REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE JUDGES: YES/NO
(3) REVISED.
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DATE: 03/08/2026 SIGNATURE……[redacted]

CASE NO: 2026-139570

In the matter between:

Musina Local Municipality	Applicant
And	
NATIONAL ENERGY REGULATOR OF SOUTH AFRICA (NERSA)	First Respondent
ESKOM SOC LIMITED	Second Respondent
SOUTH AFRICAN LOCAL GOVERNMENT ASSOCIATION (SALGA)	Third Respondent
NATIONAL TREASURY	Fourth Respondent
PROVINCIAL TREASURY, LIMPOPO PROVINCE	Fifth Respondent

Delivered: This judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses. The date for the hand-down is deemed to be **3 AUGUST 2026**.

JUDGMENT

Makoti AJ

Introduction

[1] Musina Local Municipality (Musina) approached this court on an urgent basis.[1] The application is predicated on the provisions of Rule 27 of the Uniform Rules of Court to condone its late delivery of an application of tariffs. It initially sought to obtain orders, the substance of which I shall traverse below, on an *ex parte* basis, with a return date. That procedure did not succeed, for reasons that do not detain this court's attention for purposes of the determination of this application.

[2] The respondents are the National Energy Regulator of South Africa (NERSA), which is the only participating respondent; Eskom SOC Limited (Eskom); the South African Local Government Association (SALGA); the National Treasury; and the Limpopo Provincial Treasury.

[3] In pith, Musina wants condonation for the late filing of its application to NERSA for an increase or revision of electricity tariffs. It has asked this court to direct NERSA to consider its application even though it was submitted after the closing date of submission of such applications. NERSA has opposed the application on several grounds that I will canvass below.

[1] Rule 6(12)(b) of the Uniform Rules.

The relief sought and the grounds of opposition

[4] Apart from the question of urgency, the essence of the relief asked for by the Municipality is that:

[4.1] Its late application for a tariff increase that was made after 31 March 2026 should be condoned.

[4.2] Also, that its non-compliance with the statutory timeframe for tariff processes and public participation be condoned.

[4.3] Importantly, that NERSA be authorised or directed to entertain, adjudicate and determine the Municipality's application for a tariff revision or increase.

[5] NERSA is opposed to the application for want of urgency, firstly. Its contention is that urgency was self-created by the Municipality. It is also not pleased with the fact that the application is made in this Division and has, for that reason, argued that this court lacks jurisdiction to entertain the application. The point of lack of jurisdiction is also linked to another ground of *lis alibi pendens* in that there is a pending similar application in the Gauteng Division, Pretoria. Furthermore, it was NERSA's case that the timelines set out by Musina in the notice of motion are not practically possible.

The statutory functions of NERSA

[6] As its name suggests, NERSA is the custodian and enforcer of the regulatory framework under the Electricity Regulation Act[2] (ERA). It was established in terms of section 3 of the National Electricity Regulator Act, 2004[3] (NERA). Among its functions, NERSA is charged with the duty to consider applications for licenses for the following:

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[2] Act No. 4 of 2006.

[3] Act No. 40 of 2004.

[6.1] The operation of generation, transmission and distribution;

[6.2] Regulation of electricity prices and tariffs.

[7] ERA sets out that its objects are to ensure an *'… efficient, effective, sustainable and orderly development and operation of electricity supply infrastructure…'* in the Republic.[4] It is on that basis that the Municipality would apply to NERSA when it needs to have its electricity tariffs revised. NERSA, on the other hand, regulates the time periods within which municipalities that require tariff revisions would make their applications and other conditions that may be applicable.

[8] The time periods within which Musina was required to submit its tariff application are common cause, or at least they appear to be. In any case, it is in the nature of condonation proceedings that a party making such an application begins by acknowledging a failure to act in a manner that it was required to do. This case is not different.

Whether the application is urgent

[9] Urgency stands on two anchor points. The first is that a party that seeks urgent intervention must explicitly set out facts why its application is urgent.[5] This entails factors such as whether there is harm that is likely to happen. Also, whether the applicant has acted with the promptness that is called for by the situation.[6]

[10] A party that creates its own urgency by, for instance, failure to act at the first opportunity may face a court that is reluctant to allow it to jump the queue. That

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4 Section 3 of ERA.

5 African National Congress v Umkhonto weSizwe Party [2024] 3 All SA 137 (KZD) para 17.

6 Nelson Mandela Metropolitan Municipality v Greyvenouw CC 2004 (2) SA 81 (SE) para 37 – 40.

a party has created its own urgency is not an ultimate bar to the court exercising its discretion to treat the case as urgent.[7]

[11] The second consideration questions whether a party seeking urgent intervention would have substantial redress in the future. If the answer is in the affirmative, the court would likely decline to entertain the case on an urgent basis.

[12] Musina explained that it will face a budget deficit of R94 million if its electricity tariffs are not revised and increased. For that reason, it averred that it would not attain substantial redress even if it were to be allowed a tariff increase in the next cycle of NERSA's tariff applications. NERSA disputed this. It contended that the Municipality provided no evidence of the budget deficit. Also, that Musina's argument derived from a misconception that the tariff revision was going to result in an increase.

[13] In urgent applications, courts are called upon to exercise judicial discretion upon sufficient and satisfactory grounds being shown by the applicant.[8] The following facts are apt to consider:

[13.1] Musina, upon missing the deadline, began engagements with NERSA to condone the non-compliance. It had only managed to submit its application for a tariff increase on 1 April 2026, a day after the deadline.

[13.2] On 7 April 2026 NERSA wrote to the Municipality rejecting its application as it was delivered late.

[7] South African Informal Traders Forum and Others v City of Johannesburg and Others; South African National Traders Retail Association v City of Johannesburg and Others (CCT 173/13 ; CCT 174/14) [2014] ZACC 8; 2014 (6) BCLR 726 (CC); 2014 (4) SA 371 (CC) (4 April 2014).

[8] IL&B Macrow Caterers v Greatermans SA 1981 (4) SA 108 (C) 112H.

[13.3] The Municipality instilled the help of SALGA to assist it to persuade NERSA to accept and consider the tariff revision application. SALGA responded to Musina on 9 June 2026.

[14] There is room to criticize the Municipality for timeously not following up with SALGA to ascertain whether its request for intervention was bearing fruit. That is not a reason to non-suit it. This being July, and the new tariff cycle having started on the 1st, it is difficult to imagine that the Municipality will have to wait until another tariff revision that will kick in on 1 July 2027.

[15] Musina has clearly articulated that it derives some of its revenue from electricity supply. Significant revenue for that matter. Also, that Eskom will be increasing its prices, which will put pressure on the Municipality's capacity to afford sourcing electricity from Eskom and be able to generate adequate revenue when selling it to its customers.

[16] In light of all the factors considered above, I accept that the application is one to be treated as urgent.

The defense of *lis pendens* or *res judicata*

[17] Another string in NERSA's bow is that, because the deadline of 31 March 2026 was set in judicial proceedings in the Gauteng Division, and because the Municipality seeks condonation, it ought to participate in the pending litigation in Gauteng.

[18] Our jurisprudence does not tolerate multiplication and spread of one dispute in various judicial processes. The lack of tolerance gave rise to the doctrine of *lis alibi pendens*, a well-established principle of the South African procedural law.

[19] The doctrine is designed to preserve the integrity of judicial proceedings and to prevent the duplication of litigation. Its underlying purpose is to avoid the following:

[19.1] duplication of proceedings;

[19.2] conflicting judicial determinations;

[19.3] unnecessary costs and inconvenience to litigants; and

[19.4] abuse and burdening of the judicial process.

[20] The requirements for the successful invocation of the doctrine are trite. There must exist:

[20.1] pending litigation;

[20.2] between substantially the same parties or their privies;

[20.3] founded upon substantially the same cause of action; and

[20.4] concerning substantially the same subject matter and substantially the same relief.

[21] The doctrine is not applied in a rigid or mechanical fashion. Rather, its application is informed by considerations of justice, convenience and equity, with the overarching objective of preventing the duplication of proceedings and the possibility of conflicting judgments arising from substantially the same dispute.

[22] In *Nestlé (South Africa) (Pty) Ltd v Mars Inc*[9] the SCA held that a court must look beyond the form of the pleadings and examine the true substance of the dispute in determining whether the requirements of *lis alibi pendens* have been satisfied. A litigant cannot evade the doctrine merely by reformulating the relief sought, embellishing the pleadings, or joining additional parties where the underlying dispute remains substantially the same.

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[9] Nestlé (South Africa) (Pty) Ltd v Mars Inc[9] 2001 (4) SA 542 (SCA

[23] It is apt to answer the question of whether there is a pending *lis* between the parties. This necessitates that I consider the last of the orders that were granted in the applications in Gauteng. That would be the order of Mooki J of 19 February 2026. That order extended the date of filing of tariff revision applications to 31 March 2026. It also set out a date for affected parties to anticipate it, being 17 March 2026.

[24] There are two problems with the defense of *lis alibi pendens*. The first is that, on the reading of the order of Mooki J, there is no pending litigation. That order was final in effect, and parties could ask for its variation by filing applications on 17 March 2026. So, too, the date of 31 March 2026 has passed and the Municipality could not meet the deadline.

[25] I understand the Municipality to be asking for condonation for the failure to meet the deadline of 31 March 2026. In other words, it acknowledges that it was supposed to have acted in accordance with the terms of the order and that it was unable to meet the date. It was only able to file its application on 1 April 2026, a day after the deadline.

[26] The second difficulty with the defense is that the causes of action in the two litigation processes are distinct, though related. The fact that the causes of action may be related or even arising from similar facts is not sufficient to non-suit a party to institute an application. In my view, the technical point raised in this regard must fail.

Whether this court has jurisdiction to adjudicate the application

[27] A person who initiates litigation is also entitled to select the court in which the case will proceed. What this means is that a *dominus litis*, Musina, decides which high court will hear the case. The Municipality has elected to institute the application in this Division. NERSA objects to the decision and the court's jurisdiction.

[28] High courts have inherent jurisdiction to make orders in respect of cases that are brought to them.[10] They also derive their jurisdictions from the provisions of section 21 of the Superior Court Act and not so much from the nature of the litigation. The statutory provision stipulates that a court has jurisdiction over all persons residing in its area and over all causes of action that arise in its area of jurisdiction.

[29] A court's jurisdiction may be limited in terms of both common law and by statute. Under common law, a high court does not have jurisdiction to vary or set aside a court order issued by another court that has equal standing.[11] This was confirmed in the *Pretoria Portland Cement*[12] case in which it was held *inter alia* that:

> **"… There are other means, quite sufficient means, to which I shall come, by which the judgment of a judge may be corrected."**

[29] What was espoused in the judgment above is not controversial either. On that principle, this court may not vary or set aside the orders that were granted by the court in the Gauteng Division. I do not understand it to be Musina's case to be asking this court to grant an order for variation or one that will have the effect of correcting the order so granted. The Municipality is asking through this application that its application be accepted and considered by NERSA even though it was submitted a date later than the cut-off time.

[30] NERSA's objection to jurisdiction is *inter alia* that the matter has already been before another court. It also disputes that it operates in the area of jurisdiction of this Court and that its head office is in Pretoria. I do not share the same company with NERSA on this contention. This is distinctly an application espoused in Rule 27 of the Uniform Rules. That the case has a litigation history

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[10] Connolly v Ferguson 1909 TS 195 at 198.

[11] Pretoria Portland Cement Co. Ltd v Compensation Commission 2003 (2) SA 385 at para [35].

[12] *Ibid*.

in Gauteng High Court is a matter of common knowledge. The uncontroversial terms of the court orders issued in that Division are also well understood. It was in terms of the latest order that was granted by Mooki J that the final date of 31 March 2026 was determined.

[31] Musina only offered a general denial of the point made by NERSA that has no operations that are based in provinces. The facts point to an ineluctable position that NERSA does not have provincial operations. That is not the end of the inquiry. The court notes that other parties such as Eskom and SALGA, on whom the court may exercise jurisdiction, have provincial offices. On the basis that the court has jurisdiction to adjudicate the case which includes NERSA.

[32] I cannot reach the conclusion, on my interpretation of the 20 February order, that the court intended to prevent any other court from adjudicating a case that is somehow connected to its order. Such intention does not appear from the text of the order. Neither can such a conclusion be drawn from the orders that preceded it. On this ground, too, I find that this court's jurisdiction is not affected.

Whether the Municipality has made out a case for condonation

[33] The essence of any condonation application derives from an acknowledgment of non-compliance with either a statutory rule or an order of court. It is not different for this case.

[34] As a starting point, I am inclined to observe the obvious fact that the Municipality was unable to file its application for review of tariffs on the last day, being 31 March 2026. The date was in terms of a directive that was issued by Mooki J in the 20 February order. Before that court was an application for variation, which succeeded. The order reads in part as follows:

"2.2 Paragraph 2.2 of the order: the words by 20 March of every year are replaced with 31 March 2026;

…

6. Any municipality may, in relation to the variation ordered in paragraph 2 and on good cause shown, seek leave of the court for a further deviation:

6.1 Any application contemplated in paragraph 6 shall be enrolled to be heard in the urgent court on 17 March 2026;

6.2 Any such application shall give respondents at least three (3) court days to have filed opposing papers …"

[35] The Municipality did neither of the two things that were set out in paragraph 6 that I have quoted above. It is on that basis that it is asking for condonation of the late filing of its application for tariff review. This begs the question of whether the municipality has shown good cause to be granted condemnation. If the answer is in the negative, the municipality will fail to get the order that it is asking for. I therefore begin by assessing the grounds presented by Mussina for its failure to submit its application on the date set out.

<u>The Municipality's explanation for its delay</u>

[36] There are essentially three grounds on which the application hinges. The grounds form part of the explanation that was proffered by the Municipality in its founding papers, and which can be summarized as follows:

[36.1] First, that it was not aware of the new deadline. It said it became aware of the new date on 17 March 2026 when it received the letter dated 9 March 2026. By then it was already late for it to comply with the order in terms of approaching court for relief as set out in paragraph 6.2 of the order. Also, the submission date was left with only 13 days to run.

Musina blames NERSA for this. I do not allow myself to be drawn into the question of who was wrong.

[36.2] Second, that its plans for public participation had already been made for April 2026. The explanation was that the Municipality's plans were already scheduled to run into April 2026.

[36.3] Third, that when the new deadline was communicated, it had to start the consultation process at an accelerated pace. By that time, it explained, there were a few days remaining.

[37] Regarding its acquisition of knowledge, Musina indicated that the notice was conveyed in a letter dated 9 March 2026. The information reached it on 17 March 2026. Before then, it had not been aware that there was a deadline set for municipalities to submit their applications for tariff reviews. One may criticize the Municipality for not heeding the terms of paragraph 6 of the court's order to ask for variation of the applicable timeframes. I say this because the Municipality was one of the parties that were cited in the application. It seems that it did pay proper attention to the case and its outcomes.

[38] A party that seeks condonation must show good cause to the satisfaction of the court.[13] The applicant must provide a full explanation for its non-compliance. It must also show that the interests of justice favours the granting of an order condoning the non-compliance.[14] In the circumstances of this case, as already highlighted, the non-compliance was in respect of the deadline set by the court on 20 February 2026.

[39] In *Junkeeparsad v Solomon*,[15] the position was stated as follows:

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[13] Grootboom v National Prosecuting Authority and Another (CCT 08/13) [2013] ZACC 37; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC); [2014] 1 BLLR 1 (CC); (2014) 35 ILJ 121 (CC) (21 October 2013).

[14] Van Wyk v UNITAS Hospital 2008 (2) SA 472 (CC) at paras [20] and [22].

[15] [2021] ZAGPJHC 48 at para 7.

> **"Factors which usually weigh with a court in considering an application for condonation include the degree of non-compliance, the explanation therefore and an applicant's prospects of success on the merits. (See Ferris and another v Firstrand Bank Ltd 2014 (3) SA 39 (CC) para 10; Federated Employers Fire & General Insurance Company Limited & another v McKenzie 1969 (3) SA 360 (A) at 362F-G; Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and others {2013} All SA 251 (SCA) para 11.) In Valor IT v Premier, North West Province and Others 2021 (1) SA 42 (SCA) para 39, Plasket JA said that 'very week prospects of success may not offset a full, complete and satisfactory explanation for a delay; while strong merits of success may excuse an inadequate explanation for the delay (to a point)."**

[40] The delay in this case was one day. Naturally, there is not a lot of time to expound on. According to the Municipality's explanation, the delay was caused by the fact that it was already operating in terms of its plans when it got the information on 9 March 2026. It had to expedite its public hearings to meet the timeframes. Its best endeavours failed; hence, it was still late by a day to deliver its application.

[41] This is not a weak explanation, considering the requirement to hold effective public participation and the processes for achieving it. One recalls the question as it arose in *Matatiele Municipality v President of the Republic of South Africa and Others*[16] where the court dealt with the failure to ensure effective public participation and found it inimical to constitutional order. I understand the predicament that the Municipality found itself in, on the one hand, having to exhaust public participation and, on the other, having to meet the timeline.

[42] I said earlier that the Municipality deserves criticism. That was because the court created a path for parties in a similar position as the Municipality to approach it and to seek variation of the 20 February 2026 order. Though the order was presented in clear terms, the Municipality did not take advantage of the leeway created by the order to approach it urgently to ask it for the

[16] 2006 (5) BCRL 622 (CC).

relaxation of time. That is not, on its own, a good reason to non-suit Musina from asking for condonation. Even if the knowledge of the order was received later, it could still have approached court then to seek relief, which it did not do.

<u>The interests of justice aspect</u>

[44] The Municipality explained how the situation that it finds itself in will affect its operations. It indicated that it would face a struggle to afford to procure and pay for electricity as Eskom's tariffs have been increased. Also, it would struggle to render services to its community as it draws some of its income from the sale of electricity. This latter explanation is not good. A Municipality is required to ringfence the income derived from electricity sales and not use it for its other services.

[45] Regardless of the length of delay, the interests of justice considerations remain the standard for determining if condonation is to be granted.[17] Cameron J wrote in *Buffalo City*[18] the following:

> **"[120] On the contrary, the delay bar serves an important rule of law function: it promotes the public interest in the certainty and finality of decision-making. This is an imperative focus whenever a court undertakes a case-specific enquiry as to the reasonableness of the delay. The explanation proffered is a key consideration in assessing its reasonableness, particularly in state self-review. It is an opportunity for the state to demonstrate that its self-review seeks to promote open, responsive and accountable government rather than the self-interest of state officials seeking to evade the consequences of their prior decisions. This is the key in deciding whether the Municipality's behaviour passes the interests of justice test for granting leave to appeal.**
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> **[121] Even where a delay is found to be unreasonable, however, our precedents establish that a court retains a discretion to overlook the delay provided it is in the interests of justice to do so. This stage of the**

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17 Van Wyk, supra.

18 Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited (CCT91/17) [2019] ZACC 15; 2019 (6) BCLR 661 (CC); 2019 (4) SA 331 (CC) (16 April 2019).

procedural enquiry should not take place in a "vacuum". It must instead involve weighing (a) the effect of the delay on the parties and (b) the nature of the impugned decision." [Footnotes excluded]

[46] On the facts of this case, Musina has placed before the court what seems to be the hardships that it will endure if the tariff revision is not done. NERSA contends that the Municipality is operating under the assumption that the revision will result in a tariff increase. Well, we will not know what the outcome will be unless and until such time that the revision is attended to. What stands before the court is that the Municipality, and by extension the community, stands to suffer service delivery challenges if the revision is not done. In light thereof, I find that the interest of justice favour the granting of the relief sought by the Municipality.

Consideration of costs

[47] Although the Municipality has succeeded, it is not without criticism. It could have approached the matter differently and earlier even though the window for doing so in terms of the court order of 20 February 2026 had closed. On that basis, I do not award it the costs of the litigation. In my view, each party must settle its own costs.

Court order

[48] I make the following order:

[a] The application is urgent.

[b] Musina Local Municipality's late submission of its **Revised Municipal Tariffs** in its **FY2027/27 Electricity Tariffs** that was submitted to the National Energy Regulator of South Africa (NERSA) after 31 March 2026 is condoned.

[c] NERSA is directed and authorised to consider and provide an outcome on the Municipality's application for revision of electricity tariffs for the financial year 2026/27.

[d] Each party is to pay its own costs.

[redacted]

MAKOTI AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA, LIMPOPO DIVISION POLOKWANE

APPEARANCES:

FOR THE APPLICANT	**:**	**MS SIKHWARI SC**
		MR TEFU
INSTRUCTED BY	**:**	**TSHIKOVHI INC ATTORNEYS**
		POLOKWANE
FOR THE RESPONDENT	**:**	**R TSHETLO**
		N MABUBULA
		MCHUNI ATTORNEYS
		c/o ESPAG MAGWAI ATTORNEYS
		POLOKWANE
DATE HEARD	**:**	**23 JUNE 2026**
CIRCULATED ON	**:**	**3 AUGUST 2026**