THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM	The Registrar, Supreme Court of Appeal
DATE	6 June 2017
STATUS	Immediate

Please note that the media summary is for the benefit of the media and does not form part of the judgment.

NERSA v Borbet SA (Pty) Ltd [2017] ZASCA 87 (1288/2016 & 1309/2016) (6 June 2017)

MEDIA STATEMENT

The Supreme Court of Appeal (SCA) today upheld an appeal by the National Energy Regulator of South Africa (NERSA) and Eskom Holdings SOC Limited (Eskom) against a judgment of the Gauteng Division, Pretoria of the High Court (Pretorius J). That court had reviewed and set aside a decision of NERSA approving a tariff increase by Eskom to be passed on to consumers. The review application was brought by Bobert SA (Pty) and other private businesses.

The review application concerned NERSA's approval of an additional 1,4 per cent increase in the electricity tariff, over and above an earlier, properly approved eight per cent increase for the 2013/2014 financial year. The decision by NERSA was announced on 2 March 2016. The increase came into effect on 1 April 2016 and endured until 31 March 2017, and was passed on to municipalities by Eskom.

Briefly, the manner in which electricity tariffs are regulated is set out in the Electricity Regulation Act 4 of 2000. NERSA, which is established in terms of s 3 of the National Energy Regulator Act 40 of 2004 (NERA), in turn regulates the generation, transmission and distribution of electricity. It considers and is empowered to grants applications for the distribution of electricity, and regulates electricity prices and tariffs. As between NERSA and Eskom, the electricity tariff methodology is set out in the 'multi-year price determination methodology' (the MYPDM). The MYPDM is updated in intervals. The determination which

was the subject of the review application fell within the third price determination interval, and covers the five tariff years between 1 April 2013 and 31 March 2018. This methodology, named MYPDM3, and the interpretation and application thereof, lay at the heart of the appeal. Under the MYPDM3, the tariff set by NERSA that Eskom could charge and recover from its customers was envisaged to increase by eight per cent year-on-year for each of the five years (2013 to 2018). The additional 1,4 percent, in relation to the 2013/2014 financial year, approved by NERSA, effectively meant that in the financial year 1 April 2016 till 31 March 2017, Eskom would have been entitled to a total increase of 9,4 per cent – which was passed on to consumers. Eskom applied through the Regulatory Clearing Account, in terms of s 14 of the MYPMD3, for an adjustment of approximately R22 billion. The RCA is used to debit or credit all potential adjustments to Eskom's allowed revenue. NERSA allowed Eskom an adjustment of R11,2 billion which equates to the 1,4 percent increase, despite Eskom's failure to provide quarterly reports as envisaged in the MYPDM3, and despite objections from Borbet and government departments.

The SCA stated that 'NERSA's decision-making in relation to an RCA application is an administrative action reviewable in terms of the Promotion of Access to Justice Act 3 of 2000 (PAJA).' Thus, the court continued, the scope of review was wider than envisaged by Eskom and NERSA, and the court below.

The SCA noted that the correctness or otherwise of the high court's approach and conclusions in relation to the 1,4 per cent adjustment approved by NERSA had to be determined against the backdrop and upon a scrutiny of the MYPDM3, weighed against the statutory framework (namely, ERA and NERA). It noted that licenses issued by NERSA may be made subject to conditions relating to the MYPDM3. And in relation to the regulatory scheme, in particular sections 17, 18 and 19 of ERA, it was clear that non-compliance by a licensee was not fatal to its continued operations – these provisions were intended primarily to regulate the relationship between NERSA and the licensee. The court stated that the statutory framework and the MYPDM3 imposed certain obligations on licensees, but that the framework also recognises that these obligations may not always be met and that corrective or remedial measures on the part of NERSA might ensue. It was the court's view that those measures are entirely within NERSA's remit.

Moreover, the SCA noted, section 14.2.2 of the MYPDM3 states that in order for the RCA account to be updated quarterly as part of a regular alert system, Eskom 'must . . . submit actual financial data on a quarterly basis. . . in the ordinary course, failure by a licensee to comply with the methodology or a licence condition, might result in sanctions being imposed

by NERSA. NERSA could also apply to court to compel Eskom to comply. It chose not to do so, electing rather to abide by bi-annual reports.' However, the court said, it did not follow ineluctably that Eskom's failure to supply the quarterly report precludes NERSA from entertaining an RCA application. The MYPDM3 nowhere says so and holding otherwise would be to defeat the purpose of the RCA and negate NERSA's role as regulator. It would mean that an RCA application, which if approved would strike a proper balance between the liability of Eskom and continued electricity supply and the public interest, would nevertheless be thwarted because of a failure to supply quarterly reports. This might have the consequence that Eskom was rendered financially non-viable and threaten the supply of electricity regionally or nationwide. That is not to say, the court continued, that laxity by licence holders such as Eskom should be encouraged. In these circumstances, to preclude an RCA application because of a historical failure to submit quarterly reports would not only be destructive of the regulatory framework and purpose of the RCA but would also threaten Eskom's viability and expose NERSA to legal challenge.' The court recognized, however, the importance of the quarterly reports in order to alert customers of possible adjustments.

The SCA also noted that NERSA had an overall power which was permitted by the MYPDM3 which in its introduction states that the development of the MYPDM3 does not 'preclude the Energy Regulator from applying reasonable judgment on Eskom's revenue after due consideration of what may be in the best interest of the overall South African economy and the public'. And concluded that it was apparent that the statutory framework and the MYPDM3 imposed certain obligations on licensees but that these instruments also recognized that these obligations 'may not always be met and that corrective or remedial measures on the part of NERSA might ensue.'

With regards to the timing of the implementation of the tariff increase, the court held that this was entirely within NERSA's remit, and noted that given Eskom and the municipalities' financial year ends, the decision that it be imposed from the beginning of the year following the one during which the decision was made, appeared to be realistic and rational. And the court was at pains to point out that as regards the claim of inefficiency; Eskom did not obtain a benefit from its own inefficiency.

The SCA pointed out that the present was a case in which there had to be a degree of deference to a specialized administrative body such as NERSA. What NERSA intended to do, and was so entitled, the court held, was to strike a balance between Eskom's sustainability and the impact on the consumer of the South African economy. In the event,

the court found that the high court and Borbet not only misconceived the manner in which the MYPDM3 operated, but also NERSA's role as the regulator.

Accordingly, the SCA dismissed the court below's order that NERSA's decision to allow Eskom an additional electricity tariff adjustment be reviewed. The court held that:

'[119] [It] appreciate[d] that the South African taxpayer and electricity consumer are exhausted by the constant historical failures by Eskom. Whether Eskom is penalised by NERSA through the imposition of a fine or whether a request for a tariff adjustment is granted or denied, the taxpayer and the consumer ultimately appear to be the ones who bear the financial burden. Eskom is a strategic national asset. What is required from it is optimum efficiency and accountability. NERSA and its sole shareholder, the government, are tasked to ensure that result. This case was concerned with the question of the proper adjudication of an RCA application. What was disallowed by NERSA took into account the failures on the part of Eskom. Those are matters that have to be addressed prospectively by NERSA and with government oversight. They are matters beyond the adjudication in this case.'

Earlier in the judgment the court said the following (para 2):

'It is, I venture, not unfair to say that because of historical inefficiencies leading to what South Africans have come to know as load shedding – a euphemism for electrical power cuts – and because of extensive public debates concerning its competency, Eskom has attained a level of unpopularity in the public eye. In the present case, however, the question is whether NERSA duly discharged its statutory obligations. If it did then Eskom was entitled to charge the tariffs it authorized.'

In the end, it said, the present was a case which concerned the proper adjudication of the RCA application.

--- ends ---