IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

CASE NO : 720/2017

In the matter between :

FREE STATE GOLDFIELDS CHAMBER OF BUSINESS Applicant

and

THE MATJHABENG LOCAL MUNICIPALITY 1st Respondent

THE NATIONAL ENERGY REGULATOR 2nd Respondent

HEARD ON : 4 DECEMBER 2017

CORAM : JORDAAN, ADJP *ET* MURRAY, AJ

JUDGMENT BY : MURRAY, AJ

DELIVERED ON : 8 FEBRUARY 2018

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[1] The Free State Goldfields Chamber of Business (the Applicant) instituted a review application in terms of Uniform Rule 53 against the National Energy Regulator of South Africa ("NERSA")(the Second Respondent) and the Matjhabeng Local Municipality ("Matjhabeng")(the First Respondent) regarding the approval and implementation of the 2016/2017 electricity tariff increases. Matjhabeng opposed the application.

[2] Mr Grobler appeared for the Business Chamber and Mr Edeling, assisted by Ms de Kock, represented NERSA and Matjhabeng.

[3] The Applicant applied for:

(a)NERSA's approval of Matjhabeng's application for the *time of use* electricity supply tariff increases for the 2016/2017 financial year to be reviewed, alternatively to be declared unlawful, and set aside;

(b) Matjhabeng's decision to implement the approved *time of use* tariff increases for the 2016/2017 financial year to be reviewed, alternatively to be declared unlawful, and set aside; and

(c) Matjhabeng to be ordered to revert to the *time of use* tariffs approved and implemented for the 2015/2016 financial year together with a 7.64% increase; and to use that *time of use* basis in its application to NERSA for tariff increases for the 2017/2018 financial year.

[4] An application for condonation by the First Respondent for the late filing of its Notice to Oppose and the late filing of its opposing affidavits was granted prior to argument on the merits being heard and the First Respondent was ordered to pay the costs thereof.

<u>The Statutory Framework</u>:

[5] In a nutshell the relevant statutory background to the dispute is that Matjhabeng buys electricity in bulk from ESKOM and re-sells it to clients at an increased rate. It does so in terms of the Municipal Finance Management Act, Act 56 / 2003 ("the MFMA"), which requires proper budgeting prior to any new fiscal year; in terms of

the Municipal Systems Act, Act 32 / 2000 ("the MSA"); and in terms of the Electricity Regulations Act, Act 4 / 2006, which regulates the resale of electricity acquired from a bulk supplier in terms of a "tariff".

[6] NERSA determines, on an annual basis, a benchmark or guideline for tariff increases for both ESKOM and the municipalities. Matjhabeng, as a municipality, must seek NERSA's approval of its proposed electricity tariffs and the structure thereof, as well as of any proposed increase above the approved or recommended NERSA guideline, prior to the approval of each annual Budget.

[7] In terms of the MFMA Matjhabeng has to prepare and publish for comment by the general public a Draft Budget which needs to be considered and approved 30 days before the start of every new fiscal year (1 July). In its Draft Budget Matjhabeng has to publish the electricity tariff increases which it intends to implement in that financial year, and has to give proper notice of any intended change in the structure of the tariff.

[8] Once the Draft Budget has been tabled, public participation facilitated, and the proposed changes ventilated, the Municipal

Council may finally approve the Budget for the next fiscal year which would specify the proposed rate increases and structure changes to the electricity supply.

[9] In accordance with the provisions of the Energy Regulations Act NERSA approved a 14.24% electricity tariff increase for ESKOM and a 12.20% increase for municipalities for the 2015/2016 fiscal year. For the 2016/2017 financial year it approved a guideline of a 9.4% increase for ESKOM and a 7.64% increase for municipalities.

<u>The Applicant' Case</u>:

[10] In its founding affidavit the Applicant alleged that NERSA's approval of the Matjhabeng *time of use* tariff increases for **2016/2017** and Matjhabeng's approval of the said tariff increase at its 27 May 2015 meeting where it approved its Budget (which according to the Applicant was the final 2016/2017 Budget) constituted administrative decisions which had been unlawfully taken and should be set aside. To substantiate these allegations the Applicant relied on several purported shortcomings in the approval and implementation of the 2016/2017 tariff increases.

Allegations against Matjhabeng:

[11] In its founding affidavit the Applicant alleged, first of all, that the "12.20%" increase in electricity tariffs introduced in the "2016/2017" Budget were not in accordance with the 7.64% NERSA Approved Guideline for 2016/2017.

[12] Secondly, it averred that Matjhabeng during the budget process neither informed the public of any proposed structural changes, nor informed it of the proposed "access fees" which it intended to levy over and above the basic monthly charges, but merely "stated that the electricity charges would increase by 12.20%".

[13] It also alleged that Matjhabeng did not publish any differentiation between ordinary block tariff use increases (IBT) and any other tariff structures, and that the access charges had led to a substantial increase in the overall electricity charges. According to the Applicant, although Matjhabeng reduced the demand charge, access charges substantially increased the overall costs, and the *time of use* low voltage rates increased with a percentage far beyond the "recommended and approved" "proposed 12.20%", for both low and high season tariffs.

[14] The Applicant maintained that Matjhabeng had attempted to seek approval of this tariff by stating that across the board 12.20% more was going to be charged for electricity sales, which allegedly entailed that an increase of up to 40% in one instance would be mitigated by a decrease in other areas by around 30-33% (on average). As a result, the Applicant alleged that in certain instances Matjhabeng implemented tariff increases of between 40% and more than 100%, which increases were neither in accordance with NERSA's recommendations nor with what Matjhabeng had informed its clients the tariff increases would entail.

[15] The Applicant claimed that the said "ludicrous" increases were far beyond the approved benchmark. These claims the Applicant attempted to substantiate by annexing a table of "Electrical Tariff Increases v ESKOM Charges" with reference to *time of use* tariffs which the Applicant's Chairperson, Mr Van der Merwe, himself had compiled to demonstrate the allegedly excessive increases.

[16] All of the above, according to the Applicant, rendered Matjhabeng's approval and implementation of the increased tariffs unlawful and procedurally unfair.

<u>Allegations against NERSA</u>:

[17] The Applicant averred, furthermore, that NERSA's approval of Matjhabeng's proposed increased tariffs for 2016/2017 was unlawful since NERSA had merely "rubber-stamped" the application. It submitted that, if NERSA had considered the application, it would have seen that the proposed tariff increases far exceeded the 7.64% guideline. To substantiate this allegation, the Applicant made several submissions.

[18] First of all it averred that Matjhabeng was never called upon to explain why it should be allowed to implement the proposed tariff increases. This assumption it drew from the absence of Matjhabeng's name from a list of municipalities applying for average increases above the 7.64% NERSA guideline that were invited to a NERSA meeting on 3 June 2016.

[19] The Applicant also alleged that, since Matjhabeng had applied for a 14.03% increase for *time of use* low and medium voltage tariffs, stakeholders and interested parties should have been invited to comment on the proposed structural changes and the increase but that that had not been done.

[20] It maintained, furthermore, that the 7.64% NERSA benchmark was merely used to determine whether Matjhabeng would have a revenue increase with electricity sales of 7.64% whereas it sought approval for an average 12.2% more on electricity sales.

[21] All of the above, according to the Applicant, rendered NERSA's approval of Matjhabeng's 2016/2017 tariff increase application unlawful.

<u>The Law</u>:

[22] It is trite law that an Applicant in motion proceedings has to make out a proper case for the relief in its founding affidavit.[1] As Muller J stated in *Shakot Investments (Pty) Ltd v Town Council of the Borough of Stanger*[2]:

> "In proceedings by way of motion the party seeking relief ought in his founding affidavit to disclose such facts as would, if true, justify the relief sought and which would, at the same time, sufficiently inform the other party of the case he was required to meet."

[1] National Council of Societies for the Prevention of Cruelty to Animals v Openshaw 2008 (5) SA 339 (SCA) at 349 A – B at paras [29] – [30]

[2] 1976 (2) SA 70 (D) at 704 G

[23] An applicant therefore has to set out in his founding affidavit the facts to justify the relief sought and to inform the respondent of the case he is required to meet. The Court then considers the applicant's entitlement to the relief applied for by considering the facts alleged in the founding affidavit which are admitted by the respondent in the opposing affidavit together with the facts alleged by the respondent therein.[3]

[24] A final order will only be granted if these facts justify such order.[4]

[25] The Applicant in the present case therefore had to prove in its founding affidavit that Matjhabeng had acted unlawfully in approving and implementing the 2016/2017 increases, and that NERSA had acted unlawfully in approving such increases and in allowing Matjhabeng to implement them.

<u>Application on Wrong Basis</u>:

[26] The Applicant did not succeed in doing so, however. The basis of its application was wrong. It confused and/or conflated the terms of the 2015/2016 and the 2016/2017 Budget. Whilst the Applicant

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[3] Plascon-Evans Paint Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634 - 635

[4] National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA) at 290 D – E at para [26].

was attacking the 2016/2017 Budget, it annexed to its founding affidavit the **2015/2016** Budget instead, the data of which it then erroneously relied on to attack and/or support its allegations against Matjhabeng and NERSA.

[27] The 2015/2016 Budget was the one for which a 12.20% average tariff increase was applied for in 2015, and which was then approved by NERSA and implemented by Matjhabeng on 1 July 2015. It is in the Revenue section of that Budget (2015/2016) that it was stated that Matjhabeng's *average* electricity tariff for the 2015/2016 year would increase with 12.20% "as per the NERSA approved guidelines", while the ESKOM tariff would increase with 14.24%.

[28] The Applicant's confusion between the 2015/2016 and the 2016/2017 Budgets is evident from the Applicant's repeated references in the founding affidavit to the 'proposed' or 'approved' 12.20% increase with reference to the 2016/2017 Budget. It then erroneously kept basing its arguments against the 2016/2017 tariff increases on an alleged proposed 12.20% increase. It alleged, for instance, that the *time of use* low voltage rates had been increased "far beyond the proposed 12.20%" and that Matjhabeng by the

addition of the access charge, had caused "a substantial increase above the recommended and approved percentile". Based on that misconception, the Applicant averred that the approval and implementation of those tariffs and the access charge had been unlawful and procedurally unfair.

[29] Mr Grobler had to concede, therefore, that the figures and percentages on which the Applicant relied in its founding affidavit to aver that NERSA had merely rubber-stamped Matjhabeng's 2016/2017 application in which it "attempted to seek approval of its tariff implementation by stating that – across the board 'on average' 12.20% more was going to be charged for electricity" and that the 7.64% benchmark had merely been applied to determine whether the municipality was going to have a revenue increase, were wrong.

[30] As Matjhabeng's municipal manager in his opposing affidavit pointed out, Matjhabeng never proposed, applied for or implemented a 12.20% increase in the 2016/2017 fiscal year, nor did NERSA approve such an increase for 2016/2017. On the contrary, the average electricity tariff increase which Matjhabeng did apply for in the 2016/2017 financial year was one of 7.47%,

which was less than the NERSA benchmark of 7.64% for 2016/2017. He explained, furthermore, that municipalities were allowed to increase or decrease individual tariffs as long as the overall average conformed to were less than NERSA's 7.64% guideline, which condition Matjhabeng met.

[31] As the municipal manager explained, furthermore, the reason why Matjhabeng's name was not on the list of municipalities invited to explain to NERSA their applications for average increases above the 7.64% guideline, was not, as the Applicant averred, proof of NERSA's mere rubber-stamping of Matjhabeng's application. Its name was not on the list because contrary to the 12.20% increase which the Applicant alleged Matjhabeng had applied for, it had actually applied only for an average increase of 7.47%, not for an extra-ordinary average increase above the 7.64% benchmark as alleged. There was therefore no need for its name to be on that list.

[32] The calculations in the table drafted by the Applicant's Chairperson to demonstrate the "*ludicrous*" tariff increases of "between 40% and more than 100%" were actually based on a comparison of the 2014/2015 to the 2015/2016 increases, and not on the 2016/2017

increases which were under attack. Mr Grobler duly conceded that the percentage increases so calculated and used to "prove" the Applicant's averments of unlawfulness were wrong, because of the Applicant's confusion between the contents of the 2015/2016 and the 2016/2017 Budgets.

[33] The Applicant's allegation that the access charge to be levied over and above the basic monthly charge which had been introduced into the electricity *time of use* low and medium voltage rates for which Matjhabeng applied in 2016/2017 was never mentioned during the budgeting process, was refuted. Both Matjhabeng's 2016/2017 NERSA application for tariff increases and its approved 2016/2017 Annual Budget were annexed to the opposing affidavit. Both dealt with the introduction of access fees. Since the 2016/2017 Draft Budget had to have been considered prior to the approval of the final Budget, contrary to the Applicant's allegations additional components like the access fee and the *time of use* Megaflex and Nightsave tariffs therefore had to have been made available for public consideration and comment as Mr Grobler indeed conceded. On that basis, therefore, the allegation that Matjhabeng's implementation of the 2016/2017 tariffs had been unlawful, must also fall.

[34] The same principle obviously applies to the 14.03% increase for both low voltage and medium voltage *time of use* tariffs regarding which the Applicant also averred that stakeholders and participants had not been invited to comment, but which had in fact been approved in the 2016/2017 Budget after the tabling of the Draft Budget.

[35] With reference to the allegation that NERSA should have consulted with the stakeholders before approving the 2016/2017 Matjhabeng application for tariff increases, Mathjabeng annexed, besides the approved 2016/2017 Budget, a Consultation paper dated 07 March 2016 in which NERSA invited stakeholders to comment on the guideline increase, the benchmarks and the proposed timelines set out in the said paper, warning that the approved guideline percentage was not an automatic increase for any municipality.

[36] It was denied that NERSA had merely rubber-stamped the application without applying its mind before approving it, and that the approvals had been unlawful or irrational and it was averred that the increases had been well-motivated and approved for good reason. According to NERSA's report, it, in the consideration of

Matjhabeng's application, balanced the objective of ensuring Matjhabeng's financial viability against the affordability for customers and allowed the increase to enable Matjhabeng to afford ESKOM's power and to settle its bills fully on a monthly basis. The report stated that NERSA had considered the increased fees to be justified because they were necessary to enable Matjhabeng to support itself as a sustainable service provider. The increased fees would help Matjhabeng to generate sufficient revenue to reach its service delivery targets. It also for that reason allowed the deviation from the 7.64% in certain tariff categories to protect Matjhabeng's income during the transition from flat tariffs to medium volt *time of use* tariffs which in the long run would be more cost-effective.

[37] As stated in Matjhabeng's 2016/2017 Budget, the approved 7.47% increase for that year was arrived at by taking into consideration local economic conditions, input costs, the macro-economic forecasts as prescribed by MFMA circulars, the affordability of services, the NERSA Regulations, the approved ESKOM tariff increase of 9.4%, Matjhabeng's projected income, the CPIX of 6.60%, salary increases of around 7% and the payment agreements that Matjhabeng had concluded with ESKOM for the

huge payment deficit which it needed to honour and its aim to achieve the ability to make full monthly payments. According to the 2015/2016 application it at that time owed ESKOM R2 billion, resulting in an R80 million monthly bill while Matjhabeng only earned R60 million per month from electricity sales.

[38] These averments supported the denial that Matjhabeng's application had merely been rubber-stamped or that the approvals had been unlawful or irrational and the averments that the increases had been well-motivated and approved for good reasons. In its 2016/2017 tariff increase application which the Applicant annexed, Matjhabeng explained, for instance, that the introduction of access charges to the Industrial *time of use* tariffs made the latter more cost-reflective since ESKOM had done the same.

[39] In the 2015/2016 Budget which the Applicant relied on, it was stated that a comprehensive tariff study had been performed on the electricity tariffs to ensure full cost recovery and "that the tariffs for the 2016/2017 financial year would have to be cost-reflective to ensure improving revenue collection as well as quality of services to be provided by the municipalities".

[40] The application for the 14% increase for medium voltage *time of use* tariffs was explained as being necessary to effect the conversion of the previous Large medium volt tariff to the much cheaper *time of use* medium volt tariff without jeopardising the municipality's previous income levels. In view of Matjhabeng's struggle to fully pay its monthly ESKOM bills it can hardly be said that the approval of the above tariffs are either irrational or unlawful.

[41] The First Respondent pointed out, furthermore, that Matjhabeng's approach for the 2016/2017 financial year's Budget had been guided by the back to basics principle to improve community conditions.

[42] NERSA's recommendation for the approval of Matjhabeng's tariff application was annexed to the opposing affidavit, together with the 2016/2017 tariff increase application itself. Matjhabeng's application deals with, *inter alia* the design of and application for a Commercial *time of use* tariff during the tariff application for 2017/2018 to cater for commercial customers still on a flat tariff. In NERSA's recommendation it indicated that the Industrial *time of*

use tariff would be benchmarked with the approved ESKOM's 2016/2017 Megaflex tariff plus a maximum of 7.64% increase.

[43] That Matjhabeng's application was not simply rubber-stamped by NERSA, is confirmed by the comparison of the relevant table of proposed tariff increases in Matjhabeng's 2016/2017 application which is annexed to the founding affidavit, and the "Proposal for Tariffs (2016/2017)" annexed to the opposing affidavit, in which two additional columns reflect the "NERSA Approved Figures" and show the resulting differences between what was asked and what was approved. It is only logical to deduce that, in order to have approved tariffs which differed from those applied for, NERSA considered and not only accepted the proposed tariffs.

[44] Further confirmation of NERSA's consideration of the proposed tariffs can be found in NERSA's 29 June 2016 letter to Matjhabeng's previous Municipal Manager in which it set out specific tariffs which the Energy Regulator had approved for Matjhabeng for 2016/2017 and which in several categories differed from those applied for. That the contents of the application and Matjhabeng's motivation for the increases must also have been considered appears from the Energy Regulator's directive to

increase Matjhabeng's "Budget for repairs and maintenance to 6% of the total revenue from electricity sales".

[45] In its report NERSA stated that "taking into consideration the motivation for Matjhabeng's deviation from the NERSA guidelines", it had decided to approve the proposed increases. It can therefore hardly be claimed, as the Applicant did, that NERSA failed to consider and merely rubber-stamped Matjhabeng's application, or that it acted unlawfully in approving the application.

[46] The allegation that the public was not informed of the proposed changes or given an opportunity to comment on the proposed tariff increases was not proved in the founding affidavit either. The allegation of procedural unfairness therefor also has to fail.

[47] Likewise, there is no evidence that Matjhabeng unlawfully approved or implemented the electricity tariff increases. And as Mr Edeling pointed out, neither is there any proof to that effect in the founding affidavit. Although the Megaflex tariff, plus the access fee, plus the 7.64% increase would have amounted to more than the percentage that was approved, the Applicant did not inform the Court what the Megaflex tariff or the access fee was.

[48] I therefore have to agree that due to its confusion between the 2015/2016 and the 2016/2017 Budgets and the resultant wrong basis on which the Applicant approached the Court, the Applicant failed to make out its case in its founding papers. It has, accordingly, failed to prove valid grounds for the review and the application therefore cannot succeed.

[48] As far as costs are concerned, there is no reason to deviate from the normal practice of costs following the outcome of the application.

WHEREFORE THE FOLLOWING ORDER IS MADE:

1. The review application is dismissed with costs.

H, Murray

H MURRAY AJ

I concur and it is so ordered.

JORDAAN, ADJP

On behalf of the Applicant:	Adv S Grobler Instructed by : P D Yazbek Lovius Block BLOEMFONTEIN
On behalf of the First Respondent :	Adv W J Edeling Adv D de Kock Instructed by : Bokwa Attorneys BLOEMFONTEIN