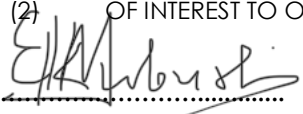




**IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)**

**Case Number:** 63393/2021

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
	
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<b>E.M. KUBUSHI</b>	<b>DATE: 20 OCTOBER 2022</b>

In the matter between:

**NELSON MANDELA BAY BUSINESS CHAMBERS  
NPC**

FIRST APPLICANT

**THE PIETERMARITZBURG & MIDLANDS  
CHAMBER OF BUSINESS NPC**

SECOND APPLICANT

and

**THE NATIONAL ENERGY REGULATOR**

FIRST RESPONDENT

**THE SOUTH AFRICAN LOCAL GOVERNMENT  
ASSOCIATION**

SECOND RESPONDENT

**ESKOM HOLDINGS SOC LIMITED**

THIRD RESPONDENT

**PIETERMARITZBURG & MIDLANDS CHAMBER  
OF BUSINESS**

FOURTH RESPONDENT

And the further Municipalities listed in Annexure A to the notice of motion, as the Fifth to further Respondents.

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**JUDGMENT**

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**KUBUSHI J**

## INTRODUCTION

[1] This case concerns the fundamental principles for electricity price regulation in South Africa, as set out in the Electricity Regulation Act (“the ERA”).<sup>1</sup> The crux is whether the method used by the First Respondent, the National Energy Regulator (“NERSA”), for the approval of municipal electricity tariffs, is unlawful and invalid. The method complained of, relates in particular, to one of NERSA’s regulatory functions of approving electricity tariffs for municipalities licensed by NERSA, to operate electricity reticulation and supply undertakings (“the municipalities”). The method is referred to in the papers as the Guideline and Benchmarking Method (“the Method or Methodology”).

[2] In these proceedings, the First Applicant, and the Second Applicant, who for convenience, are referred to herein, collectively, as the Applicants, applied for two substantive orders.

[3] In the first place, the Applicants sought an order, contained in Prayer 2 of the Notice of Motion, to declare unlawful and invalid, the Guideline and Benchmarking Method, used by NERSA, when approving municipal electricity tariffs, as set out in the record of decision issued by NERSA and entitled ‘Determination of the Municipal Tariff Guideline and Revision of Municipal Tariff Benchmarks for the 2021/2022 financial year’ (Annexure FA1 to the Applicants’ founding affidavit) and explained in the written reasons therefore (Annexure FA2 to that affidavit).

[4] In addition, the Applicants, sought an order as stated in Prayer 3 of the Notice of Motion, to prohibit NERSA from applying the said Method, when considering and approving municipal electricity tariffs for the 2022/2023 municipal financial year. As will appear more fully hereunder, the Applicants were, at the commencement of the hearing, granted an amendment of this

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<sup>1</sup> Act 4 of 2006.

prayer. The upshot of the amendment was for the interdict prohibiting NERSA from applying the Method and for the interdict to be with effect from 2023/2024 municipal financial year, instead of prohibiting NERSA from applying the Method during the 2022/2023 municipal financial year, as initially applied for.

[5] In essence, the Applicants are, in these proceedings challenging the lawfulness of the Methodology, used by NERSA when approving annual increases in municipal electricity tariffs. The Applicants submit that the Method is unlawful for the reason that it is inconsistent with the principles prescribed for electricity tariffs in section 15(1) of the ERA.

[6] This application is supported by the Third Respondent, ESKOM Holdings Soc Limited ("ESKOM"), and it is opposed by NERSA and the 46<sup>th</sup> Respondent, the City of Johannesburg through its electricity utility, City Power. City Power, is the energy services company wholly owned by the City of Johannesburg and tasked with the distribution of a reliable electricity supply to the residents of the City of Johannesburg. The two entities are referred to collectively in this judgment as City Power. For ease of reference, NERSA and City Power shall be referred to herein, collectively, as the Respondents and individually as NERSA or City Power.

[7] ESKOM agrees with the Applicants that the Guideline and Benchmarking Method is unlawful and also contends that it is irrational, hence its support of the relief sought by the Applicants in these proceedings.

[8] NERSA and City Power have, in addition, raised numerous technical points in opposition to the application, as well as, a number of defences on the merits, on the ground that this application is incompetent. They contend in the main that the Methodology used by NERSA is not unlawful and does not violate the provisions of section 15(1) of the ERA. In that regard, they seek the dismissal of the Applicants' application, as supported by ESKOM.

## THE PARTIES

[9] The Applicants, are not for profit Business Chambers. The Applicants, have collectively, approximately 1 200 members, who are carrying on businesses in the areas of Nelson Mandela Bay, Pietermaritzburg and KwaZulu-Natal Midlands. Most of these businesses are energy-intensive businesses for which electricity costs are a major component. These businesses operate within the areas supplied electricity by the municipalities.

[10] The Applicants have instituted these proceedings as *per* the mandate of their members in order to protect their members' interest, as well as in the public interest. The Applicants submit in their papers that there are millions of municipal electricity consumers in South Africa, most of whom do not have the means and capability to bring proceedings challenging the lawfulness of the methodology used by NERSA, when approving annual increases in municipal electricity tariffs, hence the Applicants' stance to act in the public interest herein.

[11] NERSA, on the other hand, is a regulatory authority established in terms of section 3 of the National Energy Regulator Act,<sup>2</sup> to, amongst others, regulate electricity in accordance with the provisions of the ERA. Its regulatory functions and duties as prescribed and described in various pieces of legislation, include, amongst others, the oversight and enforcement of the regulation of the generation, transmission, distribution, importation, exportation and trading in electricity; and issuing of licences for the lawful conduct of these activities. These proceedings involve the method used by NERSA in one of its regulatory functions, that of approving electricity tariffs for municipalities.

[12] The Second to Fourth Respondents are cited in these papers because of any interest they may have in these proceedings. No specific relief is sought

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<sup>2</sup> Act No. 40 of 2004.

against them, (save for costs if any one of them may unsuccessfully oppose these proceedings). However, as earlier indicated, ESKOM has entered the fray in support of the Applicants.

[13] The Fifth and further Respondents are all municipalities in South Africa that operate electricity reticulation and supply undertakings, and are licensed by NERSA, to do so. The Applicants do not seek any relief against the respondent municipalities (save for costs against any municipality that unsuccessfully opposes these proceedings). They are merely cited as respondents because of the interest they have in these proceedings.

[14] Except for City of Johannesburg, all the other municipalities are not taking part in these proceedings, some of them have filed notices to abide the decision of the Court.

## **BACKGROUND FACTS**

[15] The ERA, regulates the functions of NERSA in relation to the approval of electricity tariffs, including and not limited to municipal electricity tariffs.

[16] It, also, regulates the approval by NERSA of ESKOM's electricity tariffs, both the bulk tariff that it charges to municipalities, as well as, the retail tariff that it charges to consumers in those areas that are not supplied by municipalities but by ESKOM. Some of the supply by ESKOM is obviously also to bulk users of electricity, and that too is regulated.

[17] All the municipalities that reticulate electricity have to apply annually, to NERSA for its approval, to charge electricity tariffs. In order to facilitate the application process, NERSA has developed a method, the Guideline and Benchmarking Method, which it applies when considering the applications. It is this Method that the Applicants are challenging in these proceedings, contending that the Method violates the provisions of section 15(1) of the ERA.

The Applicants allege in their papers that section 15(1) of the ERA requires NERSA to use a method that is cost reflective which they refer to as a cost of supply method (“the COS”).

[18] In accordance with section 15(2) of the ERA, licensees are only permitted to charge their customers the tariffs which NERSA has approved as part of their licensing conditions. So municipalities are limited when it comes to tariffs, to charging the ones that NERSA has approved. NERSA approved tariffs are then taken to Council so that they may be imposed.

### **PRELIMINARY ISSUES**

[19] At the commencement of the hearing of this application, there were preliminary issues that required determination before the merits are dealt with. The preliminary issues consisted of interlocutory applications instituted by the Applicants, and the special defences raised by the Respondents. The preliminary issues are dealt with hereunder, in turn, starting first with the interlocutory applications.

The Interlocutory Applications Raised by the Applicants:

[20] The interlocutory applications consisted of

- 20.1 the Applicants’ notice of application for leave to amend the original relief;
- 20.2. the Applicants’ further application, for the admission of a short affidavit placing before the Court, NERSA’s recently published ‘Determination of the Municipal Tariff Guideline and the Revision of Municipal Tariff Benchmarks for the 2022/23 financial year’ and its recently published reasons for that decision; and leave to amend Prayer 2 of their Notice of Motion to include a reference to those documents in the declaratory relief they are seeking; and

20.3. the Applicants' contingent application for a referral of limited issues to oral evidence.

[21] The interlocutory applications are dealt with hereunder, in turn.

*The Application for the Amendment of Prayer 3 of the Notice of Motion.*

[22] In response to the concerns raised by the Respondents, pertaining to the practical timing related problems that would arise if the interdictory relief was granted starting from 1 July 2022, the Applicants, together with their heads of argument, filed a Notice of Application to amend the interdictory relief in Prayer 3 of the Notice of Motion, which application was not opposed by the Respondents and was, thus, accordingly granted.

[23] The effect of the granted amendment was that, should the Method be found to be unlawful, NERSA would be prohibited from, ordinarily, applying the Method when considering municipal electricity tariffs, with effect from the 2023/2024 municipal financial year, that is, from 1 July 2023. In essence, should the Methodology be found to be unlawful, NERSA would no longer have to use that Method when considering the approval of municipal electricity tariffs.

*The Application for the Admission of the Supplementary Affidavit*

[24] In addition, the Applicants' filed a further application, for the admission of a short affidavit placing before the Court, NERSA's recently published 'Determination of the Municipal Tariff Guideline and the Revision of Municipal Tariff Benchmarks for the 2022/23 financial year' and its recently published reasons for that decision; and leave to amend the Notice of Motion to include a reference of the documents in the declaratory relief they sought in Prayer 2 of the Notice of Motion.

[25] Due to some unforeseen logistical challenges that might have occasioned the postponement of the main application, the Applicants ended up not proceeding with this application, and opted, instead, to deal with the matter on the papers as they stood after the heads of argument were filed.

*The Conditional Application for a Referral of the Matter to Oral Evidence*

[26] Regarding one of the issues for determination by this Court, that is, whether the Method followed by NERSA when it approves municipal electricity tariffs complies with the legal requirements, it is the Applicants' primary submission that this issue can be decided in their favour on the papers. The submission is that the Court can find, on the papers, that NERSA's Method does not comply with the applicable legal requirements, whilst it is the Respondents' submission that this issue cannot be decided on the papers as they stand, thus, raising a dispute of fact.

[27] Consequently, together with their reply to NERSA's answering affidavit, the Applicants delivered a contingent application for referral to oral evidence of limited factual issues relevant to NERSA's Method. The application was said to be contingent because it was only if the Court would find that the Applicants were not entitled to relief on the papers, that the Applicants sought a referral to oral evidence.

[28] This Court opts not to deal with this point at this stage of the proceedings, as its determination, will be covered when this Court considers the issue of whether the Methodology adopted by NERSA, to use when it approves municipal electricity tariffs, complies with the legal requirements of the ERA, is considered.

[29] This Court will then, deal next with the special defences raised by the Respondents.



### The Special Defences Raised by the Respondents

[30] The Respondents, in opposing the Applicants' and ESKOM's case, have raised six special defences, which this Court shall deal with first, before determining the merits of the application, as they may be dispositive of the matter. The said special defences are:

- 30.1. Firstly, NERSA in its heads of argument challenged the Applicants' standing to institute these proceedings.
- 30.2. Secondly, NERSA and City Power took issue with the legal nature of the Method NERSA uses when considering and approving municipal electricity tariffs, and the implications thereof.
- 30.3. The third special defence raised by NERSA is that this Court is not entitled to exercise the discretion conferred on it by section 21(1)(c) of the Superior Courts Act,<sup>3</sup> against engaging with the issue of the validity of the Method, as it is hypothetical and abstract.
- 30.4. The fourth special defence is City Power's contention that the principle of the separation of powers militates against the granting of the substantive relief sought by the Applicants.
- 30.5. The fifth special defence is raised by both NERSA and City Power, that the interdict the Applicants seek should not be granted because it will not be practically possible for NERSA and most municipalities to comply with it.
- 30.5. The Last special defence is that of urgency raised by NERSA and City Power. It is NERSA and City Power's contention that the present matter is not urgent.

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<sup>3</sup> Act 10 of 2013.

[31] The following special defences were settled at the commencement of the hearing of the application, and this Court will, therefore, not deal with same in this judgment:

31.1. The special defence on standing of the Applicants, raised by NERSA, was summarily abandoned.

31.2. The special defence raised by NERSA and City Power about the impracticality of NERSA and most municipalities to comply with the interdictory relief requested in Prayer 3 of the Notice of Motion, was settled by the amendment of Prayer 3 of the Notice of Motion. As a result, NERSA and the municipal licensees will have ample time within which to comply with the order, if granted by the Court.

31.3. The issue of urgency was, in this Court's view, settled when the Deputy Judge President ("the DJP"), having considered the matter and all prevailing circumstances, directed that the matter be enrolled for hearing on the special roll. In so doing, it was safe for this Court to conclude that the DJP made a decision that the matter was urgent and required to be specially and urgently enrolled for hearing.

[32] Before this Court deals with the remaining special defences, it is imperative that it first deals with the preliminary points raised in oral argument by NERSA, which City Power had, actually, raised in its answering affidavit, in response to the effect occasioned by the Applicants' abandonment of their application for leave to file a supplementary affidavit as stated in paragraph [25] of this judgment and the consequent abandonment to amend Prayer 2 of the Notice of Motion; as well as, the amendment of Prayer 3 of the Notice of Motion.

[33] The submission made by NERSA is that the relief which the Applicants are seeking in these proceedings have been overtaken by serious material events. Therefore, NERSA argues that the application and the prayers as they are currently structured and formulated, are not capable of being enforced, and

that, this Court cannot make an order pertaining to a relief which has since been overtaken by material events.

[34] The Court will, sequentially, deal with the said preliminary points hereunder.

*The Relief Sought in Prayer 2 of the Notice of Motion*

[35] The relief sought in Prayer 2 of the Notice of Motion reads as follows:

*“2. Declaring unlawful and invalid the guideline and benchmarking method for the approval of municipal electricity tariffs, as set out in the record of decision issued by the First Respondent ('NERSA') and entitled 'Determination of the Municipal Tariff Guideline and the Revision of Municipal Tariff Benchmarks for the 2021/2022 financial year (Annexure FA 1 to the Applicants' founding affidavit) and explained in the written reasons therefor (Annexure FA 2 to that affidavit) ('the Guideline and Benchmarking Method').”*

[36] NERSA's argument is that the Applicants sought the relief declaring unlawful the Method for approval of municipal electricity tariff as set out in the record of decision issued by NERSA, and entitled determination of the municipal tariff guideline and the revision of municipal tariff benchmark, importantly for 2021/2022 financial year; and that what constitutes that decision and its reasons is contained in Annexure FA1 and Annexure FA2.

[37] Furthermore, NERSA argues that Annexures FA1 and FA2, which were applicable during the 2021/2022 municipal financial year have been overtaken by material events and are no longer in existence, legally and/or factually, in that NERSA has now issued a new decision and reasons thereto for the 2022/2023 municipal financial year. In addition, as such, this Court cannot declare unlawful, a non-existing decision and/or methodology and/or guideline which had since been overtaken by the introduction by NERSA of the new

decision and reasons. In support of this argument by NERSA, City Power contends that the Municipal Tariff Guideline increases and Benchmark Tariffs for the financial year 2021/2022, were designated for the purpose of determining a municipal tariff increase for a particular financial year and are not meant to be used again for any other financial year.

[38] In response to this argument, the Applicants deny that this Court cannot grant them the remedy they seek in these proceedings. This, they contend, is so because what they are challenging in these proceedings is the Methodology used by NERSA when determining the municipal electricity tariffs and not the decision NERSA takes when determining the electricity tariffs. They contend, therefore, that even if the decision contained in Annexure FA1 and the reasons thereto contained in Annexure FA2, are no longer in existence because NERSA has issued a new decision and the reasons thereto for the period 2022/2023 financial year, the Method that NERSA applied during the 2021/2022 financial year was made applicable in the period 2022/2023 financial period.

[39] In support of this submission, the Applicants referred to the contents of the aforesaid Annexures. Paragraph 5.1 of Annexure FA1 and paragraph 12.1 of Annexure FA2, which states that *“This approach will be applicable for 22/23 tariffs”*. It follows, therefore, that the approach and/or method that was adopted by NERSA in the 2021/2022 financial year was perpetuated to apply in the 2022/2023 financial year, which is the current financial year.

[40] Therefore, whether Annexures FA1 and FA2, are no longer in existence, makes no difference to the Applicants’ case. The essence of the present proceedings, as also conceded by NERSA in its papers, is to target the underlying methodology: specifically, the Method NERSA uses to consider and approve municipal tariffs. The Method that was adopted by NERSA in the 2021/2022 financial year, as earlier indicated, was extended to apply in the 2022/2023 financial year.

[41] The result is that, the contention by NERSA that the annexures have been overtaken, legally and factually, by material events, has no adverse bearing on the Applicants' case.

[42] Furthermore, this Court is inclined to agree with the Applicants' proposition that there are strong public interest considerations in favour of this Court determining the lawfulness or otherwise of the Method, in question. The Applicants' arguments are valid, in this regard, that it is not disputed that NERSA has applied this method for over a decade, and that the resulting tariffs have been the subject of several court challenges. And, for as long as the lawfulness of the Method remains unresolved, municipal tariff approvals will remain contentious. It is in the interests of all those affected that this issue be determined. Those affected include NERSA; the municipalities which reticulate electricity; municipal customers generally; and high-energy user customers specifically (who complain - as the Applicants' members do - that they bear the financial brunt of the tariffs that result from the Method they consider unlawful).

[43] NERSA, itself, appears to be in agreement with the need to move to a COS-based approach, but it has, as yet, not set out any concrete plan to replace the guideline and benchmarking approach with a COS-based approach or any other method which it considers appropriate in the circumstances. The indications are it will continue using the guideline and benchmarking approach.

[44] Consequently, it is this Court's view that a challenge to the Method is competent, the present matter is an appropriate case for the Court to grant or refuse on its merits the declaratory relief sought by the Applicants and to lay the matter to rest once and for all.

*The Relief Sought in Prayer 3 of the Notice of Motion*

[45] In relation to the effect occasioned by the amendment of Prayer 3 of the Notice of Motion, NERSA's proposition is that the interdict sought, has been overtaken by events or that the Method for the 2023/2024 municipal financial year had not been determined when the application was heard. This proposition is, in this Court's view, without merit.

[46] NERSA took the amendment simply as the replacement in Prayer 3 of the 2022/2023 municipal financial year with the 2023/2024 municipal financial year. By simply stating it like that, NERSA was in substance correct, however, the effect of the amendment is not as simple as that. When the two prayers are compared, it can easily and clearly, be determined that the amendment was not the replacement of one Municipal financial year with another.

[47] The initial prayer was couched as follows:

*"PLEASE TAKE NOTICE that the Applicants intend applying to this Honourable Court, on a date and at a time to be arranged with the Judge President, or Deputy Judge President or Registrar of this Honourable Court, for orders in the following terms, namely orders...*

*3. Prohibiting Nersa from applying the guideline and benchmarking method when considering and approving municipal electricity tariffs for the 2022/2023 municipal financial year."*

[48] The amended prayer that was granted, on the other hand, reads as follows:

*"TAKE NOTICE that the Applicants intend, at the hearing of this application on 9 and 10 June 2022, applying to amend their notice of motion by replacing paragraph 3 thereof with the following:*

*'Prohibiting Nersa from applying the guideline and benchmarking method when considering and approving municipal electricity tariffs, such interdict to take effect in respect of municipal electricity tariffs to be charged by*

*municipalities during the 2023/2024 municipal financial year commencing 1 July 2023.”*

[49] There is, thus, a fundamental difference between the two prayers. The objective of the interdict in the amended Prayer 3 is to prohibit NERSA from applying the Method, when considering and approving municipal electricity tariffs, in general, starting from the 2023/2024 municipal financial year. It is not meant to proscribe the application of the Method only when considering and approving municipal electricity tariffs during the 2023/2024 municipal financial year, as the initial Prayer 3 sought to do. The difference in the two prayers is manifest, and is not just the replacement of one municipal financial year with another, as NERSA wants to argue.

[50] The further argument by NERSA that there is no evidence on record to substantiate the relief sought by the Applicant because of the amended prayer, is without merit.

[51] The Applicants, in their replying affidavit to NERSA’s answering affidavit proposes that if the Method is indeed unlawful, then they are entitled to relief preventing NERSA from continuing to apply that Method. This proposition by the Applicant does not apply to any specific period of time, and does, in that sense, encompass the 2023/2024 municipal financial year period. Should it be found that the Method is indeed unlawful, with the amendment of Prayer 3 having been granted, an interdict, worded as such, is the only ordinary and obvious way of the Court providing a sensible remedy for the Applicants. The effect of the interdict as phrased in the amended Prayer 3, would be to prevent NERSA from continuing to carry out its legislative mandate unlawfully.

[52] Besides, there is ample evidence on record that indicates that NERSA will continue to use this Method going forward. As an example, it is stated in NERSA’s Determination of the Municipal Tariff Guideline and the Revision of

Municipal Tariff Benchmarks for the 2021/22 financial year: Reasons for Decision (RFD), that is, Annexure FA2, that –

*“5.4.This meant that an approach was needed that would somehow translate municipalities' cost requirements to tariffs. The Energy Regulator, in addressing the above predicament recommends a Cost of Supply (COS) approach in the long term. The guideline increase and benchmarks be used in the interim.”*

[53] Such evidence is enough to support the Applicants' contention that NERSA will continue to use the Method even beyond the 2023/2024 financial year period if nothing is done to stop it.

[54] The remaining special defences are dealt with hereunder, consecutively.

*The Legal Nature of the Guideline and Benchmarking Method and the Implications thereof.*

[55] Based on different reasons, the Respondents contend that the Applicants should have approached the Court in terms of the provisions of section 6 of the Promotion of Administrative Justice Act (“PAJA”),<sup>4</sup> and not sought a declaratory or interdictory remedy, as they did in these proceedings; and that, having not done so, the Applicants' claim is incompetent and ought to be dismissed.

[56] City Power, in its papers and in argument before this Court, regards the determination of the municipal tariff guideline and the revision of municipal tariff benchmarks as the decision of NERSA, which the Applicants should have taken on review in terms of PAJA. City Power bases its contention that the decision that should be at issue is the determination of the municipal tariff

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<sup>4</sup> Act 3 of 2000.



guideline, on the ground that PAJA regards a determination as a decision.<sup>5</sup> City Power, contends, also, that a methodology cannot be attacked separate from its decision.

[57] According to City Power, the determination of the municipal tariff guideline, is "administrative action" as contemplated by Section 1 of the PAJA,<sup>6</sup> in that it is a decision by an organ of state performing a public function in terms of the empowering provisions of the ERA read together with the National Energy Regulator Act;<sup>7</sup> and has a direct external legal effect in that it affects municipalities and obviously ultimately affects the municipalities' consumers of electricity.

[58] In support of its stance, that the Applicants in this matter are dealing with administrative action which is reviewable in terms of PAJA, City Power relied on the Constitutional Court judgment in *National Energy Regulator of South Africa and Another v PG Group (Pty) Ltd and Others*,<sup>8</sup> wherein that Court held in the separate concurrence of Jafta J, that if PAJA is applicable, the applicants are bound to rely on the grounds listed in section 6 of PAJA and not go the legality route. Accordingly, so City Power argues, even in this matter PAJA is applicable and the Applicants ought to have approached Court in terms thereof. Having failed to do so, renders their claim incompetent.

[59] Unlike City Power, NERSA agrees with the Applicants that the provisions of PAJA finds no application in these proceedings. NERSA concedes as well that what the Applicants are challenging is the underlying methodology adopted by NERSA when determining the municipal electricity

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<sup>5</sup> In terms of section 1 of PAJA "decision" means any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to- (a) making, suspending, revoking or refusing to make an order, award or determination.

<sup>6</sup> Act 3 of 2000.

<sup>7</sup> See fn. 2.

<sup>8</sup> 2020(1) SA 450 (CC) para 112.

tariff. NERSA, however, differs with the Applicants, in relation to the subject matter of what ought to be before the Court for determination. NERSA's approach is that what the Applicants ought to have brought to Court is a decision which is reviewable under PAJA, and in this instance, the tariff approval decision would have been the appropriate decision to bring to Court. Thus, even though NERSA concedes that what the Applicants are challenging in these proceedings is the underlying Methodology, its case is, however, that the Applicants have brought a wrong challenge to Court.

[60] NERSA's thesis, in this regard, is founded on two grounds. The first ground is that, the Methodology it uses when considering and approving the municipal electricity tariffs, is not a final step in the municipal electricity tariff determination process, but, only one of the multiple preparatory steps towards assessing and determining a municipal electricity tariff. Accordingly, so NERSA submits, it cannot be decided or determined with certainty, without first implementing the Method, together with other pieces of documents constituting the regulatory framework, that the use of the Method will offend the provisions of the ERA.

[61] Based on this argument, NERSA contends, further, that these proceedings are in fact, premature. The Applicants, according to NERSA, ought to have waited for NERSA to apply the Method to approve a particular municipality's tariffs and then taken that tariff approval decision, which is common cause would be an administrative action, on review under PAJA. It is on these contestations that NERSA opines that the Applicants' application is incompetent.

[62] In support of its argument that the Applicants should have taken a tariff approval decision on review under PAJA, NERSA relied on the Supreme Court

of Appeal judgment in *PG Group & others v NERSA*,<sup>9</sup> wherein that Court when dealing with the methodology (the Maximum Price Methodology) and the decision to fix the price (the Maximum Price Decision) in the Gas Act, made the following remarks:

*"...administrative action in general terms involves the conduct of the bureaucracy having 'direct and immediate consequences for individuals or groups of individuals'. NERSA's determination of the methodology to be used did not have consequences of that nature. It could only have had such an impact once it had determined what Sasol Gas's maximum prices should be. Until then, it did not bind any party and, in my view, did not constitute administrative action."*

[63] NERSA's second ground in this regard is that the use of the methodology does not have an external effect, and for this reason it does not meet the requirements of an administrative action as set out in section 1 of PAJA.

[64] The aforementioned allegations of the Respondents are all denied by the Applicants. Their submission is that they did not approach this Court seeking a review remedy in accordance with PAJA. They contend that they are in these proceedings, not dealing with a decision taken by NERSA. The allegation is that they are before this Court challenging the Method adopted by NERSA, which NERSA uses when considering and approving municipal electricity tariffs. In essence, they say what they are contending for in these proceedings, is not the unlawfulness of a decision taken by NERSA, but the unlawfulness of a guide or method NERSA uses when determining municipal electricity tariffs.

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<sup>9</sup> 2018 (5) SA 150 (SCA) at para 35.

[65] And, to the extent that it might be said that what is before the Court is a decision taken by NERSA, as argued by City Power, the Applicants contend that such a decision, is not reviewable in terms of PAJA, in that it is not a decision taken in terms of any legislation, nor does it have a direct external legal effect, to qualify as an administrative action.

[66] For the reasons that follow hereunder, it is this Court's view that the decision contended for by City Power, in these proceedings, is not a decision reviewable under PAJA on the basis of the grounds raised by the Applicants. The said grounds shall be dealt with hereunder, *ad seriatim*.

[67] The starting point, as it has been correctly argued, is section 1(1) of PAJA, more specifically, the relevant definition of administrative action, which provides that an administrative action means any decision taken by an organ of state when, exercising a public power or performing a public function in terms of any legislation, and which adversely affects the rights of any person, and has a direct external legal effect.

[68] It follows, therefore, that, in this matter, the determination of the Method, which City Power contends is a decision, to be regarded as an administrative action, NERSA, as an organ of state, must have determined the Method whilst exercising a public power or performing a public function in terms of the ERA. The decision must have adversely affected the rights of any person, and had a direct external legal effect.

[69] It is common cause that NERSA as an organ of state makes decisions in the exercise of public power or in the performance of public functions. The question that arises at this point, is whether the determination of the Method was taken whilst exercising public power or performing a public function in terms of any legislation and whether such a determination had a direct external legal effect.

Was the Decision taken in terms of any legislation?

[70] As already stated, the ERA regulates the functions of NERSA in relation to the approval of municipal electricity tariffs. Therefore, in this matter it must be determined whether the determination of the Method was taken in terms of the ERA.

[71] It has already been established during argument before this Court that sections 14(1)(e)<sup>10</sup> and 35(1)<sup>11</sup> of the ERA are the legislative provisions in terms of which NERSA may have actually made the Guideline and Benchmarking Methodology. NERSA could have done so in terms of section 14(1)(e) of the ERA by embodying the Guideline and Benchmarking Method as a licence condition in the licences of the municipal licensees, or in terms of section 35(1) of the ERA by publication of the Guideline and Benchmarking Method in the *Gazette*.

[72] It is not in dispute that the Guideline and Benchmarking Method as contained in Annexures FA1 and FA2 is not a licence condition of any of the licences of the municipal licensees. In other words, for the Methodology to be considered a licence condition, it should have been embodied in the licences of all the municipal licensees.

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<sup>10</sup> 14. Conditions of licence

(1) The Regulator may make any licence subject to conditions relating to—  
...(e) the methodology to be used in the determination of rates and tariffs which must be imposed by licensees;

<sup>11</sup> 35. Regulations, rules, guidelines, directives and codes of conduct and practice

(1) The Regulator may, after consultation with—

(a) licensees;

(b) municipalities that reticulate electricity; and

(c) such other interested persons as may be necessary,

make guidelines and publish codes of conduct and practice, or make rules by notice in the *Gazette*.

[73] A point was taken, orally, on behalf of the Applicants that this could have been a good point to take as an additional basis upon which NERSA's Guideline and Benchmarking Method may be found to be unlawful and invalid, if it was challenged on that ground in the founding papers. Counsel for the Applicants was quick to concede, correctly so, that the Applicants do not advance such an argument.

[74] Therefore, section 14(1)(e) of the ERA, which provides that a Regulator may make any licence subject to conditions relating to the methodology to be used in the determination of rates and tariffs which must be imposed by licensees, is not the authority for what NERSA did when determining the Guideline and Benchmarking Methodology, because it did not embody the methodology as a licence condition in the licences of municipal licensees. It, thus, leaves section 35(1) of the ERA as the alternative legislative provision in terms of which NERSA may actually have made the Guideline and Benchmarking Method.

[75] City Power's contention is that the Guideline and Benchmarking Method having been publicised in the *Gazette*, as required by section 35(1) of the ERA, qualified to have been made under a legislative provision. That is, publication in the *Gazette* qualified the Guideline and Benchmarking Method as something which was done by an organ of state in terms of legislation. In that sense, the 'in terms of legislation' requirement would then have been satisfied.

[76] The Applicants in their oral argument, whilst conceding that section 35(1) of the ERA is an empowering provision under which a guideline could be made by publication in the *Gazette*, they, simultaneously, submitted that it does not alter the fact that being a guideline and not a set of rules, the methodology is not a PAJA administrative action. They contended, further, that even if it can be found that the 'in terms of legislation' requirement of the definition of

administration action has been satisfied, what would still not be satisfied would be, the component that 'it would have to be something which has direct external legal effect'.

[77] It is the view of this Court that the words 'by notice in the *Gazette*' qualify both the making of guidelines and the making of rules for publication and not just the making of rules. When the clause is read literally, it is this Court's view that the comma in the last part of that clause incorporates both the making of guidelines and rules for publication. The result of which is that the 'in terms of legislation' component of the definition of administration action is satisfied.

[78] However, this is not the end of the matter, the Applicants have raised two further issues, which should be dealt with, namely the satisfaction of the 'direct external legal effect' component of the definition of administration of action; and the question whether the guideline made in terms of legislation is an administrative action subject to PAJA or not.

Does the decision have a direct external effect?

[79] The second ground the Applicants rely on that City Power's decision is not reviewable in terms of PAJA, is that the determination of the methodology contended for by City Power does not have a direct external legal effect, but an indirect external legal effect.

[80] This Court agrees with the submissions of the Applicants that confirms that the decision contended for by City Power does not have direct external legal effect. It is indirect, because the determined guideline is only a policy which relates to the exercise of the statutory authority conferred on NERSA, under section 15(1) of the ERA, to consider and determine conditions relating to the setting or approval of prices, and tariffs and the regulation of revenues. When the policy is applied in the taking of that decision, it has an indirect external effect in that it will eventually affect other people outside of NERSA and the municipalities. The effect of the determination of a policy or guideline

does not have direct and immediate consequences for individuals or group of individuals, outside of NERSA and the municipalities, it would have such impact once NERSA applies the guideline and determines a municipal tariff that is to be imposed by the municipalities.

[81] City Power's contention that the Applicants' by being in court have been adversely affected by the determination of the guideline, and as such shows the direct external legal effect of such determination, is meritless. The Applicants as they have continually stated are not before the Court because they have been adversely affected by the determination by NERSA of the Guideline and Benchmarking Method. They say they are before this Court because the Guideline and Benchmarking Method is unlawful and should be declared invalid and would eventually, if applied adversely affect them. The Guideline, as it has been stated will only affect them if it is applied by NERSA in the determination of a municipal electricity tariff. However, at the moment they have still not been affected. What will affect the Applicants directly, is the approval by NERSA of the municipal electricity tariff.

[82] The reliance by City Power in the case of *Economic Freedom Fighters Students Command v Minister of Higher Education, Science and Technology and Others*,<sup>12</sup> as support that the determination of the Methodology, in the matter before this Court, has the potential of an external legal effect, is not apposite in the circumstances of this matter. The Court in that judgment when holding that '*it is enough that the action has capacity to affect legal rights*', it was on the basis that such rights would directly impact the students who it was meant to affect. In that case, the decision taken by the Minister, although it did not immediately affect the students, it had the potential or capacity to affect them in future, and it would affect them directly. This is not the same as in this matter. The determination of the guideline in this matter would not in any way

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<sup>12</sup> The unreported judgment of the Gauteng High Court Case Number 7641/21 [2021] dated 11 March 2021.



directly affect any other individuals outside of NERSA and the municipalities. The potentiality and/or capacity in this matter will only be mediated through another decision, namely, the determination of a municipal electricity tariff.

[83] The Applicants, in oral argument before this Court, explained it clearly in their submission that they are in these proceedings dealing with a guideline, which is something that does not have direct external legal effect. According to the Applicants the guideline does not have direct external legal effect because it is an internal policy that guides municipalities in making their applications to NERSA for the approval of their tariffs. And, it also guides NERSA in assessing the applications made by the municipalities. It is in other words, NERSA's published policy as to the manner in which it will exercise the discretion to approve municipal tariffs, which is conferred on it by section 15(1)(a) of the ERA. And, in this Court's view the Applicants are correct. The determination of the Methodology, contended for by City Power, will also have a similar effect.

[84] The guideline because is a policy as explained above, it works indirectly to achieve the ultimate outcome. Therefore, it does not have the direct legal effect which PAJA requires.

Should the Applicants have taken a Tariff Approval Decision on review under PAJA?

[85] NERSA's submission, as earlier stated, is that the declaratory order sought by the Applicants is incompetent based on the ground that the Methodology cannot be considered an administrative action in terms of PAJA for requirement of direct external legal effect, since it is only a final decision on the tariff that would have such an effect.<sup>13</sup> NERSA argues, consequently, that the Applicants' application is premature, and that the Applicants ought to have

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<sup>13</sup> This point has already been dealt with in paragraph 65 of this judgment, where it was found that a decision that lacks direct external legal effect, does not fall within the purview of an administration action, as defined in section 1(1) of PAJA.

waited for NERSA to take a decision pertaining to an electricity tariff of a specific municipality and then challenged such decision.

[86] Additionally, NERSA submits that a guideline and a method considered by NERSA do not constitute a decision, but are mere tools considered amongst other factors when arriving at a decision captured in Annexure FA1 read with Annexure FA2. The contention being that the Applicants ought to have challenged the entire decision and to interrogate the reason upon which such a decision is premised.

[87] Conversely, the Applicants contend that, contrary to NERSA's argument in this regard, they are entitled, under the principle of legality, to seek a declaratory order of invalidity under the ambit of section 172(1)(a) of the Constitution of the Republic of South Africa, 1996 ("the Constitution").<sup>14</sup> According to the Applicants, the methodology applied by NERSA when it approves the municipal electricity tariffs, is a policy or guideline, and, as such, it may be attacked on the grounds of unlawfulness and invalidity in terms of section 172(1)(a) of the Constitution, on the basis that such policy or guideline is inconsistent with the principle of legality and, thus, invalid.

[88] The question of whether a methodology is an administrative action in terms of PAJA was left open by the Constitutional Court in *PG Group*.<sup>15</sup> However, that Court, in its majority judgment, took a view that a methodology is not law, but rather a guideline.<sup>16</sup> Similarly, the Methodology in this matter is a guideline made in accordance with empowering legislation.<sup>17</sup>

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<sup>14</sup> In terms of section 172(1)(a) of the Constitution, when deciding a constitutional matter within its power, a Court must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency.

<sup>15</sup> Para 31.

<sup>16</sup> Para 33.

<sup>17</sup> Section 35(1) of the ERA.

[89] In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 Pty Ltd and Another*,<sup>18</sup> the Constitutional Court brought a policy within the ambit of section 172(1)(a) of the Constitution, when considering the housing policy adopted by the Johannesburg Municipality, by declaring such policy unconstitutional. It follows, therefore, that a methodology as a policy or guideline can be declared unlawful and invalid to the extent of its unconstitutionality, in terms of section 172(1)(a) of the Constitution.

[90] NERSA in oral argument before this Court argued that *Blue Moonlighting* was different from the current challenge of a methodology. According to NERSA, in that case, a policy which was in a form of a Code, was being challenged as it was not in line with the enabling legislation which is far from a guideline or a methodology which is being challenged in these proceedings. The argument by NERSA is not sustainable. It has been shown that a methodology or guideline is a policy. Thus, even though the facts of the two cases in question might not be the same, of importance is the principle enunciated in *Blue Moonlighting*, which brought a policy within the purview of section 172(1)(a) of the Constitution and renders it susceptible to a declaration of invalidity.

[91] ESKOM supports the Applicants' argument that NERSA's complaint, that the Applicants' claim should not be entertained due to the reason that there is no challenge to an individual tariff approval, in these proceedings, does not get off the ground. The reason provided by ESKOM in support of this argument, slightly different from that of the Applicants, is that NERSA is confusing issues of the reviewability of a policy or a guideline on the one hand, and the separate question, of whether or not the policy or guideline amounts to administrative action. In reinforcement of its argument, ESKOM submitted, correctly so, that whether or not the guideline is administrative action is neither here nor there,

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<sup>18</sup> 2012 (2) SA 104 (CC) para 104(e)(iii).

because in this matter, the guideline, is exercised pursuant to a statutory power and hence it is reviewable under the legality principle.

[92] As argued, correctly so, by ESKOM, there is settled law that emanates from a long line of cases which held that any exercise of statutory power is reviewable under the legality principle. NERSA, in this matter, derives the statutory power to make guidelines, from the provisions of section 35(1) of the ERA, as this Court has also found, which stipulate that the regulator (NERSA) may, after consultation with licensees, municipalities that reticulate electricity and such other interested persons as may be necessary, make guidelines and publish codes of conduct and practice or make rules by notice in the *Gazette*.

[93] NERSA, in this Court's view, also failed to appreciate that the Methodology and the decision to apply that Methodology, can be challenged separately, without any dependence on each other.

[94] The decision in *PG Group* is instructive in this regard. The Court in that judgment, held distinctively so, in its majority judgment *per* Khampepe J, that decisions of this nature are two separate decisions which can be separately challenged. In *PG Group*<sup>19</sup>, the Court expressed itself, as follows:

*"In any event, even if the Maximum Pricing Methodology did constitute a reviewable decision in terms of PAJA, it is not the decision that is being reviewed and it does not preclude the Maximum Price Decision, which is an administrative action in terms of PAJA, from being reviewed. The implementation of the Maximum Pricing Methodology in deciding the maximum gas prices was a separate, substantive administrative decision, capable of being independently reviewed. Counsel for the respondents agreed with this proposition in oral argument. Nevertheless, even where the Maximum Pricing Methodology was found to be lawful, the substantive validity alone of the methodology could not*

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<sup>19</sup> Para 36.

*validate a decision taken in terms of it. It must therefore follow that the Maximum Price Decision, when implemented, is capable of independent review. Any other approach would be incorrect.”*

[95] The above quotation lays emphasis on what was previously stated that the methodology and the decision to apply that methodology, are two separate decisions, each of which can be challenged separately, without any dependence on the other.

[96] Importantly, sight should not be lost of the fact that the application before this Court is for a declaratory order of invalidity against the methodology, the Guideline and Benchmarking Method, that NERSA applies when approving the municipal electricity tariffs. This is what is being challenged, not NERSA’s decision to approve the municipal electricity tariffs. Thus, it is this Court’s finding that the correct challenge is before this Court.

*The Court’s Discretion Conferred in terms of Section 21(1)(c) of the Superior Courts Act.*

[97] NERSA contends, on this point, that the declaratory remedy sought in this application, is abstract, academic or hypothetical. This is so, according to NERSA, because the municipal tariff guidelines and benchmark is a preparatory step towards the final determination of municipal tariffs and thus not a final step in the municipal tariff review process. Importantly, so NERSA argues, no finality has actually been reached on how municipal tariffs would be assessed and determined for the year 2022/2023. As such, NERSA submits that the Applicants cannot find redress through the application for a declaratory order because the Applicants are in effect asking the court to express an opinion.

[98] Relying on the provisions of section 21(1)(c) of the Superior Courts Act, which vests the Court with discretionary power to grant a declarator where it

would be an appropriate relief, NERSA opines that since the remedy sought by the Applicants is abstract, academic and hypothetical as indicated above, this Court cannot exercise its discretion in favour of granting the said remedy. In support of this contention, NERSA referred to the judgments in *Cordiant Trading CC v Daimler- Chrysler Financial Services*,<sup>20</sup> and *Trinity Asset Management (Pty) Ltd v Investec Bank*.<sup>21</sup>

[99] To the contrary, the Applicants submit that they claim in this application, both a declaration of invalidity under section 172(1)(a) of the Constitution, as well as, a consequential interdict. They proceed to state that Courts have no discretion to refuse to make a declaration of invalidity once they have found that an exercise of public power is unlawful, and as such, this case is not a case where this Court can be asked to exercise the discretion conferred on it by section 21(1)(c) of the Superior Courts Act.

[100] In accordance with section 21(1)(c) of Superior Courts Act, this Court has the power

*"...in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future, or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination".*

[101] The provisions of this section, confers on the Court the discretion to grant declaratory orders.

[102] Both the Applicants and NERSA are in agreement, based on different grounds, that section 21(1)(c) of the Superior Courts Act, does not find application in the circumstances of this application. NERSA's reason is that this

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<sup>20</sup> 2005 (6) SA 205 (SCA) at 212H.

<sup>21</sup> 2007 (5) SA 564 (W) para 25.

Court cannot exercise its discretion in terms of section 21(1)(c) of the Superior Courts Act to grant the Applicants the order they seek in the application because a declaratory order is a discretionary remedy which can assist in clarifying a legal and constitutional obligation in a manner that promotes the Constitution and its values. This, however, according to NERSA is not the case in the remedy sought by the Applicants. The remedy the Applicants seek, so NERSA contends is abstract, academic or hypothetical and will not assist in clarifying a legal and constitutional obligation in a manner that promotes the Constitution and its values. This Court, can therefore, not exercise its discretionary power as envisaged in section 21(1)(c) of the Superior Courts Act, to grant an order the remedy of which is abstract, academic or hypothetical.

[103] The Applicants reason, on the other hand, is that the relief they are claiming for in this application, is in the form of a prohibitory interdict which is consequential upon the declaration of invalidity. The claim as they say, is in terms of section 172(1)(a) of the Constitution, the effect of which is for the Court to make a declaration of invalidity once it finds that an exercise of public power is unlawful. This, according to the Applicants, does not require the exercise of a Court's discretion in terms of section 21(1)(c) of the Superior Courts Act, as argued by NERSA.

[104] It is noteworthy that, in its argument, NERSA wrongly classifies the Guideline and Benchmarking Method which the Applicants seek to declare unlawful, as a preparatory step towards the approval of the tariff that renders the application premature, and therefore, as abstract, academic or hypothetical. It is this Court's view that the Applicants' claim is neither abstract, academic or hypothetical. The Guideline and Benchmarking Method of NERSA is a guide or a policy that NERSA has adopted and uses it, when determining the municipal electricity tariffs; and if found to be unlawful, this Court must, in terms of section 172(1)(a) of the Constitution, declare it unconstitutional and

invalid to the extent of its inconsistency. As a result, section 21(1)(c) of the Superior Courts Act does not find application, in such a case.

### *The Principle of the Separation of Powers*

[105] City Power argues that the principle of the separation of powers militates against the granting of the substantive relief of the declaration of invalidity sought in paragraph 2, as well as the prohibitory interdict sought in paragraph 3 of the Notice of Motion.

[106] The submission by City Power is that while section 15 of the ERA sets out the broad tariff principles that NERSA must follow in its regulation of electricity prices and tariffs, there is no statutory provision which prescribes a methodology to do so. The legislature left the development of the methodology to the discretion of NERSA. Requiring that this Court interfere in NERSA's lawful exercise of its discretion offends against the established principle of the doctrine of separation of powers, so argues City Power.

[107] What the Applicants seek to do, according to City Power, is to have the Court interfere with the statutory discretionary powers which NERSA has, to select and determine the methodology. The Court does not have the expertise, nor the power to decide for NERSA what methodology to use. Therefore, to require the Court to interfere in NERSA's lawful exercise of its mandate and discretion would offend against the doctrine of separation of powers.

[108] In support of the above argument, City Power, referred this Court to the recently decided case of the Supreme Court of Appeal in *National Lotteries Board v South African Education*<sup>22</sup>, which held that –

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<sup>22</sup> 2012 (4) SA 504 (SCA) para 9.



*"Indeed, because the grant or refusal of an application involves the exercise of a discretion, our courts have recognised that it is prudent for decision-makers to apply guidelines or general criteria to assist them with this task. And, provided that these criteria are compatible with the enabling legislation, the only constraint is that they may not be applied rigidly or inflexibly in a particular case. For if they are applied in this manner the decision-maker elevates the guideline to an immutable rule and thereby fetters its discretion, which it may not do."*

[109] In response to City Power's argument, the Applicants submit that the argument is without substance. The Applicants' reason being that the principle of the separation of powers does not preclude a Court upon which the Constitution has conferred the necessary power, as section 169(1), thereof does, in relation to the High Court, from deciding whether any law or conduct is inconsistent with the Constitution, and if it is, to declare it invalid to the extent of its inconsistency.

[110] The principle of the separation of powers, according to the Applicants, finds operation in circumstances where, put generally, the merits of a decision are brought under review. In terms of the principle of separation of powers, Courts have been cautioned not to become a kind of an appellate authority in relation to decisions taken by parliament or the executive. The Courts' powers, as contended for by the Applicants, are focussed primarily on legality, which includes the principle of rationality or the requirement of rationality, and when dealing with administrative actions provided for in section 6(2) of PAJA for valid administrative decision making.

[111] But, with a legality challenge, like in this matter, the Constitution, which is the foundation for any valid exercise of public authority by organs of state, like NERSA, provides that they may not exercise any power which is not conferred on them by legislation and including the Constitution itself. That, as

argued by the Applicants, is the very essence of the principle of legality, which is founded on the rule of law.

[112] In support of their argument, the Applicants referred to the recent Constitutional Court judgment in *Premier Gauteng v The Democratic Alliance*,<sup>23</sup> wherein that Court restated the principle of legality and its implications. The Constitutional Court in that case, confirmed the long held decision that in a legality challenge, there is no question of the Court making a decision, which has been reserved by the Constitution for or within the domain of another branch of government, here being NERSA.

[113] ESKOM, supporting the Applicants on this point, argues that City Power's contention that if this Court were to decide this case, it would violate the separation of powers, is simply wrong. According to ESKOM, under the separation of powers, questions of legality are reserved for the judiciary.

[114] The contention is that, if a policy is unlawful, because it mandates an unlawful approach to the determination of municipal tariffs, the Court is not only entitled to declare it unconstitutional and invalid, it is in fact the judicial duty of the Court under section 172(1) of the Constitution. Thus, performing that duty does not infringe the separation of powers, the Court is merely performing a duty reserved for the judiciary under the separation of powers.

[115] The Applicants' submission that, the Court is not being asked to interfere with the functions of a specialist regulator, as City Power seeks to suggest, is correct. The Applicants as they say, are not asking the Court to tell the regulator what to do, or to prescribe to NERSA what Methodology to employ when determining the municipal electricity tariffs. There is nowhere in their

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<sup>23</sup> 2022 (1) SA 16 (CC) at para 65 to 67.

papers, where they seek an order directing NERSA to apply the Cost of Supply Method or any other particular methodology.

[116] The Applicants are only, challenging the legality of the Method currently used by NERSA, on the ground that it is inconsistent with section 15(1)(a) of the ERA, and that it should, consequently, be declared unlawful and invalid. This, as the Applicants, rightly so argue, is a legality challenge, the adjudication of which falls squarely within the heartland of the judicial authority, which is conferred on the Court by section 165(1) of the Constitution. It is the Court's primary function to ensure in public law matters that organs of state act lawfully, within the confines of legality.

[117] Whilst it is correct that no statutory provision prescribes the methodology to regulate electricity prices and tariffs, and that the legislature left the development thereof to NERSA, it is, however, not correct that by interfering with the lawfulness of the Method employed by NERSA, would be to interfere with NERSA's discretion. In terms of section 172(1)(a) of the Constitution, this Court is empowered to declare any law or conduct that is inconsistent with the Constitution invalid to the extent of its invalidity.

[118] The Constitutional Court in *PG Group* held that a methodology is not law but rather a guideline. And in *Blue Moonlight Properties*, a guideline or policy was brought within the purview of section 172(1)(a) of the Constitution, and has been made, susceptible to the declaration of invalidity.<sup>24</sup> Therefore, it is the view of this Court that, declaring the Methodology employed by NERSA in determining the municipal electricity tariffs, which is also a policy, unlawful and invalid will not offend against the principle of the doctrine of separation of powers.

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<sup>24</sup> Para 33. See also *Arun Property Development v Cape Town City* 2015 (2) SA 584 (CC) para 47.

### *Disputes of Fact*

[119] Whilst the Applicants concedes that there may be disputes of fact on the papers, they, however, submit that there are no real genuine and *bona fide* disputes of fact, raised specifically by NERSA, and that a final order can be granted on the papers. However, in the event that the Court rules against them on that submission, their alternative submission is that this is an appropriate case why the Court should then refer the matter to oral evidence. In other words, should the Court find that there are material disputes of fact, about what the Guideline and Benchmarking Method entails, then the matter should be referred to oral evidence.

[120] For the decision that this Court comes to on the merits of this matter, it is this Court's view that there are no material disputes of fact warranting that the matter not to be decided on the papers as they stand. As a result, it is this Court's finding that a final order can be granted on the papers as they stand.

[121] Having rejected all the special defences raised by NERSA and City Power, this Court will now entertain the merits of the application.

### **WHETHER THE METHODOLOGY VIOLATES THE TARIFF PRINCIPLES SET OUT IN SECTION 15(1) OF THE ERA.**

[122] The Applicants thesis, as supported by ESKOM, in this regard is that the Guideline and Benchmarking Method that NERSA applies when considering and approving municipal electricity tariffs, is unlawful for the reason that it is inconsistent with the principles prescribed for electricity tariffs in section 15(1) of the ERA and for other reasons dealt with hereunder.

[123] The Applicants' complaint, further, that the tariffs set by NERSA's Guideline and Benchmarking Method for an individual municipality are tariff - reflective: they reflect average levels of tariffs charged by all municipalities.

They do not reflect the costs that an individual municipality incurs in separate customer categories, nor are they representative of the allowable revenue appropriate to recover that municipality's efficient costs.

[124] NERSA, on the other hand, asserts that the Applicants have failed to show the discrepancy from the usage of the Guideline and Benchmarking Method from the requisites of section 15(1) of the ERA and the Policy Positions 24 to 34 of the EPP.

[125] In particular, City Power denies that the Guideline and Benchmarking Method is inconsistent with the principles prescribed for electricity tariffs in section 15 of the ERA. The contention is that if a specific municipality overcharges its customers, blame should not be placed at the door of NERSA, as it is the function of individual municipalities to set tariffs in line with their individual and localised conditions. Furthermore, whilst, City Power, does concede that the COS study is a requirement, in line with the EPP, it contends that COS does not in and on itself constitute a tariff determination methodology.

The Methodology adopted by NERSA when determining Municipal Electricity Tariffs:

[126] On an annual basis, NERSA issues a municipal tariff guideline which approves a percentage guideline increase for municipally charged electricity tariffs, and, reviews the municipal tariff benchmarks. The municipal guideline tariff increase, is said to, assists municipalities in preparing their budget while the revised benchmarks are used to evaluate municipal tariff applications.

[127] The municipal guideline tariff increase is based on the approved increase in the bulk price of electricity supplied by ESKOM to municipalities. Only once the municipal guideline tariff increase has been published, can municipalities finalise and apply for their proposed tariff increases.

[128] In preparation for the 2021/22 municipal financial year tariff determination process, NERSA is said to have published a consultation paper titled the "Municipal Tariff Guideline Increase, Benchmarks and Proposed

Timelines for Municipal Tariff Approval Process for the 2021/22 Financial Year' ("the Consultation Paper") and invited comments from stakeholders.

[129] The Consultation Paper referred in the 'Background Section' thereto, to:

129.1 NERSA's 'historical' use of the benchmarking approach, '*which sought to ensure that tariffs do not vary vastly among the various electricity distributors*'.

129.2 '*[S]takeholders' pleas with NERSA to move towards a cost-based approach when setting tariffs for municipalities*'

[130] The Consultation Paper went on to propose two '*Alternative Regulation Approaches*'. The first required municipalities '*to set their tariffs based on a comprehensive cost of supply studies*', and the second was a '*hybrid approach requiring municipalities to indicate their revenue forecast translated into tariffs*'. The hybrid approach described in the Consultation Paper is said to be essentially the Guideline and Benchmarking Method NERSA has been applying for years.

[131] Resulting from the Consultation Paper, NERSA issued a documents titled the Tariff Methodology Determination, reflected in Annexure FA1. The Tariff Methodology Determination, read with the Determination Reasons thereto, Annexure FA2, adopted two different, alternative methods, namely –

131.1 The first method is the cost of supply (COS) method which states that '*[I]licensees are required to migrate to the COS [method]*'.

131.2 The second method is the benchmarking approach that, it is alleged, NERSA has been applying for over a decade.

The Tariff Methodology Determination and Reasons, make it clear this is the approach NERSA will apply until licensees '*migrate*' to the COS method: while the COS method is recommended in the long term, the guideline increase and benchmarks will be used in the interim.

## The General Process for Setting Municipal Electricity Tariffs

[132] The process for setting municipality electricity tariffs, as stated hereunder is common cause, and takes place in stages:

132.1 In the implementation of the ERA and the EPP, NERSA starts by issuing the periodic Multi-Year Tariff Determination (“the MYPD”) that determines the revenue which ESKOM is permitted to recover during the relevant MYPD cycle. These determinations typically extend over three to five-year periods. They set, amongst other things,

- (a) the wholesale price at which ESKOM sells electricity to the municipalities, and
- (b) the tariff at which ESKOM’s distribution division sells electricity to ESKOM customers.

The reason ESKOM’s MYPD is the starting point for municipal electricity tariffs is that ESKOM wholesale price is a major component of the cost to municipalities of supplying electricity to their customers.

132.2 In the second step, NERSA issues a consultation paper setting out its proposed methodology for determining municipal electricity tariffs and invites comments from stakeholders. NERSA then considers the written comments, and in some years, public hearings are held. Emanating from the consultation process, NERSA issues a municipal electricity tariff document, containing NERSA’s decision on –

- 132.2.1 the guideline increase, stated as a percentage to be applied to the current years’ tariffs to yield the following year’s tariffs; and

132.2.2 the benchmark tariffs for various categories of customers (domestic, commercial, industrial, agricultural).

[133] The Guideline and Benchmarking Methodology is said to be premised on there being an existing set of benchmark tariffs. The current year's benchmark tariffs are determined by taking last year's benchmark tariffs, and then increase them by applying the guideline increase percentage. It means that the benchmark tariffs are not calculated from scratch every year. The previous year's benchmark tariffs are increased by the current year's guideline increase percentage to yield the current year's benchmark tariffs.

[134] NERSA asserts that for the Methodology in question, relevant considerations were taken into account as follows: a guideline increase of 14,59% based on bulk purchases increases in line with ESKOM's tariff increase to municipalities; salary and wage increase in line with the Bureau of Economic Research consumer price index; finance costs in line with the announcement by the Reserve Bank that the repo rate will be kept unchanged; repairs and maintenance, and other expenses (including depreciation) increased in line with the CPI.

[135] After the municipal electricity tariff document containing NERSA's decisions on the guideline increase and the benchmark tariffs has been issued in a particular year, each municipality must submit its tariff application for the following year to NERSA.

[136] Once a municipality's proposed tariffs have been approved by NERSA, they are incorporated into the municipality's annual budget, to be approved by the municipal council.

#### The Regulatory Framework

[137] The regulatory framework directly relevant to this point is the framework governing the setting of electricity tariffs by NERSA, that is, the ERA, together with conditions attached to licences issued by NERSA in terms of the ERA, and



the South African Electricity Supply Industry: Electricity Pricing Policy ('the EPP').<sup>25</sup>

[138] In addition, when it comes to electricity tariffs that municipalities charge their customers, another suite of legislation applies too: namely, the local government-related legislation and the Constitution, namely -

138.1 the Local Government: Municipal Systems Act ("the Systems Act"),<sup>26</sup> which governs how municipalities charge for services they provide; and

138.2 section 229(1)(a) of the Constitution and the Municipal Fiscal Powers and Functions Act ("the Municipal Fiscal Powers Act"),<sup>27</sup> that permits municipalities to add a surcharge to the fees they charge for services.

[139] The aforementioned statutes are dealt with hereunder:

#### The Electricity Regulation Act

[140] One of the aims of the ERA is to establish a national regulatory framework for the electricity supply industry. The relevant provisions of the ERA for the purposes of this judgment are:

140.1 Section 4, which sets out the powers and duties of NERSA, that include the duty of NERSA to regulate prices and tariffs, that is, charges for electricity;<sup>28</sup> and to enforce performance and

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<sup>25</sup> Published by the then Department of Minerals and Energy in December 2008.

<sup>26</sup> Act 32 of 2000.

<sup>27</sup> Act 12 of 2007.

<sup>28</sup> Section 4(a)(ii) of the ERA.

compliance, and to take appropriate steps in the case of non-performance.<sup>29</sup>

140.2 Section 7(1) which empowers NERSA to issue licences for operators of electricity undertakings (including municipalities that operate electricity undertakings).

140.3 Section 14(1) that allows NERSA to attach conditions to licences on a range of matters, including (i) the furnishing of information;<sup>30</sup> (ii) the setting and approval of prices, charges, rates and tariffs;<sup>31</sup> (iii) the methodology to be used in the determination of rates and tariffs;<sup>32</sup> and (iv) the regulation of the revenues of licensees.<sup>33</sup>

140.4 Section 15 headed 'Tariff Principles':

140.4.1 Sub-section 15(1) is the provision that sets out the fundamental principles of electricity price regulation in South Africa. It sets out the legal requirements with which NERSA must comply when approving the electricity tariffs its licensees may charge their customers. It provides that licence conditions relating to the setting or approval of 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;<sup>34</sup>

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<sup>29</sup> Section 4(a)(vii) of the ERA.

<sup>30</sup> Subsection (1)(b).

<sup>31</sup> Subsection (1)(d).

<sup>32</sup> Subsection (1)(e).

<sup>33</sup> Subsection (1)(g).

<sup>34</sup> Subsection (1)(a).

- (b) must provide for or prescribe incentives for continued improvement of the technical and economic efficiency with which services are to be provided;<sup>35</sup>
- (c) must give end users proper information regarding the costs that their consumption imposes on the licensee's business;<sup>36</sup>
- (d) must avoid undue discrimination between customer categories;<sup>37</sup> and
- (e) may permit the cross-subsidy of tariffs to certain classes of customers.<sup>38</sup>

140.4.2 In terms of subsection 15(2), licensees are only permitted to charge their customers NERSA-approved tariffs as part of their licensing conditions.

140.5 Section 16(1)(a) which empowers NERSA to vary any licensing condition (including the approved tariffs) on application by the licensee.

140.6 Section 27(i) which requires municipalities to keep separate financial statements, including a balance sheet of the reticulation business.

### The Electricity Pricing Policy

[141] The EPP articulates national government's policy on electricity pricing in South Africa. It describes itself as providing 'direction and principles for the

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<sup>35</sup> Subsection (1)(b).

<sup>36</sup> Subsection (1)(c).

<sup>37</sup> Subsection (1)(d).

<sup>38</sup> Subsection (1)(e).

formulation of electricity prices in South Africa'. It sets out guidelines in the form of a series of 'Policy Positions' in electricity pricing, and, thus, reinforces and explains the pricing principles prescribed in the ERA. The EPP explains that 'the key principle for distribution pricing is that tariffs would be cost reflective, and that the relevant policy positions 'are in support of cost reflectivity.

[142] The relevant Policy Positions, for purposes of this judgment are:

142.1 Policy Positions 1, and 2 that apply generally across the electricity supply industry, and provides as set out hereunder:

142.1.1 Policy Position 1, provides that the revenue requirement or a related license must be set at a level which covers the full cost of production including a reasonable risk adjusted margin or return on appropriate asset values.

142.1.2 Policy Position 2, provides that 'All tariffs should become cost-reflective over the next five years, subject to specific cross-subsidies as provided for in section 9. And, that the average level of all the tariffs must be set to recover the approved revenue requirement. The tariff structures must be set to recover costs as follows: the energy cost for a particular customer category; the network usage cost for a particular consumer category; and service costs associated therewith.

142.2 Policy Positions 23 to 43 that apply specifically to the distribution sector and, therefore, to electricity tariffs charged by municipal licensees (as well as by ESKOM's distribution division). In particular, the following Policy Positions 23 and 27, are applicable:

142.2.1 Policy Position 23 provides that the industry's Cost of Supply (COS) methodology and some models to calculate these costs have existed for more than ten years. It has nevertheless only been applied by a few utilities, thus leaving the extent of cross-subsidies largely unknown.

And further provides that Electricity distributors shall undertake COS studies at least every five years but at least when significant licensee structure changes occur such as in customer base, relationships between cost components and sales volumes. This must be done according to the approved NERSA standard to reflect changing costs and customer behaviour. The cost of service methodology used to derive tariffs must accompany applications to the regulator for changes to tariff structures.

142.2.2 Policy Position 27 which sets out the cost components that should ideally be included in addressing cost reflective tariffs, to reflect the costs accurately.

[143] In as far as the local government legislation is concerned, the following relevant provisions are applicable:

143.1 Section 74 of the Systems Act that requires municipalities to adopt and implement tariff policies on the levying of fees for municipal services. The policies must reflect the following principles:

- (a) The amount individual users pay for a service should generally be in proportion to their use of the service.<sup>39</sup>
- (b) Tariffs must reflect the costs reasonably associated with rendering the service, including capital, operating, maintenance, administration and replacement costs, and interest charges.<sup>40</sup>
- (c) The economical, efficient and effective use of resources must be encouraged.<sup>41</sup>

143.2 Section 229(1)(a) of the Constitution (headed Municipal fiscal powers and functions') which authorises municipalities to impose surcharges on fees for services they provide. This is essentially a taxing power.

143.3 The Municipal Fiscal Powers Act that authorises the Minister of Finance to prescribe norms and standards relating to municipal surcharges. And, is the framework legislation which regulates the process to be followed by municipalities when imposing and publishing surcharges.<sup>42</sup>

#### Discussion

[144] The most pertinent provision, and the fulcrum on which the matter turns is section 15(1) of the ERA read with the relevant Policy Positions of the EPP. The tariff principle and relevant Policy Positions are dealt hereunder, in turn.

#### *Requirements of Section 15(1)(a) of the ERA*

[145] Section 15(1)(a) of the ERA provides that licence conditions relating to the setting or approval of tariffs and the regulation of revenues must enable an

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<sup>39</sup> Section 74(2)(b).

<sup>40</sup> Section 74(2)(d).

<sup>41</sup> Section 74(2)(h).

<sup>42</sup> Section 9(2) read with section 75A(2), (3) and (4) of the Systems Act.

efficient licensee to recover the full cost of its licenced activities, including a reasonable margin or return. The EPP on the other hand, makes it clear that NERSA must investigate a licensee's cost of supply, and the said price levels which, on an overall level, are reflective of the licensee's overall cost of supplying the licence service, including the reasonable rate of return on capital. Section 15(1)(a) of the ERA must be read in conjunction with section 14(1)(d),<sup>43</sup> of the ERA. The subsection deals with conditions of licence that relates to section 15(1)(a) of the ERA.

[146] Section 14(1)(d) of the ERA is the precursor to section 15(1)(a) of the ERA as it sets out the licence conditions relating to the setting and approval of prices, charges, rates and tariffs. Therefore, for such a licence condition to apply it must be embodied in the licence in which NERSA wants the condition to be applicable. For example, for purposes of this judgment, NERSA has made municipal electricity distribution licences subject to a condition that, it (NERSA), shall determine tariffs at which the licensees shall supply electricity to its customers. This licence condition is embodied in all municipal electricity distribution licences.

[147] The Applicants, supported by ESKOM, denounce the Guideline and Benchmarking Method as unlawful because it does not provide for consideration of the actual electricity supply costs for a particular licensee for the year in question, nor does the Method involve any determination of a reasonable margin or return for that particular year. They assert that the Guideline and Benchmarking Method is based on averages and generic norms which are applied to all municipalities regardless of their costs and efficiencies. This results, in municipalities charging tariffs that are much higher than the cost of supplying the electricity efficiently.

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<sup>43</sup> Section 14(1)(d) of the ERA deals with the licence conditions pertaining to the settling and approval of prices, charges, rates and tariffs charged by licensees.

[148] This is denied by NERSA. NERSA opines firstly that, there is no requirement that the Guideline and Benchmarking Method must comply with the requirements of section 15(1)(a) of the ERA and EPP. The said section is alleged to merely set out requirements for the determination of electricity tariffs. Secondly, the Methodology does take into account costs component and contain performance indicators that are used to assess tariff application. The assessment process is, thus, not mechanical, according to NERSA.

[149] This Court is persuaded by the Applicants' submissions on this point. As correctly argued by the Applicants, the key principles, reflected in the ERA and the EPP and consistent with accepted economic regulatory practice, is that the revenue generated from electricity distribution must reflect the cost of providing the distribution service. The total revenue requirement, that is, the starting-point for the tariff determination — must be set at a level that allows an electricity undertaking to recover the full cost of its regulated activities, including a reasonable margin or return. This is reflected in the tariff-setting principles outlined above and principally set out in section 15(1)(a) of the ERA, which provides that licence conditions relating to the setting or approval of tariffs and the regulation of revenues must enable an efficient licensee to recover the full cost of its licensed activities including a reasonable margin or return.

[150] Furthermore, as an indication that individual licensee's costs are not considered during the approval process, the evidence shows that if the municipality's proposed tariffs fall within the parameters of the guideline document, NERSA will approve them without an assessment of that municipality's cost of supply or inefficiencies, and without determining what would be reasonable margin or rate of return for the municipality. Those matters are considered only if a municipality's proposed tariffs are higher than the upper parameters in the guideline document. There is no public participation element to the individual municipal tariff approval process, as contended by NERSA.

[151] The evidence show that a municipality applying for a tariff increase is not required to substantiate its application with reference to its actual costs of



supply; it does not need to demonstrate the relationship between its actual costs and the tariffs it is applying for, or the benchmark tariffs generally. It merely has to bring itself within the benchmarks for its application to be approved.

[152] The analogy used by City Power's counsel when he wanted to show how impossible it is to describe an efficient licensee, is apposite in showing that the Methodology adopted by NERSA is unlawful as it does not cater for the needs of individual municipalities. Counsel indicated that there are 180 municipalities in South Africa, located in different parts of the country, some of which are in rural areas whilst others, like City of Johannesburg, are in highly urbanised areas. Counsel, conceded, correctly so, in his oral argument that these different municipalities cannot have one size fits all. It is this Court's view, as well, that all these municipalities, as alluded to by counsel, cannot be painted with the same brush.

[153] Additionally, section 27(i) of the ERA requires municipalities to keep separate financial statements, including a balance sheet of the reticulation business. The reason for that requirement links back to the tariff principles in section 15(1) of the ERA, because the primary determinant of a particular licensee's tariffs and revenues is the particular licensee's total electricity-related costs. NERSA needs accurate and sufficient information about the costs of the licensee's electricity-related activities. However, since municipalities carry out a wide range of functions and activities, of which the supply of electricity is only one, section 27(i) of the ERA has been enacted to ensure that municipalities keep separate, or ring-fenced, financial records of their electricity undertakings so that NERSA can, easily and readily, verify their electricity-related costs. Those costs will also allow NERSA to determine a reasonable margin; and the balance sheet of their reticulation businesses will allow NERSA to determine a reasonable rate of return on the value of their capital investment in that business.

[154] There is, however, no evidence on record that indicates that the Methodology used by NERSA enables it to ascertain that municipalities do comply with the requirement of section 27(i) of the ERA. Consequently, it cannot be said that the Methodology entails the determination of the recovery by the municipality of a reasonable margin or return for that particular licensee, in the year in question, as envisaged by section 15(1)(a) of the ERA.

[155] In any event, NERSA concedes that the Method is tariff reflective instead of cost reflective, which according, to this Court, is an indication of failure to comply with one of the tariff principles required by section 15(1) of the ERA.

*Requirements of Section 15(1)(c) of the ERA*

[156] In terms of section 15(1)(c) of the ERA, licence conditions relating to the setting or approval of tariffs and the regulation of revenues must give end users proper information regarding the costs that their consumption imposes on the licensee's business.

[157] NERSA's submission is that such information is provided as all electricity distribution licensees are ordinarily required to complete the electricity distribution forms (D-Forms) per financial year to provide proper information. NERSA contends that it is imperative that the information provided to NERSA in the D-Forms be accurate and a true reflection of the electricity distribution business. The D-Forms are accompanied by supporting documents like annual financial statements, ESKOM invoices of all points of supply to confirm purchases, the billing reports to confirm units sold, the trial balance to assess the credit and debit balances of the electricity, the asset register for the electricity department to assess the asset values, an energy losses report to indicate the cause of high energy losses including the plan to curb the loss, and any other relevant information used during the completion of the D-Forms. The supporting documents are said to serve as a D-Forms validation process and confirmation of the accuracy of the D-Forms before acceptance by NERSA.

[158] It is, indeed so, that municipalities do submit certain information, including financial information, to NERSA via standard forms known as D-forms, which are meant to be accompanied by supporting documentation. However, as the evidence show, the accuracy and completeness of the information in the D-Forms leaves much to be desired. NERSA in its evidence fails also to confirm the accuracy and completeness of these forms. It provides evidence as to what ought to be done by the municipalities when completing the forms and furnishing the supporting document. What NERSA fails to say, is what actually happens practically after the forms have been submitted.

[159] In any way, the evidence shows that NERSA does not use the municipality's D-Forms information to test that respective municipality's proposed tariffs for compliance with section 15(1)(a) of the ERA. Instead, NERSA uses some municipalities' D-Forms information to feed into its calculation of the so-called tariff guideline increase, which is an increase rate expressed as a percentage and applied to the year's tariffs to determine next year's tariffs. Essentially, NERSA combines a sample of municipalities' D-Forms information and averages it out as part of the tariff guideline increase calculation. NERSA's Guideline and Benchmarking Method, thus, does not preserve a link between (i) an individual municipality's D-Forms information and (ii) NERSA's determination of, specifically, that municipality's tariffs. The information used for the calculation, is from a sample of the D-Forms submitted and not from all of them. At the time the information is collated from the sample, it would already be outdated.

[160] NERSA, in its evidence, does not claim that it does anything tariff related with the D-Forms information, other than to use it in the calculation of the guideline increase percentage. It does not, even, claim that when it receives the 'within guideline' application from a municipality, it uses that municipality's D-Forms to assess that municipality's actual efficient costs. The evidence does not provide an explanation of whether, and if so how, NERSA determines that

the municipalities' cost of the licences activities of an efficient licensee in the specific municipality's position.

*Requirements of Section 15(1)(d) and (e)*

[161] The provisions of section 15(1)(d) and (e), provides respectively, that licence conditions relating to the setting and approval of tariffs and the regulation of revenues: (d) must avoid undue discrimination between the customer categories; and (e) may permit the cross-subsidy of tariffs to certain classes of customers. In addition, the EPP makes it clear that, in relation to specific customer pricing categories, the tariffs must be reflective of the costs of supplying that customer category, subject only to deliberate and specifically quantified cross subsidisation between customer categories of the sort permitted by section 15(1) of the ERA.<sup>44</sup>

[162] The essence is that licence conditions relating to prices and tariffs must avoid undue discrimination between customer categories and not permit cross-subsidy of tariffs to certain classes of customers. The subsections, require tariffs not just to be cost reflective in relation to the total cost of supplying the service, but, also, require an investigation into the cost reflectivity of tariffs by customer category. It requires that if one category of customers is going to cross-subsidise another category of customers, the extent of that cross subsidisation be identified and investigated before that cross subsidisation can take place. It means that such cross-subsidisation must be deliberate.

[163] Subsection 15(1)(d) of the ERA, further, stipulates that there should be no unreasonable discrimination between customer categories. The discrimination, if any, can only be known if the costs by customer category is determined. Without such determination, it can never be known that because of the application of the Method there is unreasonable discrimination or not, between customer categories.<sup>45</sup> The end result is that NERSA can provide for

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<sup>44</sup> Policy Position 2.

<sup>45</sup> Policy Position 4.

cross-subsidisation between customer categories, but such cross-subsidisation must avoid any undue discrimination.

[164] Even though NERSA wants to argue that the assessment of the individual licensees is not mechanical, there is no evidence on record that indicates that in using the Method when determining the electricity tariffs, NERSA has any regard to the cost of supply of particular customer categories, so that it could consider what cross-subsidy, if any, there was between customer categories supplied by the individual municipalities, and whether that cross-subsidisation was deliberate and justified. Moreover, the D-Forms, that are submitted by the municipalities with the tariff applications do not ask for information that would allow NERSA to investigate cost of supply within specific customer categories.

#### *Other Reasons*

[165] The unlawfulness of the Method is alleged to be compounded further by the addition of surcharges on the previous tariffs. The contention by ESKOM is that the Method in terms of which the approved tariffs are assessed against an approved guideline increase and benchmark range does not exclude the surcharge that was applied to the previous year's tariffs. This, according to ESKOM results in higher tariffs being approved by NERSA.

[166] It is not in dispute that it is only via the power to levy surcharges, conferred by the Constitution and regulated by the Municipal Fiscal Powers Act read with the Systems Act, that a municipality may charge its electricity customers amounts which are greater than the tariffs approved by NERSA. However, there is no evidence on record that indicates that when the Method is used, consideration is taken that the previous year's tariffs the municipalities charged their customers, included the surcharge for that previous year and that before the tariffs are increased, such surcharge is disregarded. In this sense, the tariffs will continue to increase higher than the municipality costs of supply, which is against the requirements of the tariff principles.

[167] Reading from the Consultation Paper referred to in paragraph [128] of this judgment, the move to COS approach is evidently an issue that has been raised by numerous stakeholders, who are desirous to migrate to that approach. And, the Consultation Paper makes it clear that the practical consequence for customers of NERSA's failure to set cost-reflective tariffs, is that, tariffs are increasingly unaffordable.

[168] The Tariff Methodology Determination makes it clear that NERSA wants municipalities to base their tariff-approval applications for 2022/2023 on the COS method. In argument, NERSA actually admits that the Guideline and Benchmarking Method does not take a municipality's cost of supply as its starting point. The Method, on NERSA's own version, is used as an alternative to a cost of supply approach, in the interim, until municipal licenses migrate to a cost of supply approach. The aim, as such, is to move towards the COS approach and continue with the current Method, while an attempt is made to move the entire municipal distribution industry to the COS approach.

[169] NERSA admits that municipalities are in the process of migrating to the COS-based tariff method. It has, already, recommended such migration of in the long term, even though it has not as yet prescribed any timeframe or deadline for the migration. This is indication enough that the Method NERSA uses has material challenges which renders it unlawful as contended for by the Applicants.

[170] From as far back as the 2021/22 municipal financial year, those municipalities that wished to apply for tariff approval using the COS method, were given the latitude to do so, with the proviso that the submission of their applications be before 15 September of the financial year preceding the year for which the tariffs are applied. Many of the municipalities missed the deadline of 15 September 2021 and an extension was granted for the COS tariff-approval applications for the 2023/2024 municipal financial year.

[171] In support of the EPP, that is, Policy Position 23 that states that electricity distributors shall undertake COS studies at least every five years, NERSA developed a COS Framework to be used by all licenced electricity distributors in South Africa. The framework is to be used as a guideline to licensees when developing their COS studies. Municipalities are currently reporting on the information required in the COS studies in the D-Forms submissions, it is thus anticipated that compliance in this regard will not be a hurdle.

### Conclusion

[172] For all the reasons stated above, it is evident that the Guideline and Benchmarking Methodology adopted by NERSA in approving municipal electricity increases, is unlawful. The evidence does not establish any material disputes of fact, as such, final relief as prayed for in the notice of motion, can be granted on the papers as they stand.

### **APPROPRIATE RELIEF**

[173] Following on a finding of unlawfulness in the impugned Methodology, this Court has a wide discretion to consider appropriate relief which is just and equitable - pursuant to section 172 (1) of the Constitution. In this regard, ESKOM in oral argument, proposed that the declaration of invalidity be suspended in order to give certainty to the time within which NERSA should adopt a cost reflective methodology. This Court is of the view that, indeed, the order of invalidity should be suspended to give certainty to the time within which NERSA should adopt a cost reflective methodology. Such an order of suspension will also take into account the issues of impracticality raised by NERSA, in coming up with a cost reflective method within the timeframe suggested by the Applicants. It will also give credence that this Court did consider the alleged cumbersome process that NERSA has to follow, to eventually adopt a cost reflective method. Hence, this Court's view is that the

timeframe ought to be extended and the prohibition to be with effect from 2024/2025 municipal financial year.

## **COSTS**

[174] As regards costs, the Applicants submit that the engagement of two counsel, including a senior counsel was a reasonable precaution, given the importance and relative complexity of this matter, and if the Applicants are successful the submission is that there is no reason why cost should not follow the result.

[175] The Applicants pray for an order for costs of suit, including the cost of one senior and one junior counsel to be paid by NERSA.

[176] This Court is, similarly of the view that this case is important and relatively complex and, thus, required the employ of two counsel, one senior and one junior. The Applicants are substantially successful in their case, consequently, costs should follow the result.

[177] The Applicants sought an order of costs only against NERSA. An order of costs is, thus, to be awarded against NERSA only.

## **ORDER**

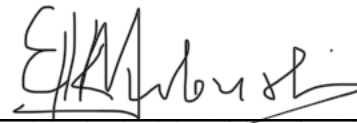
[178] In the circumstances, the following order is made:

1. The Guideline and Benchmarking Method, used by the National Energy Regulator of South Africa, when approving municipal electricity tariffs, as set out in the record of decision issued by the National Energy Regulator of South Africa and entitled 'Determination of the Municipal Tariff Guideline and Revision of Municipal Tariff Benchmarks for the 2021/2022 financial year', and



as extended to the 2022/2023 municipal financial year, is hereby declared unlawful, invalid and of no force and effect.

2. The declaration of invalidity is suspended for a period of twelve (12) months, from the date of this order, to allow the National Energy Regulator of South Africa an opportunity to correct the defect.
3. The National Energy Regulator of South Africa is prohibited from applying the Guideline and Benchmarking Method when considering and approving municipal electricity tariffs with effect from the 2024/2025 municipal financial year.
4. The National Energy Regulator of South Africa is ordered to pay the First Applicant and the Second Applicant the costs of this application, such costs to include costs of two counsel – one senior and one junior.



**E.M KUBUSHI**

**JUDGE OF THE HIGH COURT  
GAUTENG DIVISION, PRETORIA**

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on 20 OCTOBER 2022.

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