

(b) that, the application is dismissed and the applicant is directed to pay costs of the application, including costs consequent upon the employment of two counsel.



K. La M. Manamela

Acting Judge of the High Court

08 April 2016

Appearances:

For the Applicant	:	RJ Raath SC E Van As Instructed by Len Dekker & Associates Inc, Pretoria
For the First Respondent	:	D Fine SC A Pamtazos Instructed by Hogan Lovells (South Africa) Inc, Johannesburg c/o Macintosh Cross & Farquharson, Pretoria

For the Second Respondent	:	JJ Gauntlett SC SM Lebala SC EM Baloyi-Mere Instructed by Ledwaba Mazwai Attorneys, Pretoria
For the Third Respondent	:	No appearance
For the Fourth Respondent	:	LM Montsho-Moloisane SC MM Mokadikoa Instructed by State Attorney, Pretoria
For the Fifth Respondent	:	No appearance