

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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

A handwritten signature in black ink, appearing to be "Adelos".

Date: 8 July 2024

CASE NO: 2024/061993

AFRIFORUM NPC	Applicant
and	
NATIONAL ENERGY REGULATOR OF SOUTH AFRICA	First Respondent
SOUTH AFRICAN LOCAL GOVERNMENT ASSOCIATION	Second Respondent
ESKOM HOLDINGS SOC LIMITED	Third Respondent
RAND WEST MUNICIPALITY	Fourth Respondent
MUNICIPALITIES LISTED IN ANNEXURE "FA3" TO THE FOUNDING AFFIDAVIT	Fifth to the 178th Respondents

Summary

Energy – lawfulness of NERSA’s methodology employed to determine tariff increases sought by municipalities – requirement that municipalities charge for the cost of supply of electricity – requirement of a cost of supply study – ensuring municipalities charge only for the cost of supply – section 172 of the Constitution and a just and equitable remedy – rule of law – testing State’s allegation of budgetary constraints – extension of a period provided for in legislation as a just and equitable remedy – variation of order as an avenue to provide an opportunity for municipalities and NERSA to comply with their statutory obligations – the ambit of the state’s obligation must guide the determination of the budget - If the budget is premised on a misconception of the State’s duties, then it is no answer to say that its duties cannot be achieved due to budgetary constraints - the State ought to have budgeted in line with its obligations.

JUDGMENT

DE VOS AJ

Introduction

- [1] The case concerns the tariffs people and businesses (“end-users”) pay for electricity. Municipalities calculate the tariffs. The National Energy Regulator of South Africa (“NERSA”), as custodian and enforcer of the regulatory framework, must consider and approve the tariffs calculated by the municipalities. Both the application by municipalities and the approval by NERSA, must be based on the cost of supply of electricity.
- [2] The controversy is whether the methodology used to determine tariff increases is based on the cost of supply of electricity. The applicant (“Afriforum”) contends, in the interests of the end-users, that the method employed by NERSA to approve the increase in tariffs is not premised on the cost of supply and is, therefore, unlawful. The third respondent, the South African Local Government Association (“SALGA”), makes common cause with the applicant in this regard.
- [3] The context of the application is what Afriforum terms “the longstanding practice of NERSA to approve municipalities’ electricity tariffs in accordance with a method that

deviates from the regulatory prescripts”.¹ NERSA itself considered and investigated the matter, and the conclusion reached is that the failure to set cost-reflective tariffs means, practically, for end-users, that “tariffs are increasingly unaffordable.”²

- [4] The case also has to be placed within its litigation context. The present case is the second application in which NERSA's methodology is challenged for its failure to be based on the cost of supply. In *Nelson Mandela Bay Business Chambers NPC and Another v National Energy Regulator and Others* (“*Nelson Mandela Bay judgment*”),³ Her Ladyship Justice Kubushi declared NERSA's previous methodology unlawful. NERSA's previous methodology involved benchmarking municipalities' applications for tariff increases. If the tariff increase sought by a municipality fell within specific parameters, NERSA approved the application; if it fell outside the parameters, NERSA denied the application ("benchmarking methodology"). Her Ladyship Justice Kubushi declared the benchmarking methodology unlawful as it was not based on the actual cost of supply. The municipalities and NERSA requested time to get their houses in order. The Court declared the methodology unlawful but suspended the order for twelve months to permit the municipalities and NERSA to employ a method which is based on the cost of supply. The twelve-month grace period expired on 17 October 2023.
- [5] Afriforum contends that despite this grace period, NERSA is still employing a method which is unlawful in that it does not ensure that end-users pay for the costs of supply.
- [6] The obligation to base tariff increases on the cost of supply is longstanding and predates the judgment in *Nelson Mandela Bay*. The Electricity Pricing Policy (“Policy”)⁴ mandated municipalities to base tariffs on the cost of supply. The Policy also determined the methodology to determine the cost of supply. The Policy requires that municipalities “shall conduct a cost of supply study”. The Policy, and so the obligation to conduct a cost of supply study, is almost twenty years old. None of the parties before the Court dispute the obligation to base the tariffs on costs of supply

¹ Afriforum's Heads of Argument (HOA), para 3, referring to NERSA's Answering Affidavit (AA) paras 55 - 56

² *Nelson Mandela Bay Business Chambers NPC and Another v National Energy Regulator and Others* (63393/2021) [2022] ZAGPPHC 778 per Kubushi J para 167 (quoting from the Consultation Paper)

³ (63393/2021) [2022] ZAGPPHC 778

⁴ GG 31741 (19 December 2008)

studies. NERSA has approved a framework to assist municipalities in conducting the necessary cost of supply study. This framework similarly mandates municipalities to conduct a cost-of-supply study.

- [7] The cost of supply study serves a dual function. The first is to ensure that municipalities efficiently distribute electricity. If municipalities are charging more than the cost of supply studies indicate is necessary, they are not providing services efficiently. Municipalities' licenses are subject to them being efficient licensees. A cost-of-supply study allows NERSA to test the efficiency of the municipality's electricity distribution. The second is to ensure a standardised and transparent process that end-users can engage with. These twin principles of efficiency and transparency underpin the requirement of a cost-of-supply study.
- [8] All three arms of government have been clear and congruent regarding what methodology NERSA must employ. The Executive has set the Policy that requires a cost-of-supply study. Parliament has, through the Electricity Regulation Act ("ERA")⁵ determined that NERSA's methodology must comply with the Policy. In addition, Parliament enacted the Local Government Municipal Systems Act⁶ which requires that tariffs must reasonably reflect the costs associated with rendering the services.⁷ The Judiciary, in the form of a final judgment from this Court, has declared that NERSA must desist from benchmarking and use a cost-of-supply approach. NERSA itself has adopted a framework that, in line with this consistent position from all components of the State, requires a cost-of-supply study.
- [9] Despite this consistency and clarity, NERSA changed tack in January 2024. In January 2024, NERSA no longer required a tariff increase application to be accompanied by a cost of supply study. Instead, NERSA introduced another methodology that tested tariff increase applications against certain assumptions ("assumption methodology"). If the tariff applications fell "outside" certain "assumptions", NERSA would not approve the increase. If it fell within these "assumptions", it would be approved. This change, contends Afriforum is unlawful as it deviates from the requirement to conduct a cost of the supply of study. In addition,

⁵ 4 of 2006, see section 27(h)

⁶ 32 of 2000

⁷ Section 74(2)(d)

insofar as it tests an application for a tariff increase against certain assumptions – or parameters - the assumption methodology holds echoes of a benchmarking methodology.

- [10] SALGA made common cause with Afriforum on this point. SALGA also pointed out that NERSA's position was inconsistent and changed not only between its notices to municipalities but also in its answering affidavit and the position it adopted in an undertaking to the Court the day before the hearing.
- [11] SALGA and Afriforum's contentions persuaded the Court that NERSA's methodology altered and departed from the requirement to conduct a cost of supply study. The Court declared NERSA's methodology unlawful.
- [12] The Court then had to contend with an appropriate remedy. Despite the clarity of what the law required of the municipalities and NERSA, an appropriate remedy was vexing. At the time of the hearing, sixty-six municipalities had complied with the obligation to conduct a cost-of-supply study. Their applications could, therefore, be lawfully considered by NERSA based on a cost-of-supply study. However, SALGA pressed the interests of those municipalities that had not conducted a cost of supply study ("the non-compliant municipalities"). SALGA's position was that the non-compliant municipalities had already approved their budgets based on unlawful methodology. If they are prevented from implementing these budgets, it would result in financial hardship. SALGA pleaded that it would lead to the bankruptcy of many municipalities. SALGA suggested, from a position of pragmatism, that the Court permit these non-compliant municipalities to apply for tariff increases based on the unlawful method and that the Court give them a year to get their houses in order.
- [13] The Court anxiously considered this aspect of the case. The Court reflects the full consideration below. The main factors that weighed with the Court are that the proposed relief from SALGA, motivated understandably by pragmatism, requires the Court to sanction an illegality to continue. Despite the obligation being twenty years old, despite a grace period of twenty months to comply with the law and in the face of the *Nelson Mandela Bay* judgment. Whilst the suggestion from SALGA is practical, principally, it requires the Court to deviate from the precepts of the rule of law. SALGA has not pointed the Court to any law that empowers it to deviate from the Policy, the Electricity Regulation Act, the Municipal Systems Act or the *Nelson Mandela Bay*

judgment. The municipalities have not told the Court why there has been non-compliance with the law. The Court is being asked to permit illegality to continue in direct conflict with a legal precept in the absence of a judicial power to do so, absent an explanation from the non-compliant municipalities. The Court declined to do so.

[14] It weighed with the Court that the Constitutional Court in *Blue Moonlight*⁸ held that ordinarily, a budgetary constraint which has resulted from an unlawful premise cannot be a justification to permit an unlawful act. The same principle finds application in this matter. If the municipalities unlawfully determined their budgets, budgetary restraints cannot determine the legal position. Municipalities cannot escape their obligations because they have failed to budget premised on these obligations. The municipalities' legal obligations must inform the budget, not the reverse. If not, then all legal obligations owed by the State would be subject to budgetary determinations rather than determined by Parliament.

[15] The Court also considered the facts that SALGA had pleaded. SALGA pleaded conclusions of bankruptcy, but these were largely devoid of primary facts. The Court was not persuaded, premised on the authority from the Constitutional Court in *Blue Moonlight*, *Khosa*,⁹ *Lawyers for Human Rights*¹⁰ and *Mlungwana*¹¹ that a sufficient case had been made out. At the level of principle, an ipse dixit from municipalities that it cannot comply with the law cannot, without more, be the reason to permit an unlawful act to continue.

[16] In addition, the limited primary facts that SALGA presented to the Court were under closer scrutiny, contradicted by SALGA. SALGA gave examples of non-compliant municipalities that would be bankrupted, such as eThekweni Municipality, which would suffer an alleged R 1.9 billion deficit. eThekweni, however, is, on SALGA's version, a

⁸ *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another (CC)* [2011] ZACC 33; 2012 (2) BCLR 150 (CC); 2012 (2) SA 104 (CC) (1 December 2011)

⁹ *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development (CCT 13/03, CCT 12/03)* [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) (4 March 2004)

¹⁰ *Lawyers for Human Rights v Minister of Home Affairs and Others (CCT38/16)* [2017] ZACC 22; 2017 (10) BCLR 1242 (CC); 2017 (5) SA 480 (CC) (29 June 2017)

¹¹ *Mlungwana and Others v S and Another (CCT32/18)* [2018] ZACC 45; 2019 (1) BCLR 88 (CC); 2019 (1) SACR 429 (CC) (19 November 2018)

compliant municipality and is entirely unaffected by the relief granted by this Court. The Court is therefore not persuaded, even on a factual level, that SALGA has made out a sufficient case of alleged bankruptcy.

[17] The Court was not persuaded that it would be just and equitable to permit non-compliant municipalities to continue charging unlawful tariffs, particularly where there was already an order in place providing them a year to address their non-compliance. The Court was also not persuaded that it would be just and equitable to grant a remedy in contradiction of the determinations of all three arms of government. It would also not be just and equitable to grant a remedy that created two categories of municipalities: those who had to comply with the law and others who did not have to. For these reasons, more fully set out below, the Court declined the suggested relief by SALGA to permit the non-compliant municipalities to increase their tariffs in line with the unlawful method.

[18] However, in light of the seriousness of SALGA's allegation, the Court extended the period within which municipalities could bring themselves within the law and apply for tariff increases. Of course, if a municipality cannot comply within the extended period, it can approach a court to explain its positions and seek a variation of this period. The obligation, however, is on a municipality to explain its non-compliance with its obligations and request a variation of the period.

[19] The parties requested clarity as a matter of extreme urgency. The matter was heard on Wednesday, 26 June 2024, on the normal urgent court roll amidst twenty other matters on this Court's roll, and the parties requested an order by Friday, 28 June 2024. The reason for the extreme time pressure is that the parties needed to know their respective obligations before 1 July 2024, the commencement of the municipal financial year. In these circumstances, the Court granted an order in the terms set out at the end of this judgment.

[20] At the outset, the Court sets out the limited scope of the challenge. The case is limited to tariff increases. The Court has to consider whether the methodology used by the State to increase the tariffs for the new financial year aligns with the requirement that end-users pay for the cost of supply. The case is also limited to a determination of the tariffs which municipalities are entitled to charge end-users. Eskom generates electricity, and municipalities distribute or reticulate it. There are instances where

Eskom distributes, and municipalities generate or a combination of these, but for the most part, that is the structure. NERSA determines the tariffs which both Eskom and the municipalities are entitled to charge. The challenge before the Court considers increases in municipal tariffs and not Eskom's tariff increases. Further, municipalities are entitled to charge the costs of supply plus a reasonable margin of return. The current dispute is not concerned with the reasonable margin of return but rather with determining the actual cost of supply.

[21] I set out the reasons for the order in what follows. The reasons are also provided urgently, as it is expected that the parties would want to consider their positions and require the reasons to do so.

The parties

[22] The applicant is Afriforum NPC, a non-profit company and non-governmental organisation. Its Memorandum of Incorporation identifies its main purpose as the promotion of and advocacy for human rights. Afriforum's members are largely residents and ratepayers. They are also largely users of electricity, largely municipal electricity. Many of its members are large-volume users of electricity, including in the industrial and corporate spheres.

[23] Afriforum contends, however, that its interest in the matter extends beyond that of its members. It pleads that the subject matter of the application involves constitutional rights and obligations, the legality principle and the rule of law. As the subject matter of the application involves the rule of law and the legality principle, it involves a broader public interest. Afriforum pleads that almost every person in South Africa is affected by this application, but very few are aware of how their rights are affected and not all have the means to access the Court for relief. Afriforum uses the application to protect its members' interests as well as the public interest.

[24] The first respondent is the National Energy Regulator of South Africa (NERSA), a juristic person established in terms of section 2 of the National Energy Regulator Act 49 of 2004 (NERA).¹² It is the custodian and enforcer of the regulatory framework requiring the approval of municipal electricity tariffs, enjoined to “ensure that the interests and needs of present and future electricity customers and end users are

¹² NERA s 2. See also FA para 18; NERSA AA para 10

safeguarded and met”.¹³ It must regulate electricity prices and tariffs,¹⁴ which tariffs “must enable an efficient licensee to recover the full cost of its licensed activities, including a reasonable margin or return”.¹⁵ Municipal tariffs are to be approved on an annual basis.¹⁶ Section 4 of NERA places on NERSA the obligation to undertake the functions set out in section 4 of the Electricity Regulation Act 4 of 2006 (ERA). That provision places the obligation on NERSA to regulate prices and tariffs, including those of municipalities.

- [25] SALGA is cited in this application because of the interest it has in the relief which the applicant seeks because of its "role as representing, promoting and protecting the interests of local government." SALGA's participation in this application must be seen in the light of its role in representing, promoting, and protecting the interests of local government, which is the municipality cited as a further respondent in this application.
- [26] The fourth to 178th respondents are municipalities. Although they did not attend the hearing to argue the matter, some did file affidavits, which focused on the issue of remedy.

Cost of supply requirement

- [27] The Constitution empowers municipalities to provide electricity to end-users. Specifically, municipalities, as the local sphere of government, have to ensure the sustainable provision of services to communities and must strive to achieve these objectives within their financial and administrative capacity.¹⁷ In addition, municipalities have executive authority over and the right to administer the reticulation of electricity.¹⁸
- [28] The process through which a municipality must apply to set its tariffs is similarly regulated by legislation. Section 15(2) of the ERA prohibits licensees like municipalities from “...charg[ing] a customer any tariff ... other than that determined or

¹³ ERA s 2(b)

¹⁴ ERA s 4(1)(a)(ii)

¹⁵ ERA s 14(1)(a)

¹⁶ NERSA AA para 46

¹⁷ Section 152 of the Constitution of the Republic of South Africa Act 108 of 1996 (Constitution)

¹⁸ Section 156 (read with Part B of Schedule 4) of the Constitution. This is also provided for in section 83(1) of the Local Government: Municipal Structures Act 117 of 1998 (Structures Act).

approved by NERSA". ERA then sets a substantive requirement for the fees municipalities may charge for the electricity supply. Section 15(1) of ERA provides that NERSA's setting or approval of prices, charges, and tariffs and the regulation of revenues "(a) must enable an efficient licensee to recover the full cost of its licenced activities, including a reasonable margin or return". All parties accept that the text in section 15(2) that the "full cost of its licensed activities" means that municipalities can only charge for the actual cost of supplying electricity. In section 27(h), ERA further mandates that each municipality "must exercise its executive authority and perform its duty by executing its reticulation function in accordance with relevant national energy policies".

[29] The applicable energy policy is the South African Electricity Supply Industry: Electricity Pricing Policy ("Policy").¹⁹ The Policy was central to the judgment by Her Ladyship Justice Kubushi. The objectives of the Policy are that "electricity prices should reflect efficient market signals, accurate cost of supply and concomitant price levels." The Policy recognises that the Local Government Municipal Systems Act²⁰ requires that "tariffs must reasonably reflect the costs associated with rendering the services, including capital, operating, maintenance, administration and replacement costs, and interest charges."²¹

[30] Chapter 8 of the Policy deals with "Distribution pricing". Under this chapter, the critical principle for "distributing pricing, namely that tariffs must be cost reflective and in support of cost reflectivity". The policy position under section 8.1 is as follows:

"8.1 Cost of Supply Studies

The industry's Cost of Supply 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.

Policy Position: 23

Electricity distributors shall undertake COS studies at least every five years, but at least when significant licensee structure changes occur... 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

¹⁹ Government Notice No 1398, 19 December 2008

²⁰ 32 of 2000

²¹ Section 74(2)(d)

tariffs must accompany applications to the regulator for changes to tariff structures.”

[31] Clause 8.1 sets out important contextual aspects. Models to calculate the supply cost have existed for more than ten years. The failure to implement the cost of supply study means that municipalities have charged unidentified surcharges. Centrally, the obligation of municipalities to conduct cost-of-supply studies is clear. The Policy states that municipalities "shall undertake COS studies". It is repeated as the "cost of service methodology used to derive applications must accompany applications to NERSA. The COS studies must be done according to a NERSA-approved standard. The requirement that it must be done in terms of a standard procedure is repeated in the definitional section. The Policy contains a specific definition of cost of supply, which is the "standard procedure for deriving and allocating costs of supply, used for the design of tariffs."²²

[32] Policy Position 29 requires that “tariff structure and levels shall be aligned with the results from the COS studies in which the resultant income will equal the revenue requirement”.

[33] The Policy and legislative framework requires a cost-of-supply study.

The obligation is not disputed

[34] In their pleadings before this Court, all parties accepted the legislative mandate to employ a cost-of-supply methodology and the requirement of a cost-of-supply study.

[35] SALGA accepts the obligation of municipalities to conduct cost-of-supply studies.²³ In its written submissions, SALGA submits that it is common cause between the parties that “NERSA must consider the cost of supply studies of each licensee when it considers application for the approval of tariffs.”²⁴ SALGA submits that the correct position is that "municipal electricity tariffs must be based on cost of supply studies conducted by municipalities and submitted to NERSA when municipalities apply for the approval of new tariffs for the next financial year."²⁵ Afriforum similarly contends

²² Policy, see definitions section

²³ SALGA AA, para 2.8.15

²⁴ SALGA HOA, para 2.2

²⁵ SALGA HOA, para 3.5

that there is a duty to employ a cost-of-supply approach, which requires a cost-of-supply study.

[36] NERSA, also, accepts this obligation. In its pleadings, NERSA relied on the Policy, in particular, Policy Positions 23²⁶ and 29. NERSA's synopsis of its case is that the framework NERSA uses is focused on the cost of supply.²⁷ NERSA pleads that "there are no assumptions regarding the efficient costs of a municipality and each is required to support its respective application with actual cost of supplies studies".²⁸

[37] In accordance with its acceptance of this obligation, NERSA approved and adopted a Cost-of-Supply Framework (Annexure FA5) and a Cost-of-Supply Framework and Pricing Methodology (Annexure FA6). Both frameworks require a cost-of-supply study.

COS Framework

[38] The Cost of Supply Framework identifies Policy Position 23, which provides that "electricity distributors shall undertake Cost of Supply studies". The framework then states that NERSA "developed a COS framework to be used by all licensed electricity distributors in South Africa. The framework will be used as a guideline to licensees when developing their COS studies." The framework was published for written comment and public hearings were held for further comments on the framework. NERSA considered all comments when developing the final COS framework.

[39] The framework identifies the background. It states, "A Cost of Supply (COS) study is one of the most important considerations in establishing and designing electricity rates that are implemented to provide the service required by customers and recover costs incurred by licensees".²⁹ NERSA states that it "has developed the COS Framework in order to promote sustainability of the electricity supply industry while protecting customers against unduly high prices".³⁰

²⁶ NERSA AA, para 38

²⁷ NERSA AA, para 67

²⁸ NERSA AA, para 68

²⁹ COS Framework, 1. Background

³⁰ Id

[40] As to the scope, "the framework is meant to assist all licensed electricity distributors in performing their cost of supply studies".³¹ The framework "aims at assisting all licensees, with a focus being placed on smaller licensees that have limited capacity and experience data base challenges. Licensees that have advanced capacity and data warehouses can expand the adopted approach to a level that will meet their specific needs."³² The "framework serves as a regulatory standard that will guide licensees to develop their individual COS studies and submit the to the Energy Regulator for consideration. All licensees are required to submit their COS studies to the Energy Regulator."³³ The COS Framework then creates four steps to guide the licensees in conducting a cost-of-supply study.

[41] The COS Framework is not dated. It appears that this was the framework or its precursor, was already in existence before Kubushi J³⁴ -

"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."

[42] However, the attack before Her Ladyship Justice Kubushi focused on a different methodology, not this COS Framework.

[43] The COS Framework has been adopted by NERSA "to assist licensees in undertaking COS studies".³⁵ NERSA then adopted a second document, again enforcing the obligation to ensure municipalities undertook a cost-of-supply study.

COS Framework and Pricing Methodology of October 2023

[44] The Framework and Pricing Methodology³⁶ refers to the COS Framework, which has been adopted. The Framework and Pricing Methodology does not state that it

³¹ COS Framework, 2, Scope

³² Id

³³ Id

³⁴ Judgment para 171

³⁵ COS Framework and Pricing Methodology, annexure "FA6" provides that "At its meeting held on 29 October 2015 the Energy Regulator approved the COS Framework to assist licensees in undertaking COS studies. Subsequent to the approval the framework was enhanced to include the useful lives of electricity assets to be used for depreciation purposes. This was approved on 29 March 2016."

³⁶ Annexure FA 6 to the Founding Affidavit.

overrides or replace the COS Framework. They are, however, on the issue in dispute in this matter, not in conflict with each other. They both require municipalities to conduct costs of supply studies and for NERSA to consider the application based on the study.

- [45] Specifically, the Framework and Pricing Methodology requires “cost of supply studies.”³⁷ and for NERSA to “assess the study submitted”.³⁸ The Framework and Pricing Methodology, created by NERSA, identifies the need to conduct a cost of supply study and its purpose –

“The purpose of the COS study is to ensure that licensees recover all the costs associated with supplying a customer.”³⁹

- [46] The Framework and Pricing Methodology repeat the same four steps referred to in the COS Framework. The first phase of the third step commences with conducting a cost of supply study.⁴⁰

- [47] It is not for the Court to test these frameworks. They have been set and determined by NERSA, in line with section 15(2) of ERA, in compliance with *Nelson Mandela Bay* and in giving effect to the Policy. However, both of these documents were authored and adopted by NERSA and set the standard for applying electricity tariff increases. Both of them require municipalities to provide cost-of-supply studies. NERSA's acceptance of this position is apparent from its letter to all municipalities on 17 November 2023, in which it states that “the practical effect of the [*Nelson Mandela Bay* judgment] is that, all tariff applications from 2024/2025 FY should be supported by a COS study otherwise the breach becomes a contempt of court.”⁴¹

- [48] The Court concludes that there is an obligation to use a cost-of-supply approach, which requires a cost-of-supply study. In light of the fact that NERSA accepted the obligation and enacted a framework to give effect to the obligation to conduct a cost of supply study, the Court need not be concerned with overstepping into the realm of the executive.

³⁷ Framework and Pricing Methodology, FA 6 para 5.4

³⁸ *Id* para 15.5

³⁹ *Id* para 16.3

⁴⁰ *Id* para 17.16

⁴¹ NERSA AA, para 76

[49] The applicant and SALGA contend that NERSA's initial position, as set out in the notice of 17 November 2023, which demanded the cost of supply studies, was lawful. The applicant referred to NERSA's initial position as being "on a good path". However, in January 2024, NERSA changed tack and did away with the requirement that municipalities must base their tariff increase applications on a cost of supply study; instead, it introduced a new methodology. SALGA and the applicant contend that this new methodology – this change in tack - breaches NERSA's obligations.

[50] NERSA contends that there is no real "new methodology" and that the applicant and SALGA are engaged with a distinction without a difference. The Court considers this allegation that there was no change from a good to a bad path.

Did NERSA deviate from the good path?

[51] Part of the good path, contends Afriforum, was NERSA's position as set out in a notice dated 17 November 2023,⁴² NERSA said the following to municipalities:

"2. NERSA's approach of using benchmarking and guidelines has been reviewed, set aside, and declared unlawful by the High Court in the Nelson Mandela Bay Chamber of Business and others. The judgment allowed NERSA to revise the Municipal Tariff Guideline to make it compliant with section 15 of the Electricity Regulation Act.

3. The above judgment was delivered when NERSA, SALGA and Sustainable Energy Africa made available to all municipal licensees a simplified cost of supply (COS) tool. This simplified tool shows a link between the required revenue and the cost associated with supplying a category of customers, the classification of costs between fixed and variable, and energy-related, demand-related, and customer-related costs. **This simplified tool does not replace the need to conduct a fully-fledged COS.**

4. **The practical effect of the judgment is that all tariff applications from 2024/25 FY should be supported by a COS study; otherwise, the breach becomes a contempt of Court. The municipality is therefore reminded to undertake such a study, and if it is unable to do so, the NERSA's approved COS model should be used as a guide to perform the study and submit it to the Energy Regulator for consideration (attached).**

5. **NERSA is committed to supporting licensees when developing, implementing and submitting their COS studies, and is looking forward to ongoing engagements and co-operation in this regard. NERSA, along with its partners such as Sustainable Energy Africa (SEA), is available to assist struggling municipalities with the COS model and the report that should be submitted with the model.**

⁴² Attached to the founding affidavit is FA7

6. NERSA will not be issuing a guideline and benchmark letter for 2024/25 FY; licensees are required to submit three-year budget projections in a D-form format that will [be] shared with licensees ...

7. **Licensee are requested to supply their completed COS studies and their budget projections before 1 March 2024** to allow sufficient time for NERSA to consider the 2024/25 FY tariff applications.” (Own emphasis)

[52] The 17 November 2023 notice required municipalities to conduct a cost-of-supply study. What is clear from the notice is that NERSA required municipalities to "supply their completed COS studies and their budget projections before 1 March 2024 to allow sufficient time for NERSA to consider the 2024/25 tariff applications."

[53] However, after this notice, Afriforum submitted that NERSA deviated from the good path. In a notice dated 29 January 2024.⁴³ It said the following to municipalities:

"On 17 November 2023, NERSA issued a letter informing electricity distributors that the guideline and benchmarks that had been supplied in the past will no longer be published for annual electricity distributor tariff price increases; each distributor's tariff will be based on its costs.

In that regard, a revenue requirement template has been developed for municipalities to complete their 2023/2024 projections and revenue requirements for the 2024/25 financial year.

Licences are required to complete the attached **template** with projections for 2023/24 year end and revenue requirement for 2023/24. **The increase in revenues should be aligned to the following assumptions ...**

Municipalities applying for an increase that is outside the above assumptions will have to justify their increases to the Energy Regulator, and the approval will be based on the following requirements ...

It is important to note that the completion of this revenue requirement template is not an automatic increase in tariffs. Distributors are requested to submit their 2024/25 tariff applications in line with the average price increase calculated by the template by 1 March 2024 by the provisions of Section 16(2) of the Electricity Regulation Act ... before implementation."

[54] NERSA's notice of 29 January 2024 required municipalities to complete "the attached template with projections for 2023/24-year end and revenue requirement for 2024/25" with an advisory note that the "increase in revenues should be aligned to the following assumptions" listed therein. This will be referred to as the assumptions methodology. The position was that if the increase fell within specific parameters set by

⁴³ Attached to the founding affidavit is FA8

assumptions, the application would be approved. If it fell outside the parameters, it would not be approved.

- [55] SALGA submits that NERSA either changed its position or sought to modify it. Either way, it contradicted what it said in the notice dated 17 November 2023. What is also clear from NERSA's notice dated 29 January 2024 is that the submission of cost of supply studies for purposes of tariff applications was no longer required. In terms of this notice, NERSA requires municipalities "to complete the attached template with projections for 2023/24 year-end and revenue requirement for 2024/25", considering that the "increase in revenues should be aligned to the following assumptions" listed therein and not by the outcome of the cost of supply studies which NERSA said municipalities must conduct and submit by 1 March 2024.
- [56] SALGA submits that there were then further confusing changes to NERSA's methodology. First, SALGA points to NERSA's pleaded case. In its answering affidavit,⁴⁴ NERSA confirms that "each municipal application is being considered individually and each municipality is expected to (and must) set out its own costs of supply in its tariff application." SALGA contends that this is completely different from the position set out in NERSA's notice to municipalities dated 29 January 2024.
- [57] Second, SALGA points to a letter dated 25 June 2024 addressed to the applicant and SALGA to clarify matters; NERSA advised as follows:
- "10.9 In order for NERSA to determine the rates applicable for the 2024/25 FY, NERSA requires the FY2024/25 cost data as highlighted above. As explained in the answering affidavit, due to the fact that the latest audited cost data available for municipalities relates to 2022/23 FY, licensees were required to project year-end data for 2023/24 FY based on the year-to- date actual data, and to make assumptions about the anticipated increases forecasts in expenses for the 2024/25 FY. The average increase in these costs is then used to adjust tariffs, subject to prudence and efficiency testing – and any adjustments are tested for reasonableness in the context of the individual licensee."
- [58] SALGA submits that this is again confusing as it is not clear exactly when NERSA communicated its position quoted above to municipalities. What is clear is that that position is different from that set out in its notice dated 17 November 2023 and wider

⁴⁴ NERSA's AA para 71

than that set out in its notice dated 29 January 2024. SALGA's submission states, "Either way, it is confusing, and it is wrong in law."

[59] Third, SALGA points to the contents of the without prejudice letter presented to the Court on 28 June 2024, in which NERSA requests information from municipalities to determine the tariff increase itself. SALGA submits that NERSA's list of information in the letter of 28 June 2024 is different, yet again, from the information NERSA referred to in its letter of January 2024.

[60] The Court considered this correspondence. From the correspondence, it is clear that the initial position of NERSA was for municipalities to submit a cost-of-supply study. However, in January 2024, NERSA changed its methodology and provided an alternative to the cost of supply study. The Court is bolstered by this conclusion as NERSA explains the mischief which led to the change. NERSA pleads that the position it adopted in January 2024 was motivated by a "decrease" in municipal tariff applications accompanied by cost of supply studies:

"Following the court decisions, NERSA found itself without a tool to approve municipal tariffs. As a result, NERSA revised its costs of supply framework approved by the Energy Regulator on 26 October 2023. Municipalities were then expected to submit the Cost of Supply studies and the 2024/2025 tariff applications based on the COS findings.

In the wake of these changes, NERSA is grappling with the challenges of municipalities adhering to the above requirements. This has led to a significant decrease in the submission of rate tariff applications based on COS."

[61] Implicit in this is NERSA's concession that it altered its requirement—to no longer require a cost of supply study—in response to municipalities' non-compliance with the requirement.

[62] I am fortified in my conclusion that NERSA changed its methodology based on two letters attached to its answering affidavit in January 2024. These letters were from Knysna Municipality (which had a tariff application but no COS study) and Kannaland Municipality (which had provided neither a COS Study nor a tariff application). NERSA explains that it has identified certain cost information, "which will be used to enable you to calculate the average percentage increase required on tariffs. These costs will be tested for prudence and efficiency on a case-by-case basis" which costs include:

- a) bulk purchase costs indicating purchases;⁴⁵
- b) network operating costs;
- c) retail operating costs;
- d) general and other expenses relevant to the licensee;
- e) licensee's estimated reasonable return supported by motivation for such return;
and
- f) sales forecasts are shown in MWh and rand value.

[63] NERSA's position in January 2024, as conveyed to these municipalities, does not require a cost of supply study. In fact, the information requested from municipalities was to replace the need to conduct a cost of supply study.

[64] Furthermore, NERSA, at the hearing of the matter, tendered a solution that permitted licensees to follow either its cost-of-supply study framework or the cost-breakdown approach. This solution did not require a cost-of-supply study. Even on NERSA's version, paragraph 3 of the "without prejudice letter" to the Court indicated that "each municipality is expected to submit a tariff application supported by a cost of supply study or cost data to determine the costs of supply". Paragraph 5 states that "Municipalities were expected to submit tariff applications, supported by a cost of supply study and a tariff application or cost breakdowns." Paragraph 10 "Broadly, tariff applications are classified into the following categories: based on COS studies or based on the cost breakdown structure."⁴⁶ The position, even at the hearing of the matter was that NERSA would accept a cost breakdown structure, in the place of a cost of supply study.

[65] Similarly, NERSA's written submission states that "the ideal position is that all applications should be supported by a COS study. However, if a municipality is unable to conduct a COS study, for whatever reasons, it should utilise NERSA's approved COS model and reporting and submit this to NERSA for consideration."⁴⁷

⁴⁵ From Eskom SOC Limited ("Eskom"), independent power producers ("IPPs") and self-generation costs where such licensee has self-generation facilities, shown in MWh purchased and rand value and for on-selling and own use (i.e. licensees' electricity department and does not include other departments' usage as these must be billed);

⁴⁶ Consistent with the process set out in annexure AA4 (which is the letter of 17 May 2024)

⁴⁷ NERSA's HOA, para 7.4

[66] It is clear that the new model (whether it is a cost breakdown or an assumption methodology) does not require a cost-of-supply study. NERSA's motivation for using the latter methodology/ies is that some municipalities did not conduct a COS study. The new methodology eliminates this requirement.

[67] The Court therefore rejects NERSA's submission that the new methodology (cost-breakdown methodology introduced in January 2024) is no different from one that requires a cost-of-supply study (COS Framework and the methodology used in October 2023).

Is the new methodology lawful?

[68] NERSA's submission was that the methodology had not changed. NERSA's positive assertion is that the approach based on cost breakdown is no different to a guideline and benchmark approach⁴⁸ and that it is premised on "the actual costs of municipalities".⁴⁹ NERSA's written submissions state that its methodology "does not violate the Policy".⁵⁰

[69] The new method does not require a cost-of-supply study; it is explicitly introduced to replace the cost-of-supply study. To this extent, the new methodology is at odds with the Policy and NERSA's frameworks, which require cost-of-supply studies.

[70] Aside from this, the new methodology uses historical costs to inform the application. NERSA requires a breakdown of these costs in place of a supply of cost studies. This list of historical costs does not appear in either the COS Framework or the COS Framework and Pricing Methodology. It is not only a difference of name but a substantially different methodology. They are not only different; they are different on the significant issue of requiring a cost-of-supply study.

[71] The Court, therefore, rejects NERSA's submission that its methodology does not derogates from the COS framework adopted (and which is being followed by NERSA). The COS framework itself requires cost-of-supply studies. They cannot be the same.

⁴⁸ NERSA AA para 74

⁴⁹ NERSA AA para 90

⁵⁰ NERSA's HOA para 24

The derogation is on an issue of substance, the core requirement of the COS Framework premised on Policy Position 23.

[72] It is not for the Court to set out the framework within which cost-of-supply studies must be undertaken. NERSA did so, and it accepted that a cost of supply study was required. However, when faced with non-compliance, rather than enforcing compliance, it decided to act outside the law and use a new unlawful methodology. This is at odds with its duties as a regulator. On this basis, the Court declares the new methodology introduced by NERSA unlawful.

[73] The Court also accepts that the assumptions methodology tested the application against certain assumptions. This approach – rather than based on a cost of supply methodology falls into the same category as the benchmarking methodology. On this basis also, NERSA's methodology is unlawful.

The non-compliant municipalities

[74] SALGA and the applicant dovetailed on setting aside NERSA's methodology. However, they parted ways on one aspect: what to do with municipalities which had not conducted cost-of-supply studies and had sought tariff increases from NERSA. SALGA sought to find a pragmatic way through. SALGA's concern was the financial impact on municipalities if they were not permitted to charge the tariffs, which NERSA had approved on the unlawful methodology. SALGA sought to alleviate this hardship by a proposal that the Court suspend the declaration of invalidity for another 12 months. To some extent, it is a repeat of the order of Her Ladyship Justice Kubushi.

[75] SALGA pleaded and submitted that municipalities have not budgeted based on the cost of supply studies. However, if municipalities are not permitted to use their budgets as they are now—premised on the absence of cost of supply studies—they would be rendered bankrupt. The allegation must and does weigh heavily with the Court. The Court turns to precedent from the Constitutional Court in dealing with instances where municipalities and the State contend they cannot comply with their statutory obligations due to budgetary constraints.

[76] The Constitutional Court in *Blue Moonlight* dealt with a challenge to the City's housing policy. The Policy differentiated between persons who would be rendered homeless due to eviction by the State and those who were rendered homeless by natural

disasters such as fires or floods. The City contended that its budget was incapable of assisting both those left homeless as a result of a natural disaster and an eviction. The Constitutional Court declared that distinction to be unconstitutional despite the concerns with budgetary constraints.

- [77] The Constitutional Court held that the Court's determination of the lawfulness of the City's conduct "cannot be restricted by budgetary and other decisions that may well have resulted from a mistaken understanding of constitutional or statutory obligations". The Court declared that "it is not good enough for the City to state that it has not budgeted for something, if it should indeed have planned and budgeted for it in the fulfilment of its obligations."⁵¹
- [78] The Constitutional Court rejected the argument that the State need not comply with its obligations as its budget cannot fund the extent of its obligations – as properly determined by a court. It is the ambit of the obligation which must guide the determination of the budget, not the size of the budget which determines if it must comply with its obligations. If the budget is premised on a misconception of the State's duties, then it is no answer to say that the duties cannot be achieved due to budgetary constraints. The State ought to have budgeted in line with its obligations.
- [79] The inverse cannot be correct: that the State's obligations are circumscribed by its budget when the State ought to set the budget premised on its obligations. If not, the State can escape its obligations by setting a budget premised on a derogation of its obligations and then turn around and rely on its budget to justify non-compliance with its obligations. Such a position would be the antithesis of the rule of law as it would subject the rule of law to the State's determination of its budgets.
- [80] Of course, one can imagine if a party is litigating the scope of a right with an internal limitation, such as being subject to the progressive realisation of the right, in such a case, financial constraints on the State are weighed differently. Here, the Court is not dealing with a socio-economic right – the scope of which is to be determined subject to the progressive realisation of a right, but rather an obligation owed by the State. Here the Court is faced with an express obligation – with no limitation premised on the state's budget.

⁵¹ Id para 74

- [81] Premised on the approach followed by the Constitutional Court in *Blue Moonlight*, the Court declines to accept budgetary constraints as a justification for non-compliance with a duty, particularly in circumstances where the budgetary constraints are premised on an incorrect approach to the State's obligations. More so, when all state parties accept the ambit of the obligation and rely solely on their budgets as justification for non-compliance.
- [82] The approach in *Blue Moonlight* involved challenging the State's obligations as a policy. Therefore, the application of the principle in *Blue Moonlight* is appropriate in this case.
- [83] The approach of the Constitutional Court in *Blue Moonlight* was not an isolated moment, and the Constitutional Court has consistently followed it in various contexts. I consider the context and authority in these subsequent cases with care. In *Lawyers for Human Rights v Minister of Home Affairs and Others*⁵² the State sought to justify a limitation of the rights in sections 12 and 35(2) of the Constitution. The case concerned the right of persons detained under the Immigration Act to be brought before a court of law within 48 hours of their arrest. In justification of the breach of these rights, the State raised the issue of increased costs resulting from judicial reviews involving appearances in Court.⁵³ Regarding financial resources, the State alleged that there will be a need to employ a "massive number of additional magistrates who will be required to consider these warrant confirmations".⁵⁴
- [84] The Constitutional Court held that a limitation of rights like physical freedom cannot be justified based on general facts and estimates of an increase in costs.⁵⁵ The mere "increase in costs alone cannot be justification for denying detainees the right to challenge the lawfulness of their detention". Moreover, the Court held that section 34(1) requires that the arrested foreigners be informed of the right to challenge the decision to deport them on appeal and ask that a court warrant confirm their detention. If each foreigner decides to exercise these rights, increasing costs would be unavoidable. Therefore, the "State must have budgeted for these costs which are

⁵² (CCT38/16) [2017] ZACC 22; 2017 (10) BCLR 1242 (CC); 2017 (5) SA 480 (CC) (29 June 2017)

⁵³ Id para 57

⁵⁴ Id para 59

⁵⁵ Id para 61

necessitated by the implementation of the Immigration Act.” The Constitutional Court held that “the reasons advanced by the State here are woefully short of justifying the limitation”.⁵⁶

[85] In *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development*⁵⁷ The applicants, permanent residents, challenged the limitation of social assistance for South African citizens. The respondents sought to deny the benefit to permanent residents because this would impose an impermissibly high financial burden on the State.⁵⁸ The respondents relied on an affidavit deposed to by Mr Kruger, the Chief Director of Social Services in the National Treasury, for this point. Mr Kruger says that if provision has to be made for the expenditure necessary to give effect to the High Court order, the costs will be large and will “result in shortfalls in provincial budgets, particularly in the poorer provinces.” Despite this, the Court refused to view alleged “shortfalls in provincial budgets” as a basis to justify a limitation of a right.

[86] In the third case, which applied the approach of the Constitutional Court, the Court expressed itself at the principle level. In *Minister of Home Affairs and Others v Tsebe and Others*⁵⁹ the Constitutional Court said –

“We as a nation have chosen to walk the path of the advancement of human rights. ... This path that we, as a country, have chosen for ourselves is not an easy one. Some of the consequences that may result from our choice are part of the price that we must be prepared to pay as a nation for the advancement of human rights and the creation of the kind of society and world that we may ultimately achieve if we abide by the constitutional values that now underpin our new society since the end of apartheid.”⁶⁰

[87] Whilst this was not in the context of budgetary constraints being used to justify the limitation of rights, it was adapted and applied by the Constitutional Court in *Mlungwana and Others v S and Another*⁶¹ in the context of budgetary constraints, a

⁵⁶ Id para 63

⁵⁷ (CCT 13/03, CCT 12/03) [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) (4 March 2004)

⁵⁸ Id para 60

⁵⁹ (CCT 110/11, CCT 126/11) [2012] ZACC 16; 2012 (5) SA 467 (CC); 2012 (10) BCLR 1017 (CC) (27 July 2012)

⁶⁰ Id para 67

⁶¹ (CCT32/18) [2018] ZACC 45; 2019 (1) BCLR 88 (CC); 2019 (1) SACR 429 (CC) (19 November 2018)

justification was raised. In *Mlungwana*, the Constitutional Court dealt with the right to protest and the absence of a notice, and the gathering held more than 15 people. In that context, the respondents invoked a lack of resources. They argued that the police lack “resources to such an extent that the risk of unnotified gatherings must be mitigated through one of the harshest possible ways—criminalisation and punishment.” The justification was made in the context of justifying an infringement of the right to protest. In this context, the Constitutional Court held -

“Ordinarily, a lack of resources or an increase in costs on its own cannot justify a limitation of a constitutional right. The reason for attaching less weight to a lack of resources as a purpose for limiting rights is beyond question. Respecting, promoting, and fulfilling human rights comes at a cost, and that cost is the price the Constitution mandates the State to bear.”

- [88] The Court accepted the principle in *Tsebe* that respecting, promoting and fulfilling human rights comes at a cost which the State must bear and held that this is especially so when, as in that case, the State has not provided evidence demonstrating exactly to what extent costs will increase. The Court held that it is left none the wiser about what would happen if the incentive for giving notice were removed entirely or if other ways of incentivising notice were adopted by the Legislature.
- [89] I have considered the differing contexts of these judgments compared to the one before the Court. Save for *Blue Moonlight*, these cases all dealt with a section 36 analysis and tested whether the justification of a lack of funds was a reasonable justification for limiting a fundamental right. There is room in our constitutional dispensation under section 36 for the State to justify a breach of a human right. Rights are, as often stated, not unlimited.
- [90] In this case, however, it is not a breach of a right that the State seeks to justify through reliance on section 36 of the Constitution. It is the breach of law of an obligation in terms of statute and Policy. In these circumstances, there is no similar option available to the State to justify its non-compliance with a statutory provision as section 36 offers to justify the limitation of a fundamental right. NERSA has breached a statute; it cannot justify that breach regarding a lack of funds as would be available to it under a section 36 analysis. It must agitate for its amendment if it cannot comply with the law. However, a court cannot ignore the law and permit an illegality to continue.

[91] In light of the case law considered and the core principle in *Blue Moonlight*, the Court does not accept that a budgetary constraint can be used as the basis to deviate from what the statute requires of the State. On this basis, the Court did not accept the pragmatic solution tendered by SALGA.

[92] In addition to this principled position, the Court also engages with the facts of this matter.

Has a factual case of bankruptcy been made out?

[93] The Constitutional Court cases referred to above involved some engagement with the factual allegations made by the State about financial restraints. In these cases, the State pleaded with some particularity what the impact on their budgets would be. Despite this, the Constitutional Court in *Lawyers for Human Rights, Khoza and Mlungwana* noted that there was no clear evidence to show what the actual costs involved would be and decried the paucity of information before the Court. The Court in *Blue Moonlight* held in this regard:

“The City provided information relating specifically to its housing budget, but did not provide information relating to its budget situation in general. We do not know exactly what the City’s overall financial position is.”

[94] The Court must regard the information which SALGA has placed before the Court. With this in mind, the Court carefully considered the pleaded case by SALGA and the three municipalities who filed affidavits. The allegation is that if the non-compliant municipalities are not permitted to charge the tariffs in terms of the budgets approved by the municipal councils – premised on the unlawful method - then the -

“municipalities will be rendered bankrupt because they cannot afford to supply electricity at 2023/2024 tariffs when Eskom is charging them according to its increased 2024/2025 rates. By way of example:

1. eThekweni Municipality would have a revenue shortfall of R 1.9 billion
2. City of uMhlathuze would suffer a deficit of R 251 million
3. Kouga Municipality would have a shortfall of between R 30 and R 40 million
4. Overstrand Municipality would have a shortfall of R 45 million.”⁶²

⁶² The concluding allegations made in the answering affidavit are that “electricity service delivery will be brought to a standstill” as no municipality will be able to procure electricity from Eskom at Eskom 2024/2025 tariffs but then sell it at 2023/2024 tariffs.” It is also pleaded that most of the municipalities are “already in dire financial positions and are unable to service their current and historic Eskom account”. If the relief sought by the applicant is granted – to the Municipalities who did not submit the cost of supply studies – it will have “an unintended consequence of weakening the financial positions of most of the municipalities across the

- [95] There are no supporting documents or explanations, and what has been quoted here is the totality of the information provided. To borrow from the language of the Constitutional Court, it is a paucity of information.
- [96] More strangely, three of these municipalities have submitted cost of supply studies. These are compliant municipalities mentioned in the list of municipalities that can charge the increased rate and are, therefore, entirely unaffected by the application. For context, this dispute regarding the appropriate relief only impacts non-compliant municipalities. Therefore, it is odd that SALGA has presented proof of financial hardship for three compliant municipalities, as their applications are unaffected by the dispute. These compliant municipalities, being 66 in total, are specifically excluded in paragraph (b) of the order.
- [97] Specifically, eThekweni Municipality is number 2 on the list of compliant municipalities. As it is compliant, it is not affected by the application, so the alleged deficit of R 1.9 billion does not arise. The City of uMhlathuze is number 12 on the list. It is similarly in no danger, as it is a compliant municipality. Overstrand is number four on the list of compliant municipalities.
- [98] The facts presented as examples of the impact of not allowing the non-compliant municipalities to remain non-compliant are contradicted by SALGA's identification of which municipalities are compliant. SALGA's case on bankruptcy, is at best, overstated on its own facts.
- [99] In SALGA's version, it is, therefore, only Kouga Municipality which stands to run a deficit. Kouga Municipality filed an affidavit before this Court. However, in NERSA's discussion document, the Court has been told that there is a longstanding practice of municipalities overcharging consumers. It is not clear whether the alleged deficit is the result of an efficient supply of electricity from Kouga or the increase in Eskom's tariffs.
- [100] The very document which would have contained an answer to this is the cost of supply study.

Republic simply because they are then forced to sell electricity at tariffs which were not designed to enable them to recover the full cost of the supply".

[101] The Court is not persuaded, at either principle or fact, that a case has been properly made out that non-compliant municipalities ought to be permitted to continue using an unlawful method.

[102] In addition, it also weighed with the Court that it is a fundamental principle of our law that public power may only be exercised by substantive and procedural requirements prescribed by the empowering provisions,⁶³ and "action which is not by the behests of the empowering legislation is unlawful and therefore unconstitutional". As the Constitutional Court explained in *Minister of Finance v Agribusiness NPC*:⁶⁴

"The ultra vires doctrine ... is central to the determination of the lawfulness of the exercise of any public power. This demands, of every exercise of public power, a consistent compliance with the bounds set for the exercise of that power as provided for by the applicable law and the Constitution. ... The exercise of public power must, therefore, happen within the bounds set by the legal framework."⁶⁵

[103] The invitation from SALGA would be at odds with this principle.

[104] In addition, the Court considered that the obligation being breached is clear, longstanding, and not disputed. This Court recently reaffirmed it. In addition, NERSA and the municipalities were already granted a 12-month grace period, which effectively became 20 months, to bring themselves within the law.

[105] It also weighed with the Court that in these twenty months, municipalities were provided to comply with the *Nelson Mandela Bay* judgment, not one approached the Court for a variation to extend the 12-month timeframe and explain non-compliance.

Invitation to rely on section 172 of the Constitution

[106] The Court was faced with no good options. If it permitted NERSA and the municipalities to continue using an unlawful method, it would undermine the rule of law. If it prevented NERSA and the municipalities from applying the new unlawful method, tariffs would not be increased for non-compliant municipalities. The options

⁶³ National Education Health and Allied Workers Union v Minister of Public Service and Administration and Others; South African Democratic Teachers Union and Others v Department of Public Service and Administration and Others; Public Servants Association and Others v Minister of Public Service and Administration and Others; National Union of Public Service and Allied Workers Union v Minister of Public Service and Administration and Others [2022] ZACC 6 at para 73, citing Hoexter Administrative Law in South Africa 2ed Juta Cape Town 2012 at pp 254 - 256.

⁶⁴ [2022] ZACC 4

⁶⁵ Id at paras 39 – 40

for the Court, in stark terms, were to enforce the law or to yield to a pragmatic solution that would permit illegality (which has been ongoing for years) to continue to the detriment of the end-users.

[107] SALGA, however, presented the Court with an additional aspect to consider. SALGA referred the Court to the breadth of its powers under section 172 of the Constitution to craft a just and equitable remedy. Counsel for SALGA submitted that the country of section 172 is large. It is, of course, correctly submitted by SALGA.

[108] However, it is not apparent to the Court that the room created by section 172 permits the Court to grant relief which conflicts with a substantial obligation to conduct a cost of supply study and to decide tariff increases premised on such a study. Whilst our courts have repeatedly indicated the breadth of the power under section 172, in this case, the Court is being asked to use section 172 of the Constitution to contradict a substantive obligation. The Court was not persuaded its powers to grant just and effective relief included relief which contradicted the Executive, Parliament and a Court order, particularly in the circumstances of this case.

[109] The Court requested assistance from the parties as to whether there was another remedy which would ameliorate any prejudice to the non-compliant municipalities within the Courts powers. Afriforum contended it had considered relief under sections 24 and 28 of the Municipal Systems Act. However, Afriforum conceded that these were not true avenues available to the Court.

[110] As the Court was not persuaded section 172 permitted it to grant relief in conflict with explicit obligations and with no other avenue to ameliorate any alleged (but not substantiated) potential impact on non-complaint municipalities, the Court sought to provide municipalities with a way to bring themselves within the law and seek a tariff increase. The Court was not persuaded that the municipalities, represented by SALGA, had made out a case and that they would be rendered bankrupt if they had to comply. However, in light of the seriousness of such an allegation and the shortened timeframes under which SALGA had to respond, the Court permitted the municipalities another sixty days to approach NERSA.

[111] The Court founded its powers to do so in section 172 of the Constitution. As there is no provision which prohibits such an order, the Court consider this approach to be just and equitable.

[112] The time period of 60 days does not represent the maximum time within which municipalities must bring themselves within the confines of the law. It of course, remains open to Municipalities to seek an extension of this sixty day period. Our Courts have permitted such variations under section 172 of the Constitution.⁶⁶ However, that sets the requirement that municipalities must comply with the law, and if they cannot, the obligation is on them to approach the Court and explain and justify their non-compliance.

What tariff can be used by the non-compliant municipalities

[113] Another aspect which was contentious, and arose during submissions, was what tariff the non-compliant municipalities could charge? Afriforum submitted that the Court must interdict the non-compliant municipalities from charging an increased tariff which would mean effectively, they would charge their current tariffs. The need for this relief, also, is set out in paragraph 10.2 of Afriforum's letter of 26 June 2024.

[114] Mr Tshetlo for NERSA presented as evidence an SMS he had receiving during the hearing that NERSA was considering and approving tariff applications in two-hour slots. Afriforum did not object to this evidence being led, but rather relied on it in support of its relief and highlight the need to ensure that unlawful tariffs would not be permitted.

[115] SALGA and NERSA submitted that the impact of Afriforum's argument would be, perversely, to permit the very tariffs which Her Ladyship Justice Kubushi had declared as unlawful to persist. The submission was that it would be untenable if the impact of a finding that the current methodology is unlawful, would be to revert to the tariffs approved in term of the benchmarking methodology – which has been declared unlawful. The submission had another bow – to permit the existing tariffs to continue would undermine the order of Kubushi J – as it would then extend the unlawful tariff's further.

⁶⁶ See Minister of Justice v Ntuli 1997 (3) SA 772 (CC); Zondi v MEC Traditional and Local Government Affairs 2006 (3) SA 1 (CC)

[116] Afriforum responded to this criticism in reply. It submitted that it is not seeking to revert to the position prior to the *Nelson Mandela Bay* judgment. The order of Kubushi J (paragraph 3) dealt with how tariff increase applications were to be lawfully considered and approved. The order did not prohibit an existing tariff from remaining in place. The obvious consequence is that if no new tariff is approved – for its failure to be sought or considered lawfully - it stands to reason that the current tariff stands.

[117] After the hearing, NERSA filed submissions dealing with this issue. The Court received the submissions on the day the parties required an order. The Court is grateful for these submissions. They turn on the factual position that municipalities will be bankrupt if they cannot charge increased tariffs in light of the fact that the bulk electricity they buy from Eskom has increased. The submissions further referred the Court to the breadth of the Court's power under section 172 to do justice between the parties. On this basis, SALGA invited the Court to disallow the relief sought by Afriforum.

[118] For reasons set out above, the Court is not inclined to accept the conclusion of bankruptcy presented to the Court. In addition, whilst the Court's powers are broad to do what justice demands, for reasons set out above the Court is not persuaded that would include relief which contradicts the Executive, Parliament and the Courts, particularly in these circumstances.

[119] The Court therefore granted an order prohibiting the increase in tariffs outside the lawful method of a cost of supply approach, which requires a cost of supply study. The Court finds that such relief is not a contravention of the order of Her Ladyship Justice Kubushi. The Court also notes that without such an order, the relief granted by this Court would be ineffective.

Urgency

[120] The matter is urgent. The parties had engaged to a point but required a determination from the Court before 1 July 2024, when the municipal budgets had to be approved.

[121] There is no opportunity for the applicant to obtain substantial redress after 1 July 2024. The tariffs increase annually, and if the matter is not heard urgently, it is unclear how a resolution to the dispute would be found before the next year's tariffs are introduced.

The applicant also explained the steps it took in launching these proceedings; it is clear that it did not delay in the matter.

[122] The extraordinary time pressures the Court and parties were placed under could have been avoided. Before this application was filed and in a letter dated 19 April 2024, the applicant raised the confusion arising from the notices above with NERSA as follows:

"We take note of NERSA's letter of 17 November 2023 to licensees, requesting them to submit their completed COS studies by 1 March. Confusingly enough, NERSA sent out a letter on 29 January 2024 indicating that NERSA developed a revenue requirement template with various "assumptions" that municipalities must consider when applying for an increase.

What is the purpose of this template if the municipalities are supposed to submit a COS study when applying for an increase?"

[123] NERSA did not respond to the applicant's letter to clarify its position. The applicant also wrote a second letter, which was also unanswered.

[124] Had NERSA responded to these letters, the position could have been clarified sooner, and the need to litigate the week before the municipal budgets were approved could have been avoided. NERSA accepts it ought to have responded to the letters. However, it is not clear that it accepts accountability for the consequences of this conduct. It remains unexplained why NERSA did not respond to these letters.

[125] SALGA points to another aspect of NERSA's conduct, which caused unnecessary circumstances in which the matter was heard. Section 24 of the Local Government: Municipal Finance Management Act 56 of 2003 (MFMA) provides that a municipal council is required to consider approval of the annual budget at least thirty days before the start of the budget year – effectively, by no later than the end of May each year, in time for the start of the new budget year on 1 July 2024

[126] The correct position is that municipal electricity tariffs must be based on the cost of supply studies conducted by municipalities and submitted to NERSA when municipalities apply for the approval of new tariffs for the next financial year. Surprisingly, NERSA told municipalities, on 25 June 2024, what it requires from them in "*order for NERSA to determine the rates applicable for the 2024/25 FY*" when the 2024/25 financial year started on 1 July 2024, five days from the hearing. It is unclear how NERSA intended for municipalities to comply with their budgetary obligations in time.

Costs

[127] The applicant and SALGA are entitled to their costs. SALGA's position in court was clear: it supported the application save for certain relief which it believed would place municipalities in an impossible position. Their assistance to Court was premised on ameliorating the negative consequences of this Court's order. SALGA represents the municipalities. SALGA itself had no hand in the dispute before the Court. No one contended it did. However, SALGA pointed out that the municipalities – which it represents -were placed in a difficult position as a result of NERSA's conduct. As NERSA had placed SALGA in this position – particularly as NERSA could have avoided the application in a multitude of ways – SALGA is entitled to its costs.

[128] Afriforum is successful, and the cost should follow the result. However, there is a second reason the applicant is entitled to its costs. It came to the Court expressly in the public interest, litigating aspects of the rule of law and seeking to protect the rights of those who use electricity. The applicant is entitled to its costs based on the *Biowatch* principle as well.

[129] There was no dispute as to the scale of costs sought. The matter was complex, involved multiple pieces of legislation and policy. Particularly the matter of the appropriate relief justify granting of costs on Scale C for the seniors and B for the juniors involved.

Conclusion

[130] The Court ordered that:

- a) The normal rules concerning form and service are dispensed with, and the application is heard and decided upon as a matter of urgency.
- b) The first respondent's mechanism for approval of municipal electricity tariffs as set out in the *Notice to Municipal Licenced Electricity Distributors*, 29 January 2024 (Annexure "FA8" to the Founding Affidavit) is declared to be unlawful, invalid and of no force and effect.
- c) For the 2024/2025 municipal financial year, the first respondent shall consider and, if they are legally compliant, approve such electricity tariff applications by municipalities as are based on the municipalities' cost of supply studies timeously submitted by the *Notice to Municipal Licenced Electricity Distributors*, 17 November

2023 (Annexure “FA7” to the Founding Affidavit). A list of such municipalities, totalling 66, is attached hereto as Annexure A.

- d) The first respondent is prohibited from considering and approving municipal electricity tariffs for the 2024/2025 municipal financial year and subsequent municipal financial years where the municipalities’ applications for the approval of municipal electricity tariffs are not based on cost of supply studies, by the *Notice to Municipal Licenced Electricity Distributors*, 17 November 2023.
- e) No municipality shall be entitled to levy increased electricity tariffs upon end-consumers until the first respondent has approved an application supported by a cost of supply study, by the *Notice to Municipal Licenced Electricity Distributors*, 17 November 2023.
- f) Any municipality for whom the first respondent has not approved an application supported by a cost of supply study shall be entitled to continue levying electricity rate tariffs on the same tariff as that applicable during the 2023/24 municipal financial year, subject to paragraph 7.
- g) Municipalities shall be permitted to supplement electricity tariff applications with cost of supply studies, and the first respondent shall consider and, if they are legally compliant and by the *Notice to Municipal Licenced Electricity Distributors* 17 November 2023, approve such electricity tariff applications by municipalities as are based on the municipalities’ cost of supply studies submitted after the date of this order, within one month of receipt of the requisite cost of supply studies. Municipalities are afforded 60 days from the date of this order to make such a compliant application to the first respondent.
- h) The first respondent shall pay the applicant and the second respondent’s costs of the application, including the costs consequent upon the employment of two advocates, that of senior counsel and that of junior counsel on Scale C, in terms of rule 67A(2) and (7).



Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

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Instructed by:	H M Chaane Attorneys
Date of the hearing:	26 June 2024
Date of the order:	28 June 2024
Date of judgment:	8 July 2024