

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

CASE NO: 022464/2023

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE: 4 APRIL 2024

SIGNATURE

In the matter between:

**SOUTH AFRICAN LOCAL GOVERNMENT
ASSOCIATION**

Applicant

and

**NATIONAL ENERGY REGULATOR OF SOUTH
AFRICA**

First Respondent

ESKOM HOLDINGS SOC LIMITED

Second Respondent

**MINISTER OF MINERAL RESOURCES AND
ENERGY**

Third Respondent

**MINISTER OF CO-OPERATIVE GOVERNANCE
AND TRADITIONAL AFFAIRS**

Fourth Respondent

MINISTER OF PUBLIC ENTERPRISES

Fifth Respondent

MINISTER OF ENERGY

Sixth Respondent

ORDER

The application for leave to appeal is refused with costs, such cost to include the costs of multiple and senior counsel, where employed.

J U D G M E N T
(In the application for leave to appeal)

This matter has been heard in open court and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J (Collis and Nyathi JJ concurring)

Introduction

[1] On 1 December 2023 this court refused an application by the South African Local Government Association (SALGA) to review the approval of a tariff increase for Eskom for the bulk electricity tariffs for the 2023/2024 and 2024/2025 financial years by the National Energy Regulation of South Africa (NERSA) (the tariff determination).

[2] SALGA seeks leave to appeal the refusal of its review application.

SALGA's grounds

[3] Although a good many grounds were identified in SALGA's application for leave to appeal, these culminated in three main points during oral argument. These were: (1) that NERSA had not considered the impact and costs of corruption, fraud and wasteful expenditure at the first stage of the determination (the allowable revenue stage); (2)

NERSA did not properly consider the issue of overstaffing at Eskom and (3) that NERSA had failed to conduct a detailed assessment on the impact of the tariff determination on consumers who purchase electricity from municipalities.

[4] I hasten to add, as we did in the main judgment, that SALGA's complaints were not that the tariffs determined were too high. In fact, should provision be made for the inclusion of costs of possible corruption and fraud, the tariffs would probably have increased.

Ad the provision for corruption, fraud and wasteful expenses

[5] SALGA's argument commenced with a reference to the objects of the Electricity Regulation Act¹ and in particular that contained in section 2(b) of that Act. That subsection provides that one of the objects of the Act is to "*ensure that the interests and needs of present and future electricity customers and end users are safeguarded and met*". SALGA argued that, to ignore the effects of corruption and fraud, would fall foul of this objective.

[6] On behalf of NERSA Adv Maenetje SC argued that NERSA had indeed considered the impact of corruption and fraud but had determined that the impact of such impropriety can best be catered for at the RCA stage. There are many reasons for this, but the most obvious is that it would be almost impossible to forecast what the costs of these factors would be, particularly when active steps are taken to prevent corruption and fraud. It is almost as if NERSA is required by SALGA to allow Eskom to "budget" for an amount of theft to take place, rather than to prevent it. There is also an amount of "clawback" taking place in respect of previously corrupt dealings which are also difficult, if not impossible, to predetermine. To allow for both the aspects of losses due to corruption and fraud and the gains of recovery at the RCA stage by way of actual figures would result in a more precise accounting rather than an unknown or indeterminate amount being included as an "allowable" revenue. In any event, the RCA stage was "*a crucial component in the methodology for determining Eskom tariffs*".²

¹ 4 of 2006.

² *Eskom v NERSA* (74870/2019) [2020] ZAGPJHC 168 (28 July 2020) per Kollapen J

[7] Eskom also opposed the application for leave to appeal and similarly argued that the fact that provision for corruption and fraud not having been included in the allowable revenue determination stage did not mean that its impact had not been considered. It simply meant that it was decided that it should be catered for at the RCA stage in similar fashion as adjustments had been made over the past seven years.

[8] In addition to its initial argument, Adv Labuschagne SC on behalf of SALGA argued that NERSA should have “incentivised” Eskom to fight corruption and fraud and that conditions should be added to its licence to ensure that this takes place. This was not SALGA’s case in the main application and cannot now become its case on appeal in the absence of having allowed the respondents the opportunity to deal with it in evidence.

[9] On a conspectus of all the arguments, we find no reasonable prospects of success on appeal on the first ground.

Ad overstaffing

[10] SALGA argued that NERSA had not properly considered the issue of overstaffing and that this court has conflated the issue of costs of staffing with overstaffing.

[11] Overstaffing results in that costs component of Eskom’s expenditure being imprudently high. NERSA is obliged, in conducting its prudence evaluation, to exercise reasonable judgment on what costs to allow in respect of staffing costs. It did so in the following analysis: *“It was further stated by the Minerals Council that Eskom is overstaffed by 6 000 employees Eskom’s CEO stated that Eskom could operate efficiently with a staff of 38 000 instead of 44 000. Eskom is currently using natural attrition and voluntary severance packages to lower the staff complement, which is slow to get to a sustainable labour force. Eskom has not reduced staff to match the current installed capacity. NERSA has the discretion not to allow Eskom insufficient labour costs”*.

[12] As a consequence NERSA made an adjustment to the allowable revenue demanded by Eskom. Logic dictates that overstaffing results in a higher cost to Eskom.

To reduce the amount allowed for this costs item would force Eskom to conduct its business more prudently and efficiently i.e by reducing the number of staff. The argument of conflation is therefore flawed and we find no reasonable prospect that a court of appeal would find that NERSA had failed to consider the aspect of overstaffing properly or at all.

Ad failure to consider the impact of the tariff determination on consumers who purchase electricity from municipalities

[13] SALGA's ground of review under this topic was that NERSA had not considered the impact of its tariff determination on consumers who purchase electricity directly from municipalities.

[14] The record indicated however that NERSA had conducted an assessment which took into account the impact of the tariff increase on both households and firms. This was done when Eskom's allowable revenue, average tariff and actual tariffs were determined. It will be remembered that this aspect also included consideration of the cross-subsidisation issue relating to poor and impecunious households.

[15] The detailed assessment that SALGA complains about, can only be undertaken at the stage when municipal tariffs are determined. This might also differ from municipality to municipality and would involve a consideration of the additional amounts recovered by municipalities above Eskom tariffs. Those aspects cannot appropriately be assessed at the time of the determination under consideration in the review application. This much is clear from the decision of this court in *Nelson Mandela Bay Business Chamber*.³ NERSA's ERTSA decision also stated as much and we do not find a reasonable prospect that a court of appeal would either find that this approach was incorrect or constituted a material irregularity.

[16] Finally, SALGA argued that the issues of public interest involved constituted a compelling reason that leave to appeal should be granted as contemplated in section 17(1)(a)(ii) of the Superior Courts Act.

³ *Nelson Mandela Bay Business Chamber NPC & Others v NERSA and Others* (63393/20221) [2020] ZAGPPHC (20 October 2022).

[17] All the respondents opposed the granting of relief on this ground, pointing out that the lack of prospects of success remain a relevant consideration, even in respect of this subsection.⁴

[18] Adv Zikalala, on behalf of the Minister of Finance, argued that the issue of finality, not only in respect of judgments in general, but also in respect of the subject matter of this review application, is a relevant factor. She pointed out that the debt relief programmes afforded to Eskom was based on calculated shortfalls and that uncertainty in respect of electricity tariffs would negatively impact on this which would not be in the public interest.

[19] We find that the lack of prospects of success so diminish the public interest considerations that SALGA raised, that it is outweighed by the public interest considerations of finality.

Conclusion

[20] We therefore find that leave to appeal should be refused. Having reached this conclusion, we find no cogent reason why costs should not follow this result.

Order

[21] The following order is made:

The application for leave to appeal is refused with costs, such costs to include the costs of multiple and senior counsel, where employed.

N DAVIS

Judge of the High Court
Gauteng Division, Pretoria

I agree.

⁴ *Minister of Justice and Constitutional Development v Southern Africa Litigation Centre* 2016 (3) SA 317 (SCA) at par [24] and *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* 2020 (5) SA 35 (SCA).

C COLLIS

Judge of the High Court
Gauteng Division, Pretoria

I agree.

J S NYATHI

Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 7 March 2024

Date of Judgment: 4 April 2024

APPEARANCES

In Case no: 022464/2023:

For the Applicant:

Adv E C Labuschagne SC
together with Adv V Mabuza
Lawtons Africa attorneys,

Attorneys for the Applicant:

For the 1st Respondents:

Adv N Maenetje SC together with
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Prince Mudau & Associates,

For the 2nd Respondent:

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For the 7th Respondent:

Adv L Zikalala

Attorneys for the 7th Respondent:

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