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

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED
DATE: 8 June 2026
SIGNATURE:

Case No. 2023-072548

In the matter between:

CITY OF TSHWANE METROPOLITAN MUNICIPALITY	**FIRST APPLICANT**
THE CITY OF TSHWANE CITY MANAGER	**SECOND APPLICANT**

And

NATIONAL ENERGY REGULATOR OF SOUTH AFRICA	**FIRST RESPONDENT**
ESKOM HOLDINGS SOC LIMITED	**SECOND RESPONDENT**

SOUTH AFRICAN LOCAL GOVERNMENT ASSOCIATION	**THIRD RESPONDENT**
THE MINISTER OF ELECTRICITY MR. RAMOKGOPA	**FOURTH RESPONDENT**
THE MINISTER OF MINERAL RESOURCES AND ENERGY	**FIFTH RESPONDENT**
THE MINISTER OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	**SIXTH RESPONDENT**
NATIONAL TREASURY	**SEVENTH RESPONDENT**

Coram: Millar J

Heard on: 16 April 2026

Delivered: 8 June 2026 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 15H30 on 8 June 2026.

JUDGMENT

MILLAR J

[1] This is an application to review and set aside the decision of the first respondent (Nersa) to amend the Electricity Distribution Licence (Edl) granted to the second respondent (Eskom) to include in it the Mooikloof Mega City Development. The decision was made on 10 February 2023.

[2] The applicants (Tshwane) seek two orders:

[2.1] A declaration that the Mooikloof Mega City, Rietfontein 375-JR, is an area included in Schedule 1 to Tshwane's electricity licence number NER/D/TSHWANE granted by Nersa on 13 October 2011; and

[2.2] A declarator that Nersa's decision of 10 February 2023 to include the Mooikloof Mega City, Rietfontein 375-JR into Eskom's licensed area of supply be declared unlawful, invalid, and reviewed and set aside.

[3] Tshwane brings the review under section 10(3) of the National Energy Regulator Act[1] (NERA), read together with section 31 of the Electricity Regulation Act[2] (ERA), and on the principle of legality. The orders are opposed by both Nersa and Eskom.

[4] The Farm Rietfontein 375-JR (the Farm) is part of the site of the Mooikloof Mega City Development. Historically, this area fell under the jurisdiction of the Kungwini

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[1] Act 40 of 2004. The section provides *"Any person may institute proceedings in the High Court for the judicial review of an administrative action by the Energy Regulator in accordance with the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000.)"*

[2] Act 4 of 2006. The section provides *"Section 10(3) of the National Energy Regulator Act applies to every decision taken by the Regulator in terms of this Act, except where this Act provides otherwise or whether the Regulator sits as a tribunal, in which case section 10(4) of that Act applies."*

Local Municipality, which was subsequently dis-established. In 2008, the entire area was transferred to the municipal authority of Tshwane.

[5] On 22 September 2011, Nersa granted Tshwane an electricity distribution licence listing the Farm as one of the areas for electricity supply. The Farm appears in Schedule 1 to the licence as "*1926 Rietfontein 375-JR,*" which also encompasses subdivided portions of the Farm.

[6] At the time the licence was granted to Tshwane, several existing customers within the generally undeveloped area of the Farm had historically been supplied by Eskom. Eskom was separately licensed to continue supplying those legacy customers. Tshwane's licence expressly excluded those customers in that it provided:

> *"The municipal area of City of Tshwane (as per City of Tshwane's map as submitted with the licence amendment application). Customers being supplied by Eskom or any other licensed distributor at the date of commencement of this licence are excluded from this licence."*

[7] The balance of the Farm — being predominantly undeveloped land — was licensed to Tshwane. The Eskom licence was one of expedience and practicality, granted because at the time of transfer, Tshwane did not have the infrastructure presence to take over those customers' supply.

[8] On 25 March 2021, Eskom applied to Nersa to amend its Edl to include the Mooikloof Mega City development insofar as it related to the area of the Farm over which it held no licence.

[9] Tshwane, the licensed distributor for the area, only became aware of this application through social media and newspaper reports on 17 and 18 March 2022, nearly a year later, when Nersa invited public consultation and participation

in its consideration of the application. Nersa did not officially inform Tshwane until 25 March 2022 of Eskom's application.

[10] On 28 March 2022, Tshwane wrote to Nersa asserting that:

[10.1] the Farm fell within its licensed area, that it already had electricity supply infrastructure in the area which included the Mooikloof 132 kV/11 kV sub-station;

[10.2] it intended to develop a second sub-station (the Zwavelpoort sub-station) and it was amenable to granting permission for alternative distributors, including Eskom, to supply customers where it was unable to do so and

[10.3] it had concerns about the significant revenue impact on it of any licence amendment.

[11] On 11 April 2022, Tshwane attended the public hearing and presented its case fully.

[12] During the public hearing, Tshwane informed Nersa of the following:

[12.1] Tshwane is a Category A City with executive and legislative authority under section 155(2)(a) of the Constitution and the Municipal Structures Act.[3]

[12.2] Under section 156(1)(a) of the Constitution, municipalities have executive authority over electricity reticulation, which falls under Part B of Schedule 4, a concurrent national and provincial legislative competence with local government executive and legislative authority.

[3] Act 117 of 1998.

[12.3] Tshwane holds licence NER/D/TSHWANE, obliging it to operate the distribution facility within Schedule 1 and to distribute and supply electricity to all customers and end users within that area. Its license also entitled it to supply electricity in accordance with its approved electrification plan and that it would not cede or transfer any licence power without Nersa's prior consent.

[12.4] No permission had been sought from Tshwane under section 16(1)(b) of ERA for any amendment to its licence in connection with the Mooikloof Mega City inclusion.

[12.5] The Mooikloof Mega City falls within Tshwane's Region 6. While the area's agricultural holdings had historically been supplied by Eskom, any new township developments were to be supplied by Tshwane consistent with its executive and legislative authority.

[12.6] Bulk electricity supply in the Eastern Suburbs, although severely limited, was being addressed by Tshwane through the construction of the Wildebees Infeed Station, scheduled for commissioning in 2025. Once commissioned, it would alleviate the burden on the Nyala Infeed Station and create sufficient capacity to supply all 50 000 units of the Mooikloof Mega City Development.

[12.7] Full implementation of the 50 000-unit development was estimated to yield approximately R125 million per month in electricity revenue (at an average household consumption of R2 500 per month). The loss of revenue, if the license was granted to Eskom, would be significant for Tshwane.

[13] At Nersa's Electricity Subcommittee Meeting of 1 December 2022, it was observed that Eskom's application lacked any legal argument addressing Tshwane's constitutional rights and obligations regarding the executive control over electricity distribution within its jurisdiction. This observation was not taken any further after a legal opinion was obtained that reticulation had *"not been defined to a point where it is deemed as constitutionally acceptable."*

[14] At the Electricity Subcommittee Meeting of 10 February 2023, members repeatedly raised concerns that the same area was still listed in Tshwane's licence:

> *"Procedurally, Members queried whether the inclusion of one area in another licensee's (Eskom's) licence could be considered when the same area was still in another licensee's (City of Tshwane) licence. Members were of the view that the City of Tshwane's licence should be first amended to remove the area before including it in Eskom's distribution licence."*

No such amendment to Tshwane's licence was ever made or applied for.

[15] Despite these concerns, Nersa approved Eskom's licence amendment on 10 February 2023.

[16] Section 156(1)(a) of the Constitution confers on municipalities executive authority over local government matters listed in Part B of Schedule 4, which includes electricity reticulation. The ERA defines a municipality accordingly as one that:

> *"has executive authority over and the right to reticulate electricity within its area of jurisdiction in terms of the Municipal Structures Act."*

[17] Section 27 of ERA, specific to municipalities such as Tshwane, provides as follows:

"(1) Each City must exercise its executive authority and perform its duty by–

(a) Complying with all the technical and operational requirements for electricity networks determined by the Regulator;

(b) Integrating its reticulation services with its integrated development plans;

(c) Preparing, implementing and requiring relevant plans and budgets;

(d) Progressively ensuring access to at least basic reticulation services through appropriate investments in its electricity infrastructure;

(e) Providing basis reticulation services free of charge or at a minimum cost to certain classes of end users within its available resources;

(f) Ensuring sustainable reticulation services through effective and efficient management and adherence to the national norms and standards contemplated in section 35;

(g) Regularly reporting and providing information to the Department of Provincial and Local Government, the National Treasury, the Regulator and customers;

(h) Executing its reticulation function in accordance with relevant national energy policies; and

(i) Keeping separate financial statements, including a balance sheet of the reticulation business."

[18] Section 10 of ERA sets out the requirements for a licence application. Section 11 requires advertising of an application and obliges Nersa to consider objections.[4] Section 12 requires that an applicant be furnished with all substantiated objections to allow response. Section 13(1) requires a decision within 120 days from advertisement (or from any request for additional information following objections).

[19] Section 16 of ERA governs licence amendments. Section 16(1) of ERA provides:

4 Section 11(4) of ERA.

"(1) The Regulator may vary, suspend or remove any licence condition, or may include additional conditions— (a). on application by the licensee; (b) with the permission of the licensee; (c) upon non-compliance by a licensee with a licence condition; (d) if it is necessary for the purposes of this Act; or (e) on application by any affected party."

[20] Section 17 of ERA governs the revocation of a licence on application by a licensee in prescribed circumstances. No such application was ever made by Tshwane.

[21] Nersa approved and published its Internal Electricity Licence Procedure (the Rules) on 13 April 2012 pursuant to section 35 of ERA. Rule 2.1 states that the purpose of the Rules is to *"outline the administrative procedure that will apply in the processing of electricity distribution licence applications made in terms of sections 4, 7, 16 and 17 of the Act."*

[22] The Rules define *"greenfield"* as: *"an area that is outside of an existing licensed area of supply (AoS) that has never had any electrical connection, has potential for development and/or potential to be rezoned and/or proclaimed to require electricity connection(s)."*

[23] The Rules further distinguish between a *"licensed area of supply"* (a NERSA-approved area referred to in Schedule 1 of an issued licence) and a *"licensable area of supply"* (a specific area, whether greenfield or brownfield, that is eligible for licensing).

[24] These are mutually exclusive designations. Once an area is licensed, it is no longer licensable unless the licence is amended under section 16 or revoked under section 17. A licensable area is one that has never been licensed, or one in respect of which a licence has been revoked but no new licence has yet been granted.

[25] Section 10(3) of NERA provides that any person may institute proceedings in the High Court for judicial review of an administrative action by the Energy Regulator in accordance with the Promotion of Administrative Justice Act[5] (PAJA). Section 31 of ERA applies section 10(3) of NERA to every decision of the Regulator under ERA (except where ERA provides otherwise, or the Regulator sits as a tribunal).

[26] Section 10 of NERA further requires that every Nersa decision must be: "consistent with the Constitution and all applicable laws"[6]; "in the public interest"[7]; "procedurally fair"[8]; and "based on reasons, facts and evidence that must be summarized and recorded"[9] and "explained clearly as to its factual and legal basis and the reasons therefore"[10].

[27] In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*,[11] the Constitutional Court confirmed that section 6 of PAJA codifies the grounds of judicial review of administrative action and that causes of action for the review of administrative action ordinarily arise from PAJA, grounded in the Constitution.

[28] Since the decision of Nersa is an administrative action reviewable under PAJA by operation of sections 10(3) of NERA and 31 of ERA, PAJA, specifically sections 6(2)(c)[12],(f)[13] and (i)[14] provides the appropriate framework for this application. A separate legality review is accordingly not required.

[29] In *Glencore Operations South Africa (Pty) Ltd v NERSA*,[15] Senyatsi J affirmed that local government has executive authority and the right to administer electricity reticulation and may make and administer by-laws for its effective

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5 Act 3 of 2000.
6 Section 10(1)(a) of NERA.
7 Section 10(1)(b) of NERA.
8 Section 10(1)(d) of NERA.
9 Section 10(1)(e) of NERA.
10 Section 10(1)(f) of NERA.
11 2004 (4) SA 490 (CC) at para [25].
12 *"The action was procedurally unfair."*
13 *"The action itself – (i) contravenes a law or is not authorised by the empowering provision."*
14 *"The action is otherwise unconstitutional or unlawful."*
15 2023 JDR 4386 (GJ) at paras [31] - [32].

administration. ERA permits local government to exercise power in respect of electricity supply, including providing basic reticulation services free of charge or at minimum cost to certain end users, ensuring sustainable reticulation services, reporting to National Treasury and Nersa, and keeping separate financial statements.

[30] In *Joseph v City of Johannesburg*,[16] the Constitutional Court held that:

> *"The provision of basic municipal services is a cardinal function, if not the most important function, of every municipal government. The central mandate of local government is to develop a service delivery capacity in order to meet the basic needs of all inhabitants of South Africa, irrespective of whether or not they have a contractual relationship with the relevant public service provider."*

[31] In *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd*,[17] the Constitutional Court set out the complementary roles of Eskom and municipalities. Municipalities have constitutional and statutory duties to procure bulk electricity (as Eskom's customers under ERA) and to supply electricity to residents as end users. Furthermore, ERA gives effect to those constitutional duties through the obligations imposed by section 27 and Nersa enjoys the power to regulate the licensees which would otherwise enjoy a monopoly on power.

[32] The nub of the dispute is whether Tshwane holds, by virtue of its licence, an exclusive right to supply electricity to all areas of the Farm not previously supplied by Eskom's legacy customers.

[33] Tshwane's licence covered all portions of the Farm where there were no historical Eskom customers, while Eskom's licence was limited exclusively to those specific legacy customers. It follows, as a matter of logic, that any extension of Eskom's licence to additional areas of the Farm necessarily required a corresponding

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16 2010 (4) SA 55 (CC) at para [34].

17 2023 (4) SA 325 (CC). See the minority judgment of Unterhalter AJ at paras [83]-[87].

amendment to Tshwane's licence to remove those areas from its scope. It is for this reason that the licence granted by Nersa in this case was exclusive.

[34] In the present case, Eskom applied to amend its own licence under section 16(1)(a) of ERA. However, what did not occur was any application to amend Tshwane's licence. The combination of both licences on their original terms was intended to cover 100% of the Farm. Expanding Eskom's portion without contracting Tshwane's portion creates an impermissible overlap.

[35] Nersa was aware of the terms of both licences when Eskom applied. The Subcommittee itself queried procedurally whether an area could be included in Eskom's licence while it remained in Tshwane's licence and noted that Tshwane's licence should first be amended. No such amendment was ever sought or made.

[36] Nersa asserted that the Farm constitutes a greenfield area under the Rules. This assertion was made to try and take the area of the Farm (which falls under Tshwane's licence) which was undeveloped, outside of the ambit of the license. This contention is not supported by the Rules. A greenfield, as defined, is an area outside of an existing licensed area of supply that has never had any electrical connection. The Farm has been within Tshwane's licensed area since 2011. It is not outside any existing licensed area, and therefore cannot be characterized as a greenfield.

[37] Moreover, Nersa's argument that farms should not be regarded as part of Tshwane's Schedule 1 is also irreconcilable with its prior approval of tariffs for those Farms.

[38] Tshwane also argued that Eskom failed to comply with the requirements of section 10 of ERA when it submitted its application, which in addition to the failure to apply to amend or revoke Tshwane's licence, also rendered Nersa's decision *ultra vires*. Section 10 applies to initial applications, which this was not. Eskom was already in possession of a license and sought to amend it. The application

to amend can hardly be said to be on the same footing as a first application. To require Eskom in seeking to amend its application, to start from the beginning seems to me to be entirely impractical and unreasonable. It was for Nersa, given the exigencies of the application, to call for the information that it needed to properly consider it.[18] For this reason, I am not persuaded that this ground of review has any merit.

[39] In *Pepcor Retirement Fund and Another v Financial Services Board and Another,*[19] it was held:

> *"In my view, a material mistake of fact should be a basis upon which a Court can review an administrative decision. If legislation has empowered a functionary to make a decision, in the public interest, the decision should be made on the material facts which should have been available for the decision properly to be made. And if a decision has been made in ignorance of facts material to the decision and which therefore should have been before the functionary, the decision should . . . be reviewable . . . The doctrine of legality . . . requires that the power conferred on a functionary to make decisions in the public interest, should be exercised properly, i.e. on the basis of the true facts: it should not be confined to cases where the common law would categorize the decision as ultra vires."*

[40] This principle applies here. Nersa's decision was made without full material information before it and in particular, the information contained in Eskom's supplementary affidavit (regarding Tshwane's township establishment condition directing Balwin Properties to Eskom). While that information might have been relevant, it does not cure the fundamental defect. Nersa approved Eskom's licence amendment without simultaneously amending Tshwane's licence, or obtaining Tshwane's consent, or requiring Tshwane to apply for the revocation of its licence in terms of section 17 of ERA.[20]

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[18] *MEC for Environmental Affairs and Development Planning v Clairison's CC* 2013 (6) SA 235 (SCA) at para [22].
[19] 2003 (6) SA 38 (SCA) at para [47].
[20] *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 (6) SA 182 (CC) at para [91].

[41] In its supplementary affidavit, Eskom relied on a condition that Tshwane had imposed for the establishment of the Mooikloof Mega City, which directed the township owner to plan with Eskom as *"the licensed supplier of electricity in the township."* Tshwane opposed admission of this affidavit, primarily on the basis that this information was not before Nersa when the impugned license was granted. I agree and the supplementary affidavit is not admitted.

[42] The decision under review must be assessed solely through the lens of the record before Nersa at the time. This information was not before Nersa when it made its decision.

[43] Nersa and Eskom argued that electricity supply does not fall within the exclusive jurisdiction of municipalities and that Tshwane's interpretation of section 156(1)(a)[21] of the Constitution is incorrect. This contention is rejected. The Constitution unequivocally confers executive authority and jurisdiction over electricity reticulation on Tshwane. ERA expressly recognises and gives effect to this constitutional position. Nersa ought not to have approved Eskom's licence amendment without either addressing whether or not this was permissible in the absence of an amendment to Tshwane's licence and also the constitutional position of Tshwane. This was fundamental to the consideration of whether to approve Eskom's application. This is the nub of the review and why it must succeed.

[44] Several further grounds were advanced by Tshwane for the review. Both Nersa and Eskom refuted these. I am not persuaded that these are necessary or meritorious for the following reasons:

[44.1] It was asserted that there had been procedural unfairness due to delayed notification. Tshwane only became aware of Eskom's

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21 The section provides that a City *"has executive authority in respect of and has the right to administer – (a) the local government matters listed in part B of schedule 4 and part B of schedule 5."* Part B of schedule 4 specifically lists *"Electricity and gas reticulation."*

application through media reports nearly a year after it was filed. The distribution licence procedure required that a copy of any application be forwarded to other licensees operating in the vicinity, which was not done timeously. However, once Tshwane became aware of the process, it made its views known and participated meaningfully at every stage. Nersa conducted the process in a procedurally compliant manner, and Tshwane's own concession on this point disposes of this ground.

[44.2] It was asserted that the decision to grant Eskom's license, was made outside the 120 days provided for. This ground ignores that between Eskom's application (25 March 2021) and Tshwane's notification (March 2022), nothing of consequence occurred. From the time Tshwane was notified, it participated fully and so no prejudice arises from the delay and this ground alone would, to my mind, be insufficient to find that the decision to grant Eskom its license is reviewable.

[45] Eskom and Nersa also both initially argued that the present application was doomed to failure in that as Organs of State, Tshwane and Nersa ought to have attempted to resolve the dispute in terms of the Intergovernmental Relations Framework Act.[22] This argument was not pursued at the hearing as the parties had subsequent, to the issue of the application, endeavored to resolve the matter through this mechanism.[23]

[46] Eskom and Nersa also argued that the declaratory order sought was limited in geographic scope. It was argued that because the Mooikloof Mega City extends beyond the Farm Rietfontein 375-JR onto other Farms not in Tshwane's licensed area, the declaratory orders sought have no basis. This ground is not persuasive.

[22] Act 13 of 2005.

[23] In terms of a court order granted on 22 August 2025, a facilitator was appointed by the parties as envisaged by the provisions of Section 42(1)(d) of the Intergovernmental Relations Framework Act. By the time the application was heard however, the efforts to settle the dispute had been unsuccessful and a certificate to this effect was filed in court on 13 January 2026.

The orders sought relate only to the licensed area and could never be in respect of areas not specifically included within Tshwane's licensed area. The orders are accordingly appropriately framed.

[47] It was also argued that the developer (Balwin Properties) of the Mooikloof Mega City, ought to have been joined. This ground is summarily rejected. Balwin Properties does not have a direct and substantial interest in the order sought. The law in this regard is clear as set out in *Lebea v Menye and Another.*[24] An interest in the court's reasoning or findings, as opposed to the order itself, is insufficient for joinder. The only interest that Balwin Properties has is in the supply of electricity to the development. It has no interest in who supplies that electricity.

[48] For the reasons set out above, the decision taken by Nersa on 10 February 2023 is declared unlawful and invalid and is reviewed and set aside.

[49] Regarding costs, given the nature and importance of this matter to all parties, engagement of more than one counsel was a wise and reasonable precaution. Costs are ordered on Scale C, including costs of two counsel.

[50] In the circumstances, I make the following order:

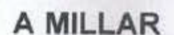
[50.1] It is declared that the Mooikloof Mega City, insofar as it is located upon Farm Rietfontein 375-JR, is an area included in Schedule 1 of the City of Tshwane's electricity licence number NER/D/TSHWANE granted by the first respondent on 13 October 2011 for the operation of a distribution facility.

[50.2] It is declared that the first respondent's decision taken on 10 February 2023 to include the Mooikloof Mega City, insofar as it is located upon

[24] 2023 (3) BCLR 257 (CC) (CC) at para [30] in which it was stated: ""*The word "interest" in rule 28(1) has been interpreted to mean a direct and substantial interest which a person is required to have in the subject matter before he or she can be said to have locus standi in such a matter or before such a person may be jointed or be allowed to be joined in proceedings. Direct and substantial interest is a direct and substantial interest in the order that a court is asked to make in a matter. It is not enough if a person has an interest in a finding or in certain reasons for an order. The interest must be in the order or the outcome of the litigation.*

Farm Rietfontein 375-JR, into the second respondent's licensed area of supply; is declared unlawful, invalid and is reviewed and set aside.

[50.3] The first and second respondents are jointly and severally, the one paying the other to be absolved, ordered to pay the costs of the applicant on the scale as between party and party, which costs are to include the costs consequent upon the engagement of two counsel upon Scale C.



A MILLAR

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

HEARD ON:	16 APRIL 2026
JUDGMENT DELIVERED ON:	08 JUNE 2026

FOR THE APPLICANTS

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NO APPEARANCE FOR THE THIRD TO SEVENTH RESPONDENTS