

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

2/11/16

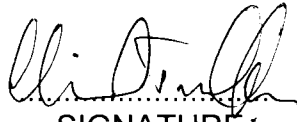
CASE NO: 95656/2015

In the matter between:

HEIDELBERG KLOOF LAND-OWNERS ASSOCIATION

Applicant

and

(1)	<u>REPORTABLE:</u>	<u>YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES:</u>	<u>YES / NO</u>
31/10/16 DATE		 SIGNATURE

LESEDI LOCAL MUNICIPALITY

First Respondent

MAYOR: LESEDI LOCAL MUNICIPALITY

Second Respondent

MUNICIPAL MANAGER:

LESEDI LOCAL MUNICIPALITY

Third Respondent

NATIONAL ENERGY REGULATOR

OF SOUTH AFRICA

Fourth Respondent

JUDGMENT

Tuchten J:

- 1 This is a dispute between the applicant and the first respondent (the municipality) which the has jurisdiction over the properties of the applicant's members. The applicant is a bulk buyer of municipal services. It buys electricity and water from the municipality which it

resells to its members. The applicant claims that the municipality has overcharged it for electricity and water. The municipality concedes that it has charged too much for water because, it says, of a clerical error. The municipality conceded the relief sought by the applicant in the answering affidavit in relation to the provision of water so nothing further need be said on this score. The real dispute is about electricity.

- 2 There is elaborate statutory provision for how the amounts municipalities charge for electricity may lawfully be determined. This is important because the lawful imposition of an electricity tariff depends on compliance with these statutory provisions. Because of the way the case developed and the conclusions to which I have come, I need sketch these provisions only broadly.
- 3 Under s 74 of the Local Government Municipal Systems Act, 32 of 2000 (the Systems Act), a municipality is obliged to adopt and implement a tariff policy on the levying of fees for municipal services. These services include in the present case the provision of electricity which the municipality buys from Eskom.

4 As I shall show, this new tariff policy might have been misleading in relation to the tariff applicable to the applicant but no direct point was made of this in the papers. I shall explain how this potential confusion arose.

5 A municipality may be licensed to sell electricity under the Electricity Regulation Act, 4 of 2006 (the Regulation Act). The municipality was so licensed by the fourth respondent (Nersa). Section 15 of the Regulation Act is important in this case. It provides:¹

- (1) A licence condition determined under section 14 relating to the setting or approval of prices, charges and tariffs and the regulation of revenues-
 - (a) must enable an efficient licensee to recover the full cost of its licensed activities, including a reasonable margin or return;
 - (b) must provide for or prescribe incentives for continued improvement of the technical and economic efficiency with which services are to be provided;
 - (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.

¹ Section 15 was previously s 16 but was renumbered by Act 28 of 2007 with effect from 1 May 2008

- (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.

6 So, under s 15(2) of the Regulation Act, a decision by a municipality to charge consumers for electricity in accordance with a particular tariff is not enough to create a legal power to charge; the approval of the Regulator, ie Nersa, must be obtained.

7 By letter dated 29 January 2015, Nersa wrote to municipal managers to tell them that it had approved a guideline increase in electricity prices for 2015/16, based on certain stated assumptions. Nersa wrote:

It is important to note that this guideline is not an automatic increase in tariffs and that licensees are still required to apply to [Nersa] for approval of their tariffs in accordance with the provisions of Section 15(1) of the [Regulation Act] before implementation.

8 The applicant was previously the beneficiary of a special dispensation in relation to the provision to it by the municipality of electricity. This dispensation was given the force of law under a tariff policy called colloquially the Kloof policy. The Kloof policy was abolished by a

resolution of the council of the municipality (the council) taken on 31 March 2015. Then the municipality proceeded to develop and advertise a new tariff policy which was approved at a meeting of the council on 27 May 2015.

- 9 In a submission to the council for consideration at its meeting on 31 March 2015, officials stated:

It is well understandable that the municipality's ability to fund its operations is also based on its own generated revenue. ...
The following tariff increases are proposed to be effected in the 2015/16 financial year.

One of the increases proposed in the submission was, in line with Nersa's guideline, 12,2% for electricity. But this broad proposal was given greater detail in the body of the proposal. In relation to the category of consumers into which the applicant falls, the proposed increase was much greater than 12,2%.

- 10 The municipality's proposed budget was also tabled at the meeting of 31 March 2015, for information. Included in the proposed budget was a category directly relevant to the applicant. This category provided under item RR1 for a fixed charge and an energy charge for the

supply of voltages between 230 and 400 volts and for the supply of voltages greater than 400 volts for consumers such as the applicant.

- 11 The applicant's case is that the charges proposed for the applicant for the 2015/2016 financial year was merely a repackaging of the charges for the previous two financial years applicable to the applicant. If this is so, I cannot see that it makes any difference to the overall result of this application.
- 12 The council met on 27 May 2015 to consider the budget, which included a consideration of the electricity tariff for the 2015/2016 financial year. The budget was approved by majority vote. Accordingly, the council resolved that the budget as tabled would be implemented by the municipality (the budget resolution). The content of the budget resolution appears from a minute of the proceedings which must be read together with certain annexures.
- 13 The charges for electricity were set out in one of these annexures and provided separately for "bulk residential resellers", a category into which the applicant falls. There, explicitly, the charges as set out in the proposal tabled on 31 March 2015 were again set out.

- 14 The municipality published a notice to ratepayers and consumers setting out what was said to be the essence of the decision of 27 May 2015 relating to, among other things, the electricity tariff. The notice recorded that the electricity tariff was subject to the approval of Nersa and that the full text of the council resolution was available on the municipality's website and in hardcopy. The notice stated (by inference) that the increase in electricity tariff over the previous tariff applicable was 12,2%.
- 15 The statement that the increase in the electricity tariffs was 12,2% was potentially misleading. This is because only *some* electricity tariff items increased by 12,2%. The electricity tariff items applicable to the applicant increased by 70,32%.
- 16 The municipality also published a notice in a local newspaper, Mapeza, in the first week of June 2015. That notice is in dense, small print and refers to the various tariff items. In the first block of the notice, the statement is made that the increase in the tariffs relating to electricity would be 12,2%. But in the body of the notice, the tariff directly applicable to the applicant was set out in the same terms as those I have previously described.

- 17 The proposed electricity increases were then submitted to Nersa for approval. Nersa wrote to the municipality making an enquiry in regard to the “adjustment and revision of electricity tariffs for the municipality ...”. Nersa’s letter of enquiry could not be traced but the municipality’s reply, dated 9 June 2015, is before me.² The letter dated 9 June 2015 makes reference to tariff B (residential resellers), a category into which the applicant would fall. It seems likely that “tariff B” is a reference to item RR1 in the proposed budget but because the page of this letter was not available when the affidavits were drawn, this was not dealt with on the papers.³
- 18 In the first paragraph of the heretofore missing page, however, the statement was made that “... only the approved increase of 12,2% was added.” Whether this statement was factually incorrect cannot be determined because nothing in regard to the second page of the letter appears in the papers and I therefore cannot determine the context in which the statement was made.

² In fact, the record as initially constituted only contained the first page of the municipality’s letter dated 9 June 2015. The second page of this two page letter was discovered shortly before the hearing and put into the record by consent. Counsel for the applicant declined the invitation from the bench to adjourn the matter *sine die* to consider whether the applicant needed to deliver further affidavits or amplify the relief it sought.

³ I say that this seems likely because in the proposed budget item “RR” falls between items AA and CC.

- 19 On 1 July 2015, in a letter to the municipality, Nersa approved the electricity tariff of the municipality. Although Nersa made reference to its guideline increase of 12,2%, Nersa in its letter of approval expressly approves in terms the charges applicable to residential resellers such as the applicant. The charges applicable to the applicant and approved by Nersa amounted to an increase over the tariff items of the previous year of 70,32%.
- 20 The municipality then proceeded to implement the tariff as approved by Nersa. Correspondence was directed by the applicant to the municipality on this issue. In a letter dated 25 June 2015, the applicant asserted that the notice which appeared in Mapeza could not be correct because the summary differs from the contents. I have dealt with this in paragraph 16 above. It is in the context of the relief sought by the applicant significant that the applicant was in fact not misled by the notice. The applicant appreciated the discrepancy. The applicant was not led by the notice to believe that the increase was only 12,2%.
- 21 In response to the applicant's letter dated 25 June 2015, the municipality replied in a letter dated 5 July 2015. In its letter the municipality admitted that the increase was greater than 12,2% and defended its decision. This led to further correspondence in which the

applicant said that it could not accept that Nersa had approved an increase greater than 12,2%.

22 In a letter dated 21 July 2015 written by its attorney, the applicant again made the assertion that Nersa had approved no more than a 12,2% increase and that the increase of over 70% had been implemented “without conveying the increase” to Nersa. The municipality however steadfastly refused to reduce the amounts charged to the applicant. The applicant paid what was charged under protest and launched the present application for the relief which I shall now describe.

23 In its notice of motion, the applicant sought relief as follows:

1 Ordering and declaring that the Council of Lesedi Local Municipality resolved at a meeting held on 27 May 2015 that the percentage increase in the electricity tariff charged for bulk residential resellers will increase with 12,2% for the 2015/2016 financial year;

2

2.1 Alternatively and insofar as the Council of Lesedi Local Municipality did in fact resolve at the meeting held on 27 May 2015 that the percentage increase to the electricity tariff for bulk residential resellers for the 2015/2016 financial year exceeded 12,2%, that such resolution is invalid, unlawful and set aside;

2.2 Ordering and directing the First Respondent to apply an increase not exceeding 12,2% to the electricity tariff charged for bulk residential resellers for the 2015/2016 financial year;

3 Ordering and directing the First Respondent to reimburse the Applicant the amount of R131 135,90 plus VAT together with interest *a tempore morae*;

...

6 Costs of the application against the First Respondent. The Second, Third and Fourth Respondents are joined in this application as interested parties only and no costs order is sought against any of these Respondents insofar that the matter is not opposed. In the event of the matter being opposed, then a costs order will be sought against such Respondents;

...

24 The second, third and fourth respondents did not oppose the application. As is evident, no relief was sought against any of them. Only the applicant and the municipality filed papers and were represented at the hearing before me.

25 The first issue raised by the notice of motion is whether the municipality as a fact resolved that the percentage increase in the electricity tariff charged to bulk residential resellers would increase by no more than 12,2% for the 2015/2016 financial year.

26 In my view, the municipality did not so resolve. To determine this issue, the terms of the resolution must be examined. Of course the resolution like any document must be read in its context, in the light of the purpose for which it was framed and passed and in the light of

what was known to councillors at the time. See eg *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 SCA paras 18 and 25-26.

- 27 But before embarking on the interpretative exercise, the terms of the resolution must be examined. It is clear in my view that a specific provision was included in the resolution which unambiguously provided for the charges that would be levied against bulk residential resellers such as the applicant.
- 28 It may be, as I have said, that an incautious reader might have been misled by the municipality's general statements that the increases would not exceed 12.2%, so that the specific provisions relating to bulk residential resellers were overlooked. But that was never the case in relation to the applicant, which appreciated the discrepancy.
- 29 It was equally not the applicant's case that references to the increase of 12.2% in the resolution constituted a promise or representation made to ratepayers and consumers which created a legitimate expectation to which the municipality should be held, notwithstanding the later provisions in the resolution which imposed greater increases. Nor was it the applicant's case that the possibly misleading presentation of the basis on which the municipality intended to

achieve its desired increase in the electricity tariff resulted in a failure by the municipality to give proper content to a duty to facilitate public participation in the legislative process. Indeed, there is nothing in the founding or replying affidavit which suggests that relief was sought on any of these grounds or that anyone other than Clr Mulder, who was present in the council chamber when the resolution was debated, was misled by its terms or the documents which preceded it. Nor was there any other basis suggested in the papers or during argument on the strength of which the resolution might have been unlawfully taken.

- 30 So on the facts, the relief in prayers 1 and 2 cannot be granted. But there is a more fundamental reason why the application cannot succeed. I have found that the approval granted by Nersa authorised the municipality in its terms to impose the 70,32%. I cannot agree with the submission of counsel for the applicant to the contrary. My reason for this conclusion is that the Nersa approval is clear in its terms. Under s 15(2) of the Regulation Act, the municipality is obliged to charge the applicant (and all other electricity consumers within its area of jurisdiction) the tariff approved by Nersa. That, in my judgment, is exactly what the municipality is doing. And it is the decision by Nersa to approve the tariffs proposed by the municipality in the terms in which Nersa did so that forms the legal foundation of the power of the

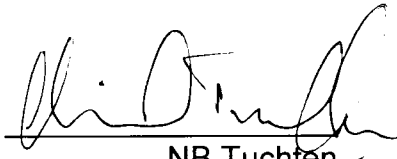
municipality to levy the charges to bulk residential resellers (and others) and the concomitant obligation of the applicant to pay them.

31 There is no challenge to the decision of Nersa. So, while it stands, the decision of Nersa constitutes existing law which must be obeyed unless and until that decision is set aside by a court. See eg *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 6 SA 222 SCA para 14.

32 In the result, except for the relief relating to the provision of water, the application cannot succeed. The result on the water issue does not translate to substantial success and I do not think the applicant is entitled to costs. I have considered whether I should order costs against the applicant as argued on behalf of the municipality. I have decided not to do so, in accordance with the *Biowatch* principle. The issues raised relate to the public powers of the municipality and resolved an issue which concerned bulk retail resellers of electricity within the municipality generally.

33 I make the following order:

- 1 The first respondent is directed to apply an increase not exceeding 14,5% in respect of the water consumption tariff for the financial year 2015/2016.
- 2 The first respondent is directed to reimburse the applicant the sum of R13 271,99 plus VAT together with interest *a tempore morae*.
- 3 For the rest, the application is dismissed.
- 4 There will be no order as to costs.



NB Tuchten
Judge of the High Court
31 October 2016

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For the applicant:
Adv C Acker
Instructed by Liebenberg Malan Liezel Horn Inc
Heidelberg

For the first respondent:
Adv M Majozi
instructed by Ngeno & Mteto
Pretoria