

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

Case Number: 92792/2019

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
DATE: 25 NOVEMBER 2022

In the matter between:

CASTING, FORGING AND MACHINING
CLUSTER OF SOUTH AFRICA (NPC)

FIRST APPLICANT

SCAW SOUTH AFRICA (PTY) LTD

SECOND APPLICANT

DUNROSE TRADING 57 (PTY) LTD

THIRD APPLICANT

INTERNATIONAL WIRE CONVERTORS (PTY) LTD

FOURTH APPLICANT

ABRACON PROPERTY 1 (PTY) LTD

FIFTH APPLICANT

and

NATIONAL ENERGY REGULATOR OF SA

FIRST RESPONDENT

CITY POWER SOC LTD

SECOND RESPONDENT

CITY OF JOHANNESBURG
METROPOLITAN MUNICIPALITY

THIRD RESPONDENT

JUDGMENT

KUBUSHI J

INTRODUCTION

[1] This application relates to the municipal electricity tariffs ("the tariffs") that were approved by the First Respondent, the NATIONAL ENERGY REGULATOR OF SOUTH AFRICA, ("NERSA") in respect of the Second Respondent, CITY POWER SOC LTD, ("City Power") for the 2019/2020 financial year. Almost three municipal financial years had elapsed before this matter could be heard by this Court.

[2] The application, itself, pertains to the review of the decision by NERSA taken on or about 10 July 2019 to approve tariffs for, City Power, for the 2019/2020 financial year (the "impugned decision") on the grounds that it was unlawful, irrational and unjustified. The review was brought under the Promotion of Administrative Justice Act ("PAJA"),¹ read with section 33 of the Constitution, alternatively the rule of law.

THE PARTIES

[3] A short background of the parties involved in these proceedings, is set out herein, in order to provide an understanding as to how they relate to each other and why it is that the Applicants brought this application against the Respondents.

The Applicants

[4] The First Applicant is CASTING, FORGING AND MACHINING CLUSTER OF SOUTH AFRICA (NPC) ("CFMC"), whose primary business is to promote the growth and development of the metals manufacturing industry in South Africa. CMFC

¹ Act No 3 of 2000.

represents the collective interests of the Applicants by pursuing growth and development of the metals manufacturing industry in South Africa.

[5] The other Applicants are all members of CMFC and pursue a common objective. The Applicants (other than CMFC), are all businesses operating within the municipal boundaries of the Third Respondent, City of Johannesburg Metropolitan Municipality ("City of Johannesburg") or ("the Municipality"). They are all consumers and users of electricity supplied by City Power, and all fall within the class of "industrial electricity users".

The Respondents

[6] NERSA is a regulatory authority established in terms of section 3 of the National Energy Regulator Act ("NERSA Act").² NERSA's mandate is to regulate the electricity industry in South Africa in terms of the Electricity Regulation Act ("the ERA").³ NERSA took the decision that is impugned in this application.

[7] City Power is a municipal entity, wholly owned by the City of Johannesburg established as a municipal owned entity. City Power conducts business by providing an energy distribution service to the City of Johannesburg. City Power is licensed by NERSA as the sole authorised distributor of electricity in the Johannesburg Metropolitan Area as designated for City Power in the applicable distribution licence. City Power discharges the electricity distribution function on behalf of and as agent of the City of Johannesburg, and, it thus, steps into the shoes of the Municipality, and assumes all of its constitutional obligations and rights.

[8] The City of Johannesburg is a Category A Municipality established in terms of section 12 of the Local Government: Municipal Structures Act.⁴ No specific relief is sought against the City of Johannesburg in these proceedings, and is cited only on the basis of its interest in the outcome of the application. The City of Johannesburg, has opted to oppose the application and together with City Power, are represented by the same counsel.

² Act No 40 of 2004.

³ Act No 4 of 2006.

⁴ Act No 117 of 1998.

[9] All of the Respondents, are Organs of State.

LOCUS STANDI

[10] It was contended on behalf of the Applicants that the impugned decision affects not only the Applicants, and those who are dependent on the Applicants for their livelihoods, but also the entire Johannesburg Metropolitan Area, and the Republic, more broadly. This was said to be so because the effect of the impugned decision, if it was allowed to proceed, will be that many of the Applicants' businesses were to become unsustainable, with consequential disastrous effects for the local and broader economy. Moreover, the public had an interest in seeing the rule of law upheld, which was what the Applicants seek to achieve in this application.

[11] The Applicants, as a result, brought this application: in terms of section 38(a) of the Constitution in their own interest; in terms of section 38(e) of the Constitution on behalf of their employees, shareholders and downstream consumers of the products they manufacture, who will all be adversely affected by the tariff increase, should the review not be upheld; and in terms of section 38(d) of the Constitution in the public interest

BACKGROUND

[12] The mandate of NERSA as the regulatory authority of the energy sector in South Africa, includes the regulation of electricity supply industry. In terms of section 4(ii) of the ERA, NERSA regulates the electricity prices and tariffs. As part of the regulation of electricity prices and tariffs, NERSA determines electricity tariffs and/or approves electricity tariff increases. The powers and function to determine tariffs or approve tariff increases, are sourced from the Constitution, the ERA and the Electricity Pricing Policy of the South African Electricity Supply Industry ("the EPP").⁵

[13] NERSA acts as the regulator of, *inter alia*, electricity tariffs for ESKOM and municipalities. In both instances, NERSA derives its authority from section 15(1) of the ERA. ESKOM generates, transmits, and distributes electricity to industrial,

⁵ Promulgated in Government Gazette No 31741 dated 19 December 2008.

mining, commercial, agricultural, residential customers and municipalities. Certain municipalities in the country, like City of Johannesburg, are licenced by NERSA to distribute electricity within their licensed area. The electricity they distribute to their customers, is purchased in bulk from ESKOM. City Power buys bulk electricity from ESKOM and distributes it to its customers within the Johannesburg Metropolitan Area. In terms of section 15(2) of the ERA,⁶ a licensee like City Power, may not charge a customer any tariff, for the distribution of electricity, other than that determined or approved by NERSA. Hence, before City Power can charge tariffs to its customers, it must first apply to NERSA for approval of such tariffs.

[14] The method NERSA uses when setting or approving electricity tariffs is called the Guideline and Benchmarking Method, which involves an annual approval of a percentage guideline increase and a review of the municipal benchmarks. The guideline increase is said to assist municipalities in the preparation of their budgets, while the revised benchmarks are used in the evaluation of the municipal tariffs applications. The benchmarks are, also, developed to ensure that tariffs across municipalities are not vastly different.

[15] The municipal tariff guideline increase is developed based on ESKOM's approved bulk price increase of electricity to municipalities, and the increase in the municipalities' cost structures. For this reason, the approval of the municipal guideline increase is determined subsequent to the ESKOM Retail Structural Adjustments (ERTSA) and the Multi-Year Determination ("MYPD") of the ESKOM's tariffs.

[16] The process for the determination and approval of municipal electricity tariffs by NERSA, commences a year preceding the year in which the determination or approval of the tariff is made, by the submission of Distribution Forms ("D-Forms") to NERSA by municipalities. The closing date for the submission of D-Forms is the end of October of the preceding year.

⁶ "A licensee may not charge a customer any other tariff and make use of provisions in agreements other than that determined or approved by the Regulator as part of its licensing conditions."

[17] These forms contain information regarding the financial position and efficiency levels of the municipality, as well as data regarding the customer's consumption patterns and the number of customers *per* tariff category. The information is said to assist NERSA in the analysis of the tariffs and in determining the revenues that the municipality collects from the various tariff categories. The D-Forms that are primarily used for the tariff approval process are financial forms (D1 Forms), Market Information (D2 Forms), and Human Resources Information (D3 Forms). It is said that NERSA will not consider any municipal tariff application without the submission of appropriate and accurate D-Forms information.

[18] The submission of D-Forms is followed by the MYPD process by NERSA, followed, thereafter, by NERSA issuing the municipal tariff guideline and the application by municipal licensees for approval of increases in terms of the issued NERSA guideline.

[19] Periodically, NERSA engages in a MYPD in respect of ESKOM, in terms of which NERSA approves the various tariffs which ESKOM is allowed to charge in respect of its electricity business over the period covered by the determination. These tariffs include, amongst others, the Supply Tariff, that is, the tariff at which ESKOM supplies electricity in bulk to other licensees (such as City Power). The tariff, also, includes the costs of generation and transmission of electricity plus a "reasonable rate of return", but does not include any charges in relation to the distribution of electricity.

[20] Following the completion of the MYPD process, NERSA uses the outcome of the MYPD together with the information derived from the D-Forms, to annually, issue a Municipal Tariff Guideline Increase (the "Tariff Guideline"). The Tariff Guideline is extrapolated from a sample of the information contained in the D-Forms and comprise of:

20.1 a guideline increase for licensees (most of the licensees are Municipalities; some, like City Power are municipal entities) over the previous guideline tariff, of a fixed percentage; and

20.2 a benchmark price in respect of each Municipal (licensee) customer category.

[21] The Tariff Guideline sets the tariffs that NERSA deems justifiable to be raised by municipal licensees when supplying electricity to their various categories of customers, and is updated annually.

[22] NERSA, also, reviews the tariff benchmarks and recommends the new benchmarks that would be used in the evaluation of the municipal tariff applications and are developed in order to ensure that tariffs across municipalities are not vastly different.

[23] The Tariff Guideline, done in terms of the benchmark formulation, is communicated to municipal distributors as a guideline in determining their annual electricity tariffs. This occurs in the following manner:

23.1 NERSA issues a Consultation Paper⁷ setting out proposed increases to the Municipal Tariff Guideline for the forthcoming financial year. This normally happens during September to October of the year preceding the financial year in respect of which the guideline tariff will become applicable;

23.2 Consultation between NERSA and licensees (municipalities) and stakeholders, takes place;

23.3 After the consultation process NERSA determines the Municipal Tariff Guideline for the relevant year during March to April of the year during which the increases are to take effect; and

23.4 The determined Municipal Tariff Guideline and its reasons therefor are then published by NERSA on the NERSA Website, in compliance with the provisions of section 10(2) of the ERA.

⁷ Consultation Paper on the "Municipal Tariff Guideline Increase, Benchmarks and Proposed timelines for the Municipal Tariff Approval Process for the 2019/2020 Financial Year" ("the Tariff Guideline and Benchmarks Consultation Paper").

[24] Following the issuing of the Tariff Guideline, all municipal licensees are required to submit fully motivated proposals to NERSA in respect of their tariffs for the forthcoming year. The submissions of the applications, are intended to take place during April to June, for implementation on 1 July of that year.

[25] The approval process proceeds as follows:

25.1 If the licensee's proposal falls within the parameters of the Municipal Tariff Guideline, the proposal is generally accepted and approved by NERSA without further consideration; but

25.2 If the proposal exceeds the approved Municipal Tariff Guideline, the proposal is referred to as an "above the guideline" increase, and will have to be justified before consideration and approval or rejection by NERSA.

[26] The electricity tariffs approved by NERSA are incorporated into each municipality's annual Budget and submitted to Council for approval. Following the completion of the municipal budget process, the Municipal Tariff takes effect with the implementation of the Municipal Budget on 1 July of every year. The impugned decision is the outcome of this process in regard to the submission of tariffs application by City Power and the resultant approval of tariffs of the City of Johannesburg for the 2019/2020 financial year.

CITY POWERS' APPLICATION

[27] The process set out above, is the same process that NERSA followed when setting tariffs for the 2019/2020 financial year. The only difference is that in the 2019/2020 financial year, NERSA is said to have used D-Forms for the 2017/2018 financial year instead of the 2018/2019 financial year. In addition, the Municipal Guideline determination were issued on 23 May 2019 instead of April to June 2019.

[28] City Power submitted its tariffs increase application for the 2019/2020 financial year, on 14 March 2019. The application was to increase the tariffs by 12,20%. As earlier stated, NERSA issued its Municipal Guideline determination on

23 May 2019. On receipt of the municipal tariff guideline letter from NERSA, City Power submitted another application which amended the tariff increase of 12.20% to 13,07% in line with NERSA's guideline tariffs. NERSA approved the 13,07% tariff increase as applied for by City Power. This is the decision that is being challenged by the Applicants in these proceedings.

PROCEDURAL ISSUES

Disputes of fact

[29] The issue of disputes of fact, more particularly between the expert reports on which the parties relied, arose sharply in NERSA's papers, this issue was however, abandoned by NERSA at the commencement of the proceedings. The issue will not be considered in this judgment.

The Rule 53 Record

[30] At the commencement of the hearing, the Applicants' counsel raised the issue of the delay occasioned by the supplementation of the Rule 53 Record ("the Record"), by NERSA and the late filing of City Power's answering affidavit. The Applicants requested that such delay be attributed to NERSA and City Power when the issue of remedy is considered, and that the supplementary Records filed be struck out from the record of proceedings.

[31] In opposing the Applicants' application for the striking out of the supplementary Records from the record of proceedings, NERSA submitted that such application should not be granted on the ground that the delay is not attributable to it, but to the Applicants. NERSA, further, argued that since there was no formal application before Court for the striking out of the supplementary Records from the record of proceedings, NERSA was ambushed, as it was not informed that such application was to be argued in Court.

[32] City Power argued that the delay ought not to be placed at its door as it played no role in the supplementation of the Record.

[33] The common cause chronology of events, in regard to the Record, are that the original Record was filed on 25 June 2020. On 19 August 2021, after the Applicants had supplemented their founding affidavit, as required in terms of Uniform Rule 53, and had, also, filed its first heads of argument, NERSA supplemented the Record by filing the first supplementary Record. The first supplementary Record contained documents that NERSA argued were before it when the impugned decision was taken and were erroneously omitted when the Record was compiled. The Applicants in turn filed a Rule 30A notice, requesting NERSA to provide certain documents, which would authenticate the fact that documents filed with the first supplementary Record were before NERSA at the time of taking the impugned decision. NERSA responded to the said notice by indicating that such documents were not available. On 22 November 2021, together with its answering affidavit, NERSA filed the second supplementary Record, which sought to replace City Power's Annual Financial Statement for the 2018/2019 financial year with that of the 2017/2018 financial year, filed with the first supplementary Record. City Power, in turn, filed its answering affidavit on 10 December 2021.

[34] In the circumstances, the Record was filed five (5) months late. NERSA supplemented the Record for the first time twenty (20) months after the application was launched, and twenty-two (22) months after the launch of the application, NERSA filed the second supplementary Record. The full Record, which should have been filed in January 2020, was filed almost two years later on 22 November 2021. The Record was filed in full, after the Applicants had filed a supplementary affidavit in terms of Rule 53, the first heads of argument, and the second supplementary affidavit in terms of Rule 53. City Power, on the other hand, filed its answering affidavit almost 2 years after the launch of the application. By the time the matter was heard before this Court, the delay had taken the matter out of the 2019/2020 tariff year into almost three years down the line.

[35] The Applicants' proposition in regard to the issue of delay, was that it would primarily, be relevant to the question of remedy, in relation to providing them with substantive relief in the form of the right not to be charged the unlawful tariffs that City Power charged them for 2019/2020 financial year.

[36] As will appear more fully later in the judgment, the issue of the delay occasioned by the supplementation of the Record was finally resolved by the filing of a draft remedy proposal by City Power, which provided the Applicants with a substantive retrospective relief. The Applicants will, as a result, not have a problem with being deprived of substantive relief, if they are successful, because of the delay.

[37] In regard to the application for the striking out of the supplementary Records from the record of proceedings, it is this Court's view that the supplementary Records should not be struck out. In this Court's opinion, the Record as filed by NERSA will provide this Court with a much better perspective since all the documents will be before it, when the matter is dealt with.

The Applicants have challenged the wrong decision

[38] City Power submitted in oral argument before this Court that the Applicants' challenge in these proceedings is misdirected, and, as such, fatal to their case. The gravamen of City Power's complaint was that while the Applicants' concern is primarily with the tariff decision, they have taken no steps to challenge it. They, instead, sought to challenge the tariff decision by raising arguments, which are directed at the Guideline and Benchmarking Method, which is misdirected, so City Power argued.

[39] The argument was that the Guideline and Benchmarking Methodology is an administrative decision, and the Applicants should not have expected NERSA to depart from the trite principle that NERSA was bound to follow the guideline and not depart from it unless it was set aside by a Court.

[40] Furthermore, it was City Power's contention that it formulated its application on the understanding that it would be assessed according to the tariff guidelines and benchmarks which were published a week before it submitted its tariff application increase to NERSA. According to City Power, it would have been procedurally unfair for NERSA to have applied a different set of rules to those, which were in place at the time it submitted its tariff application increase. City Power had, thus, a legitimate

expectation that its application would be assessed using the Guideline and Benchmarking approach.

[41] Relying on the decision in the *Oudekraal* principle,⁸ City Power argued that the fatal shortcoming in the Applicants approach, is that since they have not sought to review the Guideline and Benchmarking Method, that methodology was to be treated as valid and binding, unless and until it was reviewed and set aside by a competent Court of law. Therefore, City Power submitted, the Applicants could not challenge the tariff decision by raising arguments, which were directed at the Guideline and Benchmarking Method. Consequently, City Power contended for the dismissal of the Applicants' case on the basis that the Guideline and Benchmarking Methodology was obligatory and should be followed because of the *Oudekraal* principle. In, further, developing the argument, City Power submitted that the *Oudekraal* principle, is recognised as authority by other Constitutional Court judgments,⁹ for the trite proposition that until an administrative act is set aside by Court, it exists in fact, and is to be treated as valid, and as a result, NERSA had no discretion to exercise under the circumstances. The further submission was that, even if it can be found that NERSA had a discretion, or that *PG Group* was on point, NERSA acted lawfully and rationally in choosing to follow the policy and, that must be so, because the policy was not set aside.

[42] Conversely, the Applicants' argument was that City Power's argument as set out above is misguided in that it depends on the proposition that NERSA's Guideline and Benchmarking Method is not a guideline but rather some form of binding law. The contention was that, such an argument would collapse if NERSA's Guideline and Benchmarking Method were to be held as a guideline.

[43] In the main, the Applicants' argument was that there is nothing in law precluding it from challenging the tariff decision without attacking the underlying methodology, and this is what they were doing in these proceedings.

⁸ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA).

⁹ *MEC for Health, Eastern Cape and Another v Kirkland Investments (Pty) Ltd t/a Eye and Lazer Institute* 2014 (3) SA 481 (CC) para 101; *Merafong City Local Municipality v AngloGold Ashanti Ltd* 2017 (2) SA 211 (CC) paras 41 and 43; *Department of Transport and Other v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC) para 147.

[44] It is not in dispute that the Applicants are in these proceedings challenging the impugned tariff decision and not the Guideline and Benchmarking Methodology used by NERSA when it determined City Power tariffs. It is, also, not in dispute that the impugned tariff decision is a separate and independent administrative decision from the Guideline and Benchmarking approach, and that nothing precludes the Applicants from challenging only the tariff decision without challenging the underlying methodology that produced it.

[45] The controversy, as seen by this Court, is whether NERSA's Guideline and Benchmarking Method is binding on NERSA, as contended for by City Power or whether, as a guideline, it is not binding and affords NERSA an exercise of discretion when applying it, as argued by the Applicants.

[46] City Power's suggestion that the Guideline and Benchmarking Method is an administrative decision that is binding until set aside by a Court of law, is reinforced by City Power's reliance on the *Oudekraal* principle, as alluded to earlier in this judgment. Whereas, the Applicants' assertion that the methodology is a guideline which is not binding and affords NERSA an exercise of discretion when applying it, is fortified by the Applicants' reliance on the principle in *PG Group*,¹⁰ that states that a methodology is not law but a guideline that allows the exercise of a discretion when applying it.

[47] The Constitutional Court in its decision in *PG Group*,¹¹ when dealing with the Gas Act, held that the maximum pricing methodology is not law, but rather a guideline made in accordance with the empowering legislation. In addition, NERSA, in that judgment, had a discretion not to rigidly apply the maximum price methodology, if its application would lead to irrational or otherwise unlawful results.

[48] Similarly, in this matter, if it could be found that NERSA's Guideline and Benchmarking Method was a guideline and not a binding decision, as argued by City Power, then in that event, as a guideline, it will allow NERSA to exercise its

¹⁰ *National Energy Regulator of South Africa v PG Group (Pty) Limited and Others* 2020 (1) SA 450 (CC).

¹¹ Para 33.

discretion not to rigidly apply the methodology if its application would lead to irrational or otherwise unlawful results.

[49] This Court is of the view that the Applicants' argument that NERSA's Guideline and Benchmarking Method is a guideline, is valid, simply because the method says it's a guideline – the Guideline and Benchmarking Method, and NERSA itself, throughout its papers, regards the method as a guideline.

[50] Having found that the method is a guideline, it stands to reason that in applying it, NERSA is allowed to exercise its discretion not to rigidly apply it. A good example that, NERSA exercises a discretion when applying the methodology, is in regard to NERSA's tariff determination process, which runs on D-Forms and require cost information from the municipalities. If there was no discretion to exercise, and NERSA was to rigidly apply the methodology, the information derived from the D-Forms would be unnecessary. Moreover, if NERSA were to rigidly apply the methodology with the result that its application would lead to irrational or otherwise unlawful outcomes, then it would be acting contrary to the provisions of the Constitution, the ERA and the EPP, which are binding on NERSA and City Power.

[51] The majority judgment, in *PG Group*,¹² held, also, that determining rationality, whether under PAJA or not, must include some evaluation of the process by which a decision was made – in other words, the process leading to a decision (or the means) must be rationally related to the purpose or ends. This puts to bed City Power's proposition that the Applicants are not allowed to challenge the tariff decision by raising arguments, which are directed at the Guideline and Benchmarking Method. This is so, even though it is clear from the Applicants' papers that the pleaded case of rationality was directed at the impugned decision itself, and not the process leading to the decision.

[52] City Power's proposition that the methodology is an administrative decision – a guideline decision and benchmark decision, is in this Court's view, misguided. The Constitutional Court in *PG Group* left the question of whether a methodology is an

¹² Para 48.

administrative action in terms of PAJA open.¹³ However, that Court, in its majority judgment, as earlier stated, took a view that a methodology is not law, but rather a guideline.¹⁴ Similarly, the Methodology in this matter is a guideline made in accordance with empowering legislation.¹⁵ In this Court's opinion, an administrative decision is taken at the time of adoption of a guideline and benchmark as a methodology to be used when tariffs are determined, and once, the decision is made, and the methodology adopted, the Guideline and Benchmarking Method, is now a guideline or policy. Additionally, a guideline or policy may be attacked on the grounds of unlawfulness and invalidity in terms of section 172(1)(a) of the Constitution, on the basis that such policy or guideline is inconsistent with the principle of legality and, thus, invalid.¹⁶

[53] Consequently, this Court holds that it is bound by the Constitutional Court in *PG Group*, which clearly state that a methodology is a guideline that allows the exercise of discretion in its application and that there is nothing that proscribes the Applicants from challenging the tariff decision without having to challenge the underlying methodology or the process leading to such a decision.

[54] Having made such a finding, it follows that the Applicants have challenged the correct decision.

THE APPLICANTS' GROUNDS OF REVIEW

[55] The Applicants raised a number of grounds of review in their papers, but, in oral argument before this Court, only three of those grounds, which according to the Applicants, are most important and reflect the obvious flaws in NERSA's decision to approve the City Power tariffs, were argued. The Applicants maintained that they stand by all the grounds of review set out in their papers, and were not abandoning any. The three grounds of review are:

¹³ Para 31.

¹⁴ Para 33.

¹⁵ Section 35(1) of the ERA.

¹⁶ See *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 Pty Ltd and Another* 2012 (2) SA 104 (CC) para 104(e)(iii).

55.1 The first ground of review is that in adopting the approach NERSA is using, it acted in an objectively irrational manner and had regard to irrelevant considerations, by using the wrong benchmarks to measure the City Power tariffs.

55.2 The second ground of review is that, NERSA did not consider the cost of supply of particular customer categories, and this rendered the determination of the tariffs illegal and inconsistent with the ERA and the EPP.

55.3 The last ground of review is that, NERSA acted unconstitutionally and unlawfully by approving the City Power tariffs without having regard to any cost of supply study, and without being able to assess whether the set tariffs are reflective of City Power's overall cost of supply.

[56] For all these reasons, including those stated in the Applicants' papers, it was submitted, on behalf of the Applicants, that the tariffs are irrational; contrary to law; not authorised by the empowering provisions; taken in circumstances where relevant considerations were not taken into account and irrelevant considerations were included; and are unreasonable.

ARGUMENTS

The Applicants

[57] The Applicants' core complaint is that NERSA's tariff decision did not comply with the applicable legislation, was not cost-reflective and was not based on verified or reliable information.

[58] The submission by the Applicants was that NERSA's determination of the tariffs which are at issue in this application fails to comply with the regulatory framework in at least three respects, each of which render the tariff unlawful and contrary to the ERA read with the EPP, as follows:

58.1 First, NERSA's Guidelines for municipal tariff setting did not require tariff applicants (including municipalities such as City Power) to demonstrate the cost-basis for their tariffs. There was accordingly no cost-basis for the tariffs imposed. The tariffs were not based on costs as required by section 15(1)(a) of the ERA (not cost-reflective); but, were based on the previous years' tariffs set by NERSA in terms of its benchmarking approach as set out in the Municipal Guideline. A further argument was that NERSA had never determined a cost reflective tariff for City Power. The generic indexing approach was wholly unrelated to the reasonable costs incurred by City Power in providing its licensed distribution service and was inconsistent with the ERA and the EPP.

58.2 Second, the tariffs were entirely generic. The process was focused on the determination of a generic approved tariff increase percentage and if a municipality's tariffs prior to the increase were already above cost-reflective levels, then the application of an "approved" increase merely perpetuated this state of affairs. There was, thus, no question or consideration of "reasonableness" or cost reflectivity in relation to any of the tariffs imposed as required by section 15(1)(a) of the ERA.

58.3 Third, the tariffs set by NERSA did not consider the different costs of supplying different customer categories as required by section 15(1)(d) of the ERA read with Policy Position 2 of the EPP, nor was there any evidence of any approval by NERSA for cross-subsidies or other pricing to customers that departed from cost-reflective levels *per* customer category. It was, thus, factually impossible for NERSA to have determined whether the tariffs *per* customer category were cost-reflective, as those costs were unknown.

NERSA

[59] NERSA, in rejecting the Applicants' argument, submitted, that the most important feature of section 15(1) of the ERA was that it does not prescribe how NERSA should determine whether the licensee covers costs plus a reasonable margin or return. The contention was that it was incumbent upon NERSA to develop

municipality guidelines that gave effect to the jurisdictional facts set out in section 15(1) of the ERA. In the absence of the cost of supply study, it was argued that, NERSA was empowered to exercise the powers conferred upon it by the ERA and the EPP, *to wit*, to request the municipalities to furnish relevant information regarding their costs. In so doing, NERSA would have had all the relevant information regarding costs. This information would have assisted in terms of determining whether the municipality concerned, covered its costs and the reasonable margin or return, as envisaged by both the ERA and EPP.

[60] NERSA, argued further that, the fact that the cost of supply study was not conducted, did not mean that other avenues including the powers of NERSA to source financial information from a municipality, was ineffectual. NERSA contended that it sourced the information from the Municipality specifically to determine cost reflective tariffs as the cost of supply study of the Municipality was found to be insufficient.

[61] In response to the Applicants' argument that the methodology that NERSA used when setting the City Power tariffs did not enable the Municipality to: be efficient; prescribe incentives for continued development; provide end users with information regarding cost of consumption; and avoid undue discrimination amongst customer category, NERSA's submission was that the Applicants incorrectly interpreted the provisions of section 15(1) of the ERA. According to NERSA, the method it used in this case, albeit, the benchmark methodology, took cognisance of the individual cost of supply of the Municipality. Therefore, the fact that the methodology was referred to as a benchmark did not mean that it was not capable of sourcing relevant information for the purpose of determining whether it covered costs and a reasonable margin or return. In fact, the ERA conferred powers on NERSA to seek any information from the Municipality to determine the tariffs in question.

[62] Secondly, as NERSA argued, the Applicants incorrectly stated that the Municipality provided no independently verified or reliable cost information to NERSA in respect of the impugned decision and that NERSA took no steps to establish the actual costs of supplying electricity within the City of Johannesburg.

City Power

[63] Before this Court, City Power argued three points in opposition to the arguments raised by the Applicants in this Court.

[64] The first point was that of the Applicants' contention that the impugned decision produced City Power tariffs that were 43% higher than the other municipalities. The second point was in respect of the contention that the Applicants attacked the wrong decision, which has already been dealt with earlier. The last point was that argued by the Applicants that NERSA misapplied the methodology.

[65] As regards the grounds of review raised by the Applicants, City Power submitted that the first ground of review, that of unlawfulness, and the second ground of review, that of the failure to consider relevant considerations and considering irrelevant considerations, were hit by the wrong challenge point and required no further elaboration. The only ground of review that remained was partly addressed by NERSA's counsel, and City Power wanted to make some additions to it, that is, the point that, NERSA misapplied the methodology.

[66] City Power's argument in this regard was that the wrong benchmark approach, as contended for by the Applicants, was not applied to all City Power tariffs. The method, as specifically argued by the Applicants, was wrongly applied to the business conventional tariffs and the industrial medium voltage TOU tariffs. In support of its argument, City Power, referred to a judgment in *Retail Motor Industry Organisation*,¹⁷ where the Supreme Court of Appeal, *per* Justice Plasket, dealt with the question of what happens when a single decision has parts that are good and parts that are bad. That Court, advocated for the fashioning of a remedy which only set aside the bad part and retaining the good part. On the basis of that judgment, City Power argued for the severance of the two tariffs that were adversely affected, in this matter.

¹⁷ *Retail Motor Industry Organisation and Another v Minister of Water and Environmental Affairs and Another* 2014 (3) SA 251 (SCA).

[67] City Power's proposition would have been appropriate only if the Applicants had raised it as the only ground of review. The order would, correctly so, be confined to the commercial and industrial tariffs. The challenge for City Power, however, is that there are other grounds of review the ruling of which, as will appear clearly hereunder, are in favour of the Applicants. Moreover, in view of the order that City Power has proposed, as will appear hereunder, severance will not be necessary because the order makes it clear that it is only the Applicants who will have any claim to the benefit of the adjusted tariffs, and residential tariffs will not be affected.

[68] Consequently, this point is not sustainable, and, if the Applicants are successful, Prayer 2 of the notice of motion ought to be granted as it is.

THE ISSUE FOR DETERMINATION

[69] The issue for this Court to determine is whether the decision taken by NERSA when it approved the electricity tariffs for City Power was unlawful.

[70] According to NERSA, the relevant question for the purpose of this inquiry should be whether NERSA was in possession of sufficient information to determine cost reflective tariffs, and whether the method used was in line with the ERA and other relevant legal frameworks.

ELECTRICITY REGULATION FRAMEWORK

[71] The parties are agreed that NERSA is required to determine an electricity tariff with reference to the applicable legal prescripts. These legal prescripts include the Constitution, the ERA, and the EPP, which bind both NERSA and the municipalities (including City Power).¹⁸

[72] The principles that NERSA ought to have taken into consideration when setting municipal electricity tariffs, including those of City Power, are reflected in section 15(1) of the ERA read with certain relevant Policy Positions of the EPP.

¹⁸ See section 27(h) of the ERA.

[73] The principles are stated in section 15(1) of the ERA as follows: a licence condition determined under section 14 relating to the 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 licensed activities, including a reasonable margin or return; (b) must provide for or prescribe incentives for continued improvement of the technical and economic efficiency with which services are to be provided; (c) must give end users proper information regarding the costs that their consumption imposes on the licensee's business; (d) must avoid undue discrimination between customer categories; and (e) may permit the cross-subsidy of tariffs to certain classes of customers.

[74] In essence, the key requirements, in terms of section 15(1) of the ERA, include allowing for cost recovery of an efficient municipality, incentive for improvement of efficiency, proper information regarding costs of consumption, avoiding undue discrimination between customer categories, and explicit allowance for cross-subsidisation between classes of customers.

[75] The Applicants have based their grounds of review, argued orally in Court, mainly on the principles in subsections 15(1) (a), (d) and (e) of the ERA. The principles that are relied upon are that the setting or approval of prices, charges and tariffs (a) must enable an efficient licensee to recover the full cost of its licensed activities, including a reasonable margin or return; (d) must avoid undue discrimination between customer categories; and (e) may permit the cross-subsidy of tariffs to certain classes of customers. Section 27(h) of the ERA makes it clear that the EPP is binding on the City of Johannesburg and all other municipalities. Thus, the relevant sections of the EPP, namely, section 2 read with Policy Positions 1,¹⁹ 2²⁰ and 4²¹ dealing with the general tariff principles; and, section 8 read with Policy

¹⁹ "(a) The revenue requirement for a regulated licensee must be set at a level which covers the full cost of production, including a reasonable risk adjusted margin or return on appropriate asset values. . ."

²⁰ "Electricity tariffs must reflect the efficient cost of rendering electricity services as accurately as practical. . ."

²¹ "All forms of discriminatory pricing practices must be identified and removed, other than those permitted under specific cross-subsidisation/developmental programmes, or be transparently reflected to unlock the full potential of electricity to all."

Positions 23,²² 26,²³ 27²⁴ and 29²⁵ dealing with cost of supply studies, must be adhered to.

APPLICATION OF THE LAW TO FACTS

[76] The three grounds of review raised orally by the Applicant in Court, are dealt with hereunder.

Whether NERSA's failure to consider a cost of supply study, for City Power resulted in the set tariffs, being tariff reflective instead of cost reflective.

[77] The principle set out in subsection 15(1)(a) of the ERA prescribes that municipal electricity tariffs must be cost reflective instead of tariff reflective. The EPP, as well, makes it clear that tariffs must be cost reflective. Section 8 of the EPP, which deals with distribution pricing, emphasises this by stating that -

"...This first section will address the key principle for distribution pricing, namely that tariffs would be cost reflective and in support of cost reflectivity."

[78] The EPP requires the Municipalities to conduct a cost of study within a period of five years from the date on which the policy was published. Policy Position 23 of the EPP, emphatically states that electricity distributors should undertake cost of supply studies at least every five years, but at least when significant license structure changes occur, such as in customer base, relationships between cost components and sales volumes.

[79] In terms of the EPP, for NERSA to determine electricity tariffs that are cost reflective, a cost of supply study must be carried out by each municipality before

²² "Electricity distributors shall undertake COS studies at least every five years, but at least when significant licensee structure changes occur, such as in customer base, relationships between cost components and sales volumes. . ."

²³ "(a) The number of consumer categories for tariff purposes should be justifiable to NERSA based on cost drivers and customer base: . . ."

²⁴ "NERSA must see within five years that cost reflective tariffs shall reflect all the following cost components as far as possible: . . ."

²⁵ "Tariff structure and levels shall be aligned with the results from the COS studies in which the resultant income will equal the revenue requirement."

such tariffs are set. This process will enable NERSA to assess the overall cost of supply of a municipality applying for a determination or an increase of its tariffs for that financial year. The cost of supply study should have been carried out within five (5) years from the promulgation of the EPP.

[80] NERSA in its papers, concedes, correctly so, that a cost of supply study determines the actual cost *per* customer group, and, allows for cost-reflective pricing *per* customer category in line with the relevant provisions of the ERA and the EPP.

[81] From the evidence proffered by NERSA in these papers, it is quite clear that NERSA acknowledges that a cost of supply study is a requirement, which must be complied with, for the achievement of a cost reflective municipal tariff.

[82] Firstly, in its response to the Applicants' argument that the methodology used in determining the guideline was based on averages which do not accurately reflect the operating circumstances of each municipality and the cost drivers impacting on the different input costs *per* municipality, NERSA, acknowledged that an averaging approach was not ideal, given the uniqueness of each entity, and conceded that an ideal situation will only result when each municipality is assessed individually based on its unique cost structure and load profile. In addition, it also, stated that, this can only be achieved by means of a cost of supply study.

[83] Secondly, NERSA, acknowledged that the cost of supply studies and outcomes thereto, should be available as a normal course of business as they are required as part of the regulatory framework, that is, in terms of Policy Position 23 of the EPP.

[84] Furthermore, NERSA conceded that it used the benchmarking methodology only because there was no other method available, and that it had taken steps to ensure that municipalities carry out their respective cost of supply studies. It is not in dispute that NERSA had, by then, already directed municipalities to submit cost of supply studies that should allow a shift towards cost reflective tariffs for electricity tariffs to reflect efficient costs and reasonable return for every licensee, in line with the requirements of the ERA and the EPP.

[85] From what is stated above, there appears to be no doubt that NERSA supported the fact that municipalities should undergo a cost of supply study as that would have definitely enabled NERSA to determine tariffs that are based on each municipality's cost of supply.

[86] That NERSA supported the view that the cost of supply studies, were important, was, clearly, reflected in its response to some of the concerns raised by stakeholders during the consultation process. NERSA agreed, during those consultations, that municipalities must develop cost of supply studies that will reflect the true cost of supplying electricity to their customers. And, in order to show the seriousness in which NERSA took the requirement for cost of supply studies, it approved a cost of supply study framework and implored all municipalities to undertake and submit cost of supply studies, so that the revenue earned by the municipalities *per* tariff category, was aligned with the cost of supply of electricity. Municipalities were informed to use the framework as a guideline when developing their cost of supply studies. In addition, NERSA undertook to continue to support and engage licensees when they develop their cost of supply studies, so as to ensure a smooth transition towards the cost of supply study implementation.

[87] It is not in dispute that City Power did not supply NERSA with a cost of supply study before its application was considered by NERSA. Both NERSA and City Power conceded in their evidence before this Court that at the time of approval of City Power tariffs, City Power's cost of supply studies did not serve before NERSA for consideration. NERSA stated that the cost of supply study furnished to it by City Power was insufficient and could not be considered.

[88] On the basis of what this Court has stated above, which is mainly based on the evidence of NERSA, it is evident that without the cost of supply study serving before it, at the time of considering City Power tariffs, NERSA could not have been able to assess City Power's true cost of supply.

[89] NERSA's contention that the methodology it used enabled it to take into account the overall cost of supply of City Power, is, in this Court's view, without merit. The evidence on record, based on City Power's version, indicates that City

Power's application for tariffs increment, itself, was not based on costs, it was merely based on an estimate of what NERSA's guideline tariff would be.

[90] In its own evidence City Power stated that it initially applied for a tariff increment of 12,20% based on an estimate of what it thought NERSA's guideline percentage increase would be. City Power stated, further that when NERSA later on publicised its guideline, which was more than that City Power applied for, it had to reapply and request an amendment of the percentage increase to 13,07% in line with NERSA's publicised percentage increase, which application was approved without much ado.

[91] City Power's application would have been approved without much ado because it fell squarely within the percentage increase set by NERSA. In the Consultation Paper that was circulated to NERSA's stakeholders, including the municipalities, at the time, NERSA mentioned that municipalities must submit their specific cost drivers should they be different from the ones presented by NERSA in the Consultation Paper. The Consultation Paper, furthermore, mentioned that municipalities applying for an increase that was above the guideline have to justify their increases to NERSA. Moreover, in NERSA's 'Reason for Decision' of the 'Determination of the Municipal Tariff Guideline for the Financial Year 2019/2020 and the Revision of the Municipal Tariff Benchmarks Decision', it was stated that municipalities applying for an increase that was above the guideline would have to justify their increases to NERSA.

[92] It follows that since City Power's tariff increment was within NERSA's guideline, its application would be approved without it having to justify anything. In fact, City Power did not have to motivate its application because it had applied in line with the percentage tariff guideline issued by NERSA. City Power's application was approved even without having to explain why it changed the tariff increment it had originally applied for which was lower than that issued by NERSA, to the one that was in line with NERSA's guideline. Of concern is that some of the tariffs proposed by City Power in its application, because they fell within the guideline were approved even though NERSA did not have benchmark tariffs for them.

[93] Importantly, the method used by NERSA, does not allow for the actual distribution costs to be identified or investigated, but, is instead, reflective of tariffs charged by other municipalities. This is occasioned by the fact that this is the method that was used to derive the original benchmark values that were set some ten (10) years ago by NERSA. The actual tariffs have never been determined because of this method. The benchmarks have simply been, annually, escalated since then without regard to the actual underlying costs of any municipality, City of Johannesburg, included. Without the actual underlying costs being determined, City Power's true cost of supply will never be known and any tariff set by NERSA will remain in contravention of the legislative and regulatory framework and, therefore, unlawful.

[94] Additionally, the Record of Decision does not indicate that there was sufficient cost based information to enable NERSA to determine the true cost of supply for City Power. The Record of Decision states that when developing the percentage guideline for the 2019/2020 financial year, NERSA considered the 2016/2017 D-Forms information which was used to determine whether there would be any changes to the municipality's cost structures. The D-Forms were, also, considered to determine whether the weights of the cost drivers that have been developed need to be revised and maintained.

[95] As is evident from what is said above, the D-Forms information for the financial year 2016/2017, was used to determine the percentage guideline for the 2019/2020 financial year. Ordinarily the information that ought to have been used, should have been the information of the preceding year, that is, the information from the D-Forms of the 2018/2019 financial year. Undoubtedly, therefore, the information that was used to determine the City Power tariffs, was outdated, and NERSA's argument that it had credible financial information that assisted it to approve a tariff that allows for the recovery of efficiently incurred costs including a reasonable margin or return, is not sustainable. NERSA stated, as well, that the information submitted in the D-Forms was expected to be accurate as it was mainly based on previously audited ring-fenced financial statements. It argued that it did not have to doubt that information as it was from audited financial statements. NERSA, also, acknowledged that it had seen an improvement in the quality of data submitted by the municipalities.

[96] This statement, in this Court's view, is an indication that there have been some discrepancies noted by NERSA previously in regard to the information provided in the D-Forms, which appears not to have been dealt with satisfactory and completely. Save for saying, it had seen some improvements, NERSA, does not state what the discrepancies were and in what manner those discrepancies have improved. Therefore, without that explanation by NERSA, it cannot be categorically stated, that the discrepancies that NERSA had noted previously, have been completely and satisfactory dealt with, nor can NERSA say, with certainty, that the information that was before it when it took the impugned decision was accurate and reliable.

[97] Moreover, even if, as NERSA wanted to argue, the information was contained in audited and ring-fenced, financial statements, the fact remains that the information in those financial statements, was definitely dated.

[98] NERSA's challenges are further compounded by the fact that the benchmark was developed based on information contained in a stratified sample of all municipalities, and City Power tariffs were increased by that benchmark. City Power tariffs can, therefore, not be said to be cost reflective, under the circumstances.

[99] Of fundamental importance is that NERSA conceded that it could only develop and implement costs reflective tariffs upon submission of the cost of supply studies by municipalities. City Power did not submit a cost of supply study. Therefore, it goes without saying that NERSA could not determine cost reflective tariffs for City Power.

Whether NERSA did not consider the cost of supply of particular customer categories

[100] Going further, NERSA did not have before it, information that would have assisted it to assess City Power's cost of supply to different categories of customers, because the costs, thereof, were not known. This was so because NERSA had not in the first place determined City Power's overall cost of supply.

[101] In terms of subsection 15(1)(d) of the ERA, discrimination between customer categories is allowed, but undue discrimination should be avoided. The subsection provides that the setting or approval of prices, charges and tariffs must avoid undue discrimination between customer categories.

[102] The non-discrimination principle is further articulated in section 2.5 read with Policy Position 4 of the EPP, where the non-discrimination principle is set out as follows:

“There are currently a number of obstacles, principally relating to cross subsidies that prevent the full implementation of non-discriminatory pricing approach. These discriminatory practices have created a situation where similar customers are subject to significantly different tariffs without any real differences in the cost of supply. This undermines the efficient allocation of resources and prevents healthy competition within similar industries. This means that the full potential and benefits of electricity could only be extended to all customers once these discriminatory pricing practices are removed. The obstacles should therefore, be addressed and removed”.

[103] Furthermore, categories of customers, for a municipality, are allowed, in terms of section 15(1)(e) of the ERA, to subsidise each other, that is, cross-subsidisation is allowed between the customer categories, but such cross-subsidy must be deliberate and transparent. Furthermore, the EPP provides that the number of customer categories for tariff purposes should be justifiable to NERSA based on cost drivers and customer base.²⁶

[104] It is clear, from the above stated, that over and above cost of supply of a customer, NERSA had, also, to consider the cost of supply by customer category and the discrimination and cross-subsidisation between the customer categories.

[105] NERSA, in its evidence, conceded, correctly so, that it is, by means of a cost of supply study, that the actual cost *per* customer group can be determined. This, according to NERSA, allows for cost-reflective pricing *per* customer category in line

²⁶ Section 8.4 of the EPP read with Policy Position 26.

with the EPP, and provides a means of ascertaining cross-subsidisation, particularly, between the residential customers and commercial customers as envisaged.

[106] What, however, is apparent on record, is that NERSA did not consider the different costs of supplying different customer categories, nor was there any approval by NERSA of cross-subsidies or other pricing to customers that departed from cost reflective levels *per* customer category. In fact, NERSA, itself, conceded that it did not have regard to costs *per* customer category. A detailed assessment of costs *per* customer category was not possible and it could not have been possible because City Power did not make a cost of supply study available to NERSA.

[107] The extent to which there had been undue discrimination or cross-subsidisation between the different customer categories, same could, not be determined as the data on which to base such an assessment was not before NERSA at the time of decision making. NERSA could only determine whether any undue discrimination or cross subsidisation between customer categories occurred, by considering the costs of supply by customer category, which could have been enabled by a cost of supply study.

[108] Section 15(1)(d) of the ERA read with the principles set out in Policy Positions 2, 4 and 29 of the EPP, makes it clear that NERSA must consider cost of supply through the whole service, that is, the service of the customer, as well as, within customer categories of that customer.

[109] Of importance is that the methodology adopted by NERSA was unable to assess the cost of supply of City Power. In its evidence, NERSA acknowledged that although the benchmarking approach created discrepancies between the tariffs of various municipalities, it was, however, developed to ensure that tariffs across municipalities are not vastly different when evaluating the municipal tariff application. NERSA, also, admitted that certain customer categories like industry and business, largely overpay for the rendered distribution services if compared with other customers, particularly residential, which results in substantial cross-subsidisation requiring a cross-subsidy framework, that would clearly define how subsidies should be shared amongst customers.

[110] From the record, it is common cause that no cross-subsidy framework was developed. Certainly, at the time of the approval of City Power tariffs no such framework existed. It can, thus, be safe for this Court to infer that there might have been undue discrimination and cross-subsidies between City Power's customer categories, which remained undetected. The methodology that was in place at the time, as NERSA conceded, was developed to ensure that tariffs across municipalities are not vastly different. It was not developed to assess cost of supply of licensee's services or cost of supply *per* customer category.

[111] It is evident from the evidence on record, which NERSA appears not to be disputing, that NERSA made no attempt whatsoever to consider the cost of supply to different customer categories. This is so because the methodology that was used by NERSA to develop the benchmarks was materially flawed, as it did not assist NERSA to investigate the cost of supply through the whole service, that is, the service of City Power, as well as, within customer categories of City Power.

[112] According to NERSA's Consultation Paper, the municipal electricity tariff benchmarks for the 2019/2020 financial year, were based on five assumed tariff/customer categories, whilst City Power's application was based on more than five customer categories. NERSA having assumed the customer categories, it cannot be said that it considered City Power's customer categories. Even if it can be said that NERSA did consider those assumed customer categories for City Power, nevertheless, it is evident that not all City Power's customer categories were included in that assumption, when the percentage tariffs were set.

[113] Furthermore, NERSA acknowledged in the stakeholder engagement process that there should be different financial benchmarks for municipalities, applying different depreciation regimes. It, further, acknowledged that it was not correct to use the same benchmark to utilities using different accounting regimes. However, the evidence proffered in this matter indicates the opposite. It is obvious that the benchmarks that were used by NERSA, having been developed from stratified samples, were used in the same way for all municipalities even those which used different accounting regimes. There is no evidence on record that indicates whether NERSA treated City Power differently from other municipalities that applied

depreciation regimes or accounting regimes, that are different from those of City Power.

[114] Earlier in this judgment, it was found that the methodology used by NERSA is not able to determine a licensee's cost of supply. This being so, it obvious that the benchmark would not have ensured cost reflective tariffs for City Power's customer categories.

[115] In terms of the ERA and the EPP, if a council of a municipality wanted to cross subsidise, it must do so deliberately and in a way that is transparent. It must show the cost of supply of customers who are going to be subsidised. Cross-subsidisation must, also, exclude any undue discrimination. In the view of this Court, this could only be properly done where a cost of supply study has been done.

[116] Policy Position 23 of the EPP, dealing with cost of supply studies, at section 8.1 thereof, emphasises that *'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'*.

[117] Without the cost of supply study, and, therefore, the cost of supply of City Power, which would result in the cost of supply of City Power's customer categories, NERSA would not have been able to investigate the extent, if any, of undue discrimination or cross-subsidisation between City Power's customer categories. When setting or approving municipal tariffs, NERSA was enjoined by the provisions of the ERA and the EPP, to consider these principles, and assess whether or not there was undue discrimination or cross-subsidisation that was deliberate and transparent.

[118] Even if it were to be accepted that the method adopted by NERSA did consider the cost of supply of each municipality, what it cannot contest is that the methodology did not look at costs within customer categories and the cross subsidisation between the customer categories. This is a requirement, in terms of the ERA and the EPP, that NERSA must comply with and which is binding on the

municipalities, including City Power that NERSA failed to adhere to. Because no cost of supply study was provided, NERSA, actually, had no way of assessing the extent of any discrimination and whether such discrimination was not undue, as well as, cross subsidies between customer categories, and to determine whether such cross subsidies were deliberate and transparent.

[119] The Applicants' ground of review that the tariff decision taken by NERSA when it determined the City Power tariffs was unlawful because it was in breach of section 15(1)(d) and (e) of the ERA, and principles 2, 4 and 29 of the EPP, is in this Court's view correct, and ought, therefore, to succeed.

Whether NERSA considered irrelevant considerations and did not consider relevant considerations

[120] Although NERSA was of the view that there was sufficient information before NERSA to approve the City Power tariffs, (D-Forms and financial statements); and that the information that was allowed, was credible and reliable, the problem is that the benchmark was developed based on information contained in a stratified sample of all municipalities and City Power tariffs were increased by that benchmark. The information as such was not municipality specific, hence the tariff increase was not cost reflective.

[121] In setting the percentage increase for City Power, NERSA did not consider City Power's D-Forms and other information, alone. The other municipalities' information was put in the mix to develop a percentage increase which applied to all the municipalities equally. In essence, NERSA engaged in a process of comparing the base values across municipalities in an effort to assess efficiency on a broad level. The value NERSA arrived at was based on averages across all municipalities, and not on City Power's base value, only.

[122] Furthermore, as already stated, the information from the D-Forms was stale as it was for the 2016/2017 financial year when it ought to have been for the 2018/2019 financial year. Consequently, NERSA's contention that the process of

approving tariffs was not mechanical and that the tariffs were considered on a case-by-case basis, cannot be correct when the aforementioned reasons are considered.

[123] Fundamentally, without a cost of supply study, it cannot be said that the information in the D-Forms and the audited financial statements, even if it could have been accepted as not being outdated, was properly applied. It follows that when the percentage increase was determined irrelevant consideration were taken into account and relevant considerations, which could have been provided by a cost of supply study, were not considered.

CONCLUSION

[124] In essence, the Applicants' case hinged on the fact that there was no cost of supply study developed for the City of Johannesburg, at the time NERSA took the decision to set the 2019/2020 financial year, City Power tariffs.

[125] Without a cost of supply study, which the EPP emphasises it should be carried out every five years,²⁷ by each municipality, NERSA could not assess the overall cost of supply of the municipality applying for an increase of its tariffs,²⁸ or the cost of supply of the customer categories of that municipality, and, as a result, NERSA could not lawfully set tariffs for such a municipality. This is what happened in the case of City Power.

[126] NERSA, has continually in its argument stated that a cost of supply study is the responsibility of individual municipalities and that without being furnished with one, like in this matter, it will continue to apply the Guideline and Benchmarking Method when setting municipality tariffs. However, NERSA has been enjoined by the EPP to see that within five (5) years that cost reflective tariffs shall reflect all costs components.²⁹ The calculation of the five (5) year period should have started from 2008, when the EPP was promulgated.

²⁷ Policy Position 23 of the EPP.

²⁸ Section 8.8 read with Policy Position 29 emphasises that the tariff structure and levels should be aligned with the results from the cost of supply studies in which the resultant income will equal revenue requirements.

²⁹ Section 8.5 read with Policy Position 27 of the EPP.

[127] City Power having conceded that it did not carry out a cost of supply study for its application for the 2019/2020 financial year tariffs approval, it cannot be said that the decision NERSA took to set City Power tariffs was lawful. This is so because without the cost of supply study, NERSA could not assess the correct overall cost of supply for City Power, and without the correct overall cost of supply, NERSA could not assess the cost of supply of City Power's customer categories. NERSA could, also not assess whether there was discrimination that occurred between the customer categories and if discrimination did occur, whether such discrimination was undue or not. NERSA could, also, not assess whether there was any cross-subsidisation that occurred between the customer categories, and, that if such cross-subsidisation did occur, whether or not it was deliberate and transparent. As such the impugned decision is unlawful, unconstitutional and invalid.

[128] As the Constitutional Court confirmed in *PG Group*,³⁰ information relating to costs is a necessary input into a tariff determination. Without that information, there is "*a missing or faulty link between the means and the ends*", it is a procedural irrationality that signifies the material irrationality. On the facts of this matter, this reasoning applies equally to the City of Johannesburg tariff determination by NERSA. Irrationality has, thus, been established. Accordingly, NERSA's decision, taken when setting City Power tariffs for the 2019/2020 financial year, is hereby declared unlawful, unconstitutional and invalid, it ought to be reviewed and set aside as prayed for by the Applicants.

EXPERT EVIDENCE

[129] Each of the parties commissioned economic experts to analyse the Record of Decision and to determine whether it could be said that the tariffs were cost reflective.

[130] Based on the final decision this Court eventually reached, in this application, on the common cause facts, it was not necessary for the Court to make use of the reports of the experts which are, in any event, based on divergent opinions.

³⁰ Para 51.

REMEDY

[131] In addition to the declaratory relief of invalidity of the impugned decision, the remedy sought by the Applicants in the amended notice of motion is for this Court to

- (a) Suspend the declaration of invalidity in prayer 1A until finalisation of the process contemplated in prayers 3 and 4 below.
- (b) Remit the decision back to NERSA, along with directions as to how the decision should be taken, and, pending the re-taking by NERSA of the impugned decision.
- (c) Order the retrospective reconciliation of the tariffs originally charged against the tariffs lawfully to be determined on remittal and repayment to the Applicants of any amounts due in terms of that reconciliation.
- (d) Declare that all future tariff determinations must be made on a cost recovery basis and by means of a process, which ensures that the City of Johannesburg furnishes NERSA with all the prescribed information, which is necessary for NERSA to determine a cost-based tariff.

[132] City Power seemed not to be too adverse, to the remedy sought by the Applicants, in the event that the declaratory remedy of invalidity sought by the Applicants is granted in their favour. City Power, however, argued against the insertion of the retrospective application of the remedy in so far as the Applicants sought refund of the tariffs for the financial period of 2020/2021 and thereafter.

[133] City Power submitted further that it would not be just and equitable for this Court to make an order prescribing how NERSA should conduct itself in future when determining electricity tariffs as this would be tantamount to violating the principle of separation of powers.

[134] It, in that regard, proposed what it considered to be a just and equitable remedy to be granted, as follows:

1. The decision of the First Respondent, published on the First Respondent's website on or about 16 August 2019 (with retrospective effect to 1 July 2019), to approve an electricity tariff for the Second Respondent for the 2019/2020 tariff year ("the tariff decision"), is reviewed and set aside.

2. Save to the extent set out in paragraph 3 below, the order in paragraph 1 shall not have any retrospective effect and shall not affect any amounts that became due to the Second/Third Respondents pursuant to the tariff decision.

3. In respect of the Applicants (which shall include the members of the applicants as at the date of instituting the present application), the following regime shall apply subject to paragraph 4 below:

3.1. The Applicants and the Second/Third Respondents will seek to resolve by mutual agreement their dispute regarding the applicable electricity tariffs payable for the 2019/2020 tariff year;

3.2. If agreement is not reached in terms of paragraph 3.1 within thirty (30) days of the date of this order, the tariff decision is remitted to the First Respondent, for it to take a decision only on the applicable electricity tariffs payable by the Applicants for the 2019/2020 tariff year; and

3.3. Following the agreement in paragraph 3.1 or a valid decision as contemplated in paragraph 3.2:

3.3.1. If the Applicants owe amounts to the Second/Third Respondents arising from the agreement in paragraph 3.1 or the decision in paragraph 3.2, they shall pay these amounts forthwith; and

3.3.2. If the Second/Third Respondents owe amounts to the Applicants arising from the agreement in paragraph 3.1 or the decision in paragraph 3.2, they shall credit the Applicants with these amounts forthwith.

[135] In support of City Power's argument and suggested draft remedy, NERSA emphasised City Power's submission that the Court should not grant a remedy whereby a regulator, like NERSA, would be told what it must do when taking a decision. NERSA, as such, made a suggestion that an order be granted remitting the

matter to NERSA for reconsideration of the tariffs, without having to prescribe to NERSA what it must do because NERSA does not regulate the industry only as between City Power, the City of Johannesburg and the Applicants, but, that there are other role players which will be impacted upon by anything that NERSA was going to do.

[136] NERSA was also, adverse, to the retrospective effect of the remedy, contending that the order is made in 2021/22 for the tariff decision taken in 2019/20. As such, NERSA cautioned about the ramification of such a remedy, which if not guarded may open flood gates for other parties who were impacted by the tariff decision.

[137] The Applicants, did not have a problem with the draft remedy as suggested by City Power and supported by NERSA, in that, the proposed remedy provided them with substantive relief, in respect of the challenged tariffs. They were, however, not satisfied by the omission in the draft remedy of the prayer that they said addressed the future. Their contention was that such a prayer was particularly important, as this dispute will be replayed again as soon as NERSA makes its next tariff determination; and that NERSA seemed not to accept that it was bound by the provisions of section 27(h) of the ERA to execute the reticulation function in accordance with the EPP. Thus, an order fashioned to incorporate the future, would ensure that NERSA complies with the provisions of the ERA and EPP, so the argument went.

[138] In terms of section 172(1)(b) of the Constitution and section 8 of PAJA,³¹ this Court has a wide discretion to consider an appropriate relief following the finding of unlawfulness in the impugned decision. The remedy to be granted must be just and equitable.

[139] The Constitutional Court in *Hoërskool Ermelo*,³² when granting a remedy based on section 172(1)(b) of the Constitution, expressed itself as follows:

³¹ **Remedies in proceedings for judicial review** 8 (1) The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable.

³² *Head of Department Mpumalanga v Hoërskool Ermelo* 2010 (2) SA 415 (CC) at 96-97.

“The power to make such an order derives from section 172(1)(b) of the Constitution. First, section 172(1)(a) requires a court, when deciding a constitutional matter within its power, to declare any law or conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency. Section 172(1)(b) of the Constitution provides that when this Court decides a constitutional matter within its power it ‘may make any order that is just and equitable’. The litmus test will be whether considerations of justice and equity in a particular case dictate that the order be made. In other words, the order must be fair and just within the context of a particular dispute.

It is clear that section 172(1)(b) confers wide remedial powers on a competent court adjudicating a constitutional matter. The remedial power envisaged in section 172(1)(b) is not only available when a court makes an order of constitutional invalidity of a law or conduct under section 172(1)(a). A just and equitable order may be made even in instances where the outcome of a constitutional dispute does not hinge on constitutional invalidity of legislation or conduct. This ample and flexible remedial jurisdiction in constitutional disputes permits a court to forge an order that would place substance above mere form by identifying the actual underlying dispute between the parties and by requiring the parties to take steps directed at resolving the dispute in a manner consistent with constitutional requirements. In several cases, this Court has found it fair to fashion orders to facilitate a substantive resolution of the underlying dispute between the parties. Sometimes orders of this class have taken the form of structural interdicts or supervisory orders. This approach is valuable and advances constitutional justice particularly by ensuring that the parties themselves become part of the solution.” (Footnote omitted)

[140] The *PG Group* litigation, on the other hand, demonstrates that the Courts will, in appropriate cases, where NERSA's conduct has been shown to be unreasonable or contrary to the empowering legislation, have "not the slightest hesitation" to set

aside NERSA's tariff determinations.³³ The Court will also ensure that the remedy granted is meaningful and will ensure that proper tariffs are to be imposed, even retrospectively.

[141] It is trite that when invoking the provisions of section 172(1)(b) of the Constitution, the granting of a just and equitable remedy in the circumstances of this case, must ensure that the tariffs are adjusted retrospectively to a lawful amount.

[142] The parties agreed to the substantive remedy which ought to be granted in favour of the Applicants as *per* the draft remedy proposed by City Power. The Applicants appear, also, to be content that the proposed draft remedy does not extend to other parties except the Applicants and that the retrospective effect thereof covers only the period in question, which is the 2019/2020 financial period. What remained the challenge was the additional declaratory relief sought by the Applicants in regard to the future, that is, an order prescribing how NERSA should conduct itself when setting tariffs, in the future.

[143] In this Court's view, the agreement by the parties as to the extent of the retrospectivity of the refund of the tariffs, is correct. It would never have been just and equitable for the remedy sought by the Applicants, to reach all the way back into those periods (2020/2021 tariff year and the tariffs thereafter) and result in the extraordinary potential for refunds that will cause calamity for the Municipality. Fundamentally, there was no basis to interfere with the 2020/2021 tariff year and the tariffs thereafter, since there would be separate decisions, which have not been challenged.

[144] This Court is in agreement that it is not for this Court to prescribe to NERSA what it must do when taking a tariff decision. This Court has clearly expressed itself in the judgment and has stated as such what NERSA did that was wrong and what it

³³ PG Group Ltd and Others v National Energy Regulator of South Africa and Another 2018 (5) SA 150 (SCA).

needs to correct. It is therefore unnecessary for this Court to grant the relief that the Applicants seek.

[145] The further argument by City Power that such an order will be remiss for lack of joinder to these proceedings of other role players, who might be impacted by such an order, is valid, as well. It is indeed, so that NERSA does not regulate the industry only as between City Power, the City of Johannesburg and the Applicants. NERSA can, also, not treat City Power differently from other municipalities when it comes to the determination of electricity tariffs. Whatever remedy is granted to the Applicants which would prescribe the manner in which NERSA should conduct itself when determining electricity tariffs, will have an impact on other municipal electricity distributors.

[146] It is this Court's view that the remedy sought by the Applicants will definitely have an impact on other municipal electricity distributors and it will, consequently, not be just and equitable to grant such a remedy. Under the circumstances, a just and equitable remedy, that this Court should grant, is that proposed by City Power.

COSTS

[147] The Applicants as the successful parties have prayed for a punitive cost order against NERSA on the basis of an alleged shifting case, and that such costs to include the costs of two counsel. They, also, prayed for costs against City Power.

[148] It is the view of this Court that punitive costs against NERSA are not warranted in this matter. There is no evidence, none was argued before this Court that established that NERSA was a vexatious or frivolous litigant in these proceedings, warranting that it be mulcted with a punitive cost order.

[149] This Court is in agreement that the issues in this matter were complex and important to warrant the employment of two counsel – one senior and one junior.

[150] Therefore, an order for costs on a party and party scale, inclusive of costs consequent upon the employment of two counsel, ought to be granted jointly and severally against NERSA and City Power, in favour of the Applicants.

THE ORDER

[151] The following order is made

1. The application is granted.
2. The Draft Order annexed to this judgment is made an order of Court.

E.M KUBUSHI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on 25 November 2022.

APPEARANCES:

APPLICANTS' COUNSEL:	ADV. M CHASKALSON SC ADV. S PUDIFIN-JONES
APPLICANTS' ATTORNEYS:	JOUBERT GALPIN SEARLE INC

and

NATIONAL ENERGY REGULATOR OF SA

FIRST RESPONDENT

CITY POWER SOC LTD

SECOND RESPONDENT

CITY OF JOHANNESBURG

METROPOLITAN MUNICIPALITY

THIRD RESPONDENT

This Order is made an Order of Court by the Judge whose name is reflected herein, duly stamped by the Registrar of the Court and submitted electronically to the Parties/their legal representatives by email. This Order is further uploaded on Caselines by the Judge's secretary. The date of this Order is deemed to be 25 November 2022.

COURT ORDER

1. The decision of the First Respondent, published on the First Respondent's website on or about 16 August 2019 (with retrospective effect to 1 July 2019), to approve an electricity tariff for the Second Respondent for the 2019/2020 tariff year ("the tariff decision"), is reviewed and set aside.
2. Save to the extent set out in paragraph 3 below, the order in paragraph 1 shall not have any retrospective effect and shall not affect any amounts that became due to the Second/Third Respondents pursuant to the tariff decision.
3. In respect of the Applicants (which shall include the members of the applicants as at the date of instituting the present application), the following regime shall apply:

3.1. The Applicants and the Second/Third Respondents will seek to resolve by mutual agreement their dispute regarding the applicable electricity tariffs payable for the 2019/2020 tariff year;

3.2. If agreement is not reached in terms of paragraph 3.1 within 30 days of the date of this order, the tariff decision is remitted to the First Respondent, for it to take a decision only on the applicable electricity tariffs payable by the Applicants for the 2019/2020 tariff year; and

3.3. Following the agreement in paragraph 3.1 or the decision in paragraph 3.2:

3.3.1. If the Applicants owe amounts to the Second/Third Respondents arising from the agreement in paragraph 3.1 or a valid decision in paragraph 3.2, they shall pay these amounts forthwith; and

3.3.2. If the Second/Third Respondents owe amounts to the Applicants arising from the agreement in paragraph 3.1 or a valid decision in paragraph 3.2, they shall credit the Applicants with these amounts forthwith.

4. The respondents are directed jointly and severally to pay the costs of the applicants, such costs to include the costs of two counsel – one senior and one junior.

REGISTRAR OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

APPEARANCES:

APPLICANTS' COUNSEL: ADV. M CHASKALSON SC
ADV. S PUDIFIN-JONES

APPLICANTS' ATTORNEYS: JOUBERT GALPIN SEARLE INC

FIRST RESPONDENT'S COUNSEL: ADV. P MOKOENA SC
ADV. P MANAGA

FIRST RESPONDENT ATTORNEYS: CHEADLE THOMPSON & HAYSOM INC

SECOND & THIRD RESPONDENTS'
COUNSEL: ADV. S BUDLENDER SC

ADV. P NGCONCO

SECOND & THIRD RESPONDENTS'
ATTORNEYS:

EDWARD NATHAN SONNENBERGS INC