THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 1288/2016

1309/2016

Reportable

In the matter between:

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

and

BORBET SA (PTY) LTD	**FIRST RESPONDENT**
PG GROUP (PTY) LTD t/a SHATTERPRUFE	**SECOND RESPONDENT**
CROWN CHICKENS (PTY) LTD	**THIRD RESPONDENT**
AGNI STEELS SA (PTY) LTD	**FOURTH RESPONDENT**
AUTOCAST SOUTH AFRICA (PTY) LTD t/a AUTOCAST PORT ELIZABETH	**FIFTH RESPONDENT**
NELSON MANDELA BAY BUSINESS CHAMBER	**SIXTH RESPONDENT**
MINISTER OF ENERGY	**SEVENTH RESPONDENT**
NELSON MANDELA BAY MUNICIPALITY	**EIGHTH RESPONDENT**
SOUTH AFRICAN LOCAL GOVERNMENT ASSOCIATION	**NINTH RESPONDENT**

and

In the matter between:

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

And

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AGNI STEELS SA (PTY) LTD	**FOURTH RESPONDENT**
AUTOCAST SOUTH AFRICA (PTY) LTD t/a AUTOCAST PORT ELIZABETH	**FIFTH RESPONDENT**
NELSON MANDELA BAY BUSINESS CHAMBER	**SIXTH RESPONDENT**

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

Coram: Navsa, Ponnan, Wallis and Dambuza JJA and Mbatha AJA

Heard: 4 May 2017

Delivered: 6 June 2017

Summary: Adjudication by the National Energy Regulator of South Africa (NERSA), a statutory regulator, of tariff adjustment application by Eskom, a licensee with a license, inter alia, to distribute as principal supplier electricity in South Africa : nature of adjudication process and decision: administrative action: subject to review in terms of the Promotion of Access to Justice Act 3 of 2000: not, as suggested by NERSA and Eskom, immune from judicial scrutiny because it involved application of policy.

Price adjustment methodology discussed, interpreted and applied: whether decision by NERSA rational and whether adjudication process and decision unfair.

Discussion of deference to specialised administrative body.

ORDER

On appeal from: Gauteng Division, Pretoria of the High Court (Pretorius J sitting as court of first instance):

The following order is made:

1 The appeal is upheld with costs including the costs of two counsel.

2 The order of the court below is set aside and replaced with the following:

'The application is dismissed with costs including the costs of two counsel.'

JUDGMENT

Navsa JA (Ponnan, Wallis and Dambuza JJA and Mbatha AJA concurring):

Introduction

[1] On 1 March 2016 the first appellant, the National Energy Regulator of South Africa (NERSA), approved an additional 1,4 per cent increase in the electricity tariff, over and above an earlier, properly approved eight per cent increase, that the second appellant, Eskom Holdings SOC Limited (Eskom),[1] could impose on its customers in relation to the 2013/2014 financial year. The decision was announced on 2 March 2016. It is common cause that the increase came into effect on 1 April 2016 and endured until 31 March 2017. It is uncontested that the increase was passed on to municipalities by Eskom and that consumers were charged that increased rate.[2] At the end of March 2016, the first to sixth respondents successfully challenged NERSA's approval of the additional 1,4 per cent increase in the Gauteng Division, Pretoria of the High Court. The first to fifth respondents are private companies which operate businesses within the Nelson Mandela Bay Metropolitan Municipality. They are consumers and users of electricity distributed by that municipality and were all affected by the tariff increase. The sixth respondent is the

[1] Eskom is a public company licensed to generate, transmit and distribute electricity under licences issued by NERSA.

[2] This was ascertained for the first time by counsel for the second appellant during argument before us after enquiry by the court. It should be borne in mind that municipalities are able to load the tariff with their own margin.

Nelson Mandela Bay Business Chamber (the Chamber), which represents a broad spectrum of businesses in the Nelson Mandela Bay with a membership of close to one thousand. I shall, for the sake of convenience, refer to the respondents collectively as Borbet.[3] Eskom is undoubtedly the major bulk supplier of electricity in South Africa. The State is its sole shareholder. In the ordinary course it provides electricity to municipalities for onward transmission to consumers within their area of jurisdiction. Eskom's continued viability is of vital national importance. In this regard, NERSA is charged with oversight.

[2] The Gauteng Division, Pretoria of the High Court (Pretorius J) reviewed and set aside the decision taken by NERSA, on the basis that it had failed to follow its own statutorily based Multi-Year Pricing Determination Methodology (MYPDM), more specifically, the provisions dealing with adjustments to already approved tariffs. The details of the prevailing methodology will be dealt with in due course. It is against that order that the present appeal, by NERSA and Eskom, with the leave of that court, is directed. 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.

[3] Electricity tariff increases affect all South Africans. They impact the business world as well as domestic households. Thus, there is a statutory framework to ensure fairness so that tariff increases have the result that electricity infrastructure remains sustainable while at the same time ensuring that undue hardships are not imposed on consumers. For a proper appreciation of the matter it is necessary at the outset to have regard in some detail to the regulatory framework.

[3] Borbet SA (Pty) Ltd is the first respondent.

The regulatory framework

[4] NERSA was established in terms of the National Energy Regulator Act 40 of 2004 (NERA),[4] which, inter alia, regulates the generation, transmission and distribution of electricity. Section 4 of NERA sets out NERSA's functions and provides, amongst others, that NERSA is to undertake the functions set out in s 4 of the Electricity Regulation Act 4 of 2006 (ERA).[5] In that section of ERA the powers and duties of the regulator are set out as follows:

'The Regulator –

(a) must –

(i) consider applications for licenses and may issue licences for –

(aa) the operation of generation, transmission or distribution facilities;

(bb) the import and export of electricity;

(cc) trading;

(ii) *regulate prices and tariffs*;

(iii) register persons who are required to register with the Regulator where they are not required to hold a licence;

(iv) issue rules designed to implement the national government's electricity policy framework, the integrated resource plan and this Act;

(v) establish and manage monitoring and information systems and a national information system, and co-ordinate the integration thereof with other relevant information systems;

(vi) enforce performance and compliance, and take appropriate steps in the case of non-performance;

(b) may –

(i) mediate disputes between generators, transmitters, distributors, customers or end users;

(ii) undertake investigations and inquiries into the activities of licensees;

(iii) perform any other act incidental to its functions.' (My emphasis.)

[5] The objects of ERA are as follows:[6]

'*(a)* [to] achieve the efficient, effective, sustainable and orderly development and operation of electricity supply infrastructure in South Africa;

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[4] Section 3 of the Act provides:
'The National Energy Regulator is hereby established as a juristic person.'

[5] NERSA is also a gas and petroleum regulator. See sections 4(1)*(a)* and *(b)*.

[6] Section 2 of ERA.

(b) ensure that the interests and needs of present and future electricity customers and end users are safeguarded and met, having regard to the governance, efficiency, effectiveness and long-term sustainability of the electricity supply industry within the broader context of economic energy regulation in the Republic;

(c) facilitate investment in the electricity supply industry;

(d) facilitate universal access to electricity;

(e) promote the use of diverse energy sources and energy efficiency;

(f) promote competitiveness and customer and end user choice; and

(g) facilitate a fair balance between the interests of customers and end users, licensees, investors in the electricity supply industry and the public.'

[6] Section 14(1) of ERA under the title 'Conditions of licence' provides, inter alia:

'(1) The Regulator may make any licence subject to conditions relating to –

. . .

(d) the setting and approval of prices, charges, rates and tariffs charged by licensees;

(e) the *methodology* to be used in the determination of rates and tariffs which must be imposed by licensees;

. . .' (My emphasis.)

[7] Section 15 of ERA sets out 'Tariff principles':

'(1) 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.

(2) 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.

(3) Notwithstanding subsection (2), the Regulator may, in prescribed circumstances, approve a deviation from set or approved tariffs.'

[8] Section 21(2) of ERA provides:

'A licensee may not discriminate between customers or classes of customers regarding access, tariffs, prices and conditions of service, except for objectively justifiable and identifiable differences approved by the Regulator.'

[9] Municipalities are charged with the obligation to ensure electricity reticulation services within their areas of jurisdiction. Section 27 of ERA states that each municipality must exercise its executive authority and perform its duty by:

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

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

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

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

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

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

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

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

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

[10] In the present case, in relation to the time period concerned, Borbet and others in that municipal area were billed by the Nelson Mandela Bay Metropolitan Municipality. It is necessary to record that municipalities are themselves, as licensees for reticulation to customers and/or end-users, in terms of s 15(1)*(a)* of ERA, entitled to the same recovery of costs of licenced activities, as is Eskom, including a reasonable margin or return.

[11] Section 35(1) reads as follows:

'(1) The Regulator may, after consultation with –

(a) licensees;

(b) municipalities that reticulate electricity; and

(c) such other interested persons as may be necessary,

make guidelines and publish codes of conduct and practice, or make rules by notice in the *Gazette*.'

[12] The provisions set out above create a situation where licensees are the ones empowered to charge a tariff for electricity consumption within parameters set by the Regulator. Licences, as can be seen from the provisions of ss 14(1)*(d)* and *(e)* of ERA, may contain conditions relating to the setting and approval of prices, charges, rates and tariffs to be charged by licensees. Licences may be made subject to conditions relating to the methodology to be used in the determination of rates and tariffs which must be imposed by licensees (s 14(1)*(e)*). NERSA is therefore responsible for determining whether a licence should be granted; the terms of the licence; the methodology by which tariffs and charges are to be determined and the imposition of that methodology on the licensee by way of a licence condition; and the tariffs and charges that the licensee may recover from its customer. All of these are embodied directly or indirectly in the licence and the obligation to adhere to them flows from the licence. Notionally, licence conditions could vary from licensee to licensee.

[13] During the hearing of this appeal, we called for a copy of the Eskom licence. It sets out Eskom's duties, largely in line with the provisions of ERA. Under 'Specific Conditions', Eskom is required to maintain financial records in relation to the distribution of electricity. Clause 4.6 of the licence provides that 'the licensee' shall comply with 'the price and tariff methodology' provided by NERSA in determining its prices and tariffs and it is restricted to charging the consumer and/or end-user tariffs and prices approved by NERSA. Under 'General Conditions', Eskom is required to comply with the applicable provisions of ERA. It is also required to take reasonably practical steps to protect the environment and to ensure safety in the course of operations associated with the licence, including, but not only those specified, in health and safety and environmental legislation.

[14] In terms of s 17 of ERA, NERSA may revoke a licence on the application of a licensee if the licenced facility or activity is no longer required and the licenced

facility or activity is not economically viable. That provision is mirrored in clause 7 of Eskom's licence. Section 18 of ERA deals with contraventions of a licence and allows for the Regulator to sit as a tribunal to deal with allegations of a failure to comply with a licence condition, or with any provision of ERA. Section 18(5) of ERA allows for financial penalties to be imposed on licensees, depending on the degree of non-compliance. Section 19 of ERA empowers the Regulator to apply to the high court for an order suspending or revoking a licence, if there are grounds for doing so. Many of the sections of ERA referred to and the licence conditions predominantly set and define the parameters of the relationship between NERSA and licensees. I pause to reflect that it is significant that any failure to comply with licence conditions, which includes the failure to maintain financial records, and non-compliance with the pricing tariff methodology, clearly does not, in terms of the provisions set out above, operate as a guillotine against the licensee, resulting in an immediate cancellation of the licence and the cessation of licenced activities. This is an aspect to which I shall revert.

The Multi-year Price Determination Methodology (the MYPDM)

[15] It is common cause that tariffs to be charged by licensees are determined by NERSA at intervals in accordance with the MYPDM, ostensibly in terms of s 14(1)*(e)* of ERA. [7]

[16] Each price determination interval covers a period of three to five years, hence the description 'multi-year price determination methodology'. The MYPDM is apparently updated in relation to each interval. The determination in dispute falls within the third price determination interval, which covers five tariff years between 1 April 2013 and 31 March 2018. The methodology employed in relation thereto will henceforth be referred to as the MYPDM3. It is the interpretation and application of the MYPDM3 that lies at the heart of this appeal.

[17] Under the MYPDM3 the tariffs set by NERSA that Eskom would charge and recover from its customers was envisaged to increase by eight per cent year-on-year for each of the five years in question. The additional 1,4 per cent, an adjustment in

[7] This is envisaged in the Electricity Pricing Policy, GN 1398, *GG* 31741,19 December 2008.

relation to the 2013/2014 financial year, approved by NERSA, referred to in para 1 above, would mean 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, as stated earlier, was passed on to end-consumers.

[18] In keeping with the principle of transparent and accountable governance and administration, the MYPDM3 is contained in a comprehensive document and was the product of extensive consultation by NERSA with interested and affected parties. The introduction to the document is significant and I consider it necessary to set it out in full:

'The Multi-Year Price Determination (MYPD) Methodology is developed for the regulation of Eskom's required revenues. It forms the basis on which the National Energy Regulator of South Africa (NERSA or "the Energy Regulator") will evaluate the price adjustment applications received from Eskom. The MYPD was first introduced in 2006 for implementation from 01 April 2006 to 31 March 2009. It is a cost-of-service-based methodology with incentives for cost savings and efficient and prudent procurement by the licensee (Eskom). The Methodology also provides for Services Quality Incentives (SQI) for Eskom. On an annual basis, the MYPD runs concurrently with Eskom's financial year(s). A second MYPD period started from 01 April 2010 to 31 March 2013, with the next one scheduled to run from 01 April 2013 to 31 March 2018.

In developing the MYPD Methodology, the following objectives were adopted:

1. to ensure Eskom's sustainability as a business and limit the risk of excess or inadequate returns; while providing incentives for new investment;
2. to ensure reasonable tariff stability and smoothed changes over time consistent with socio-economic objectives of the Government;
3. to appropriately allocate commercial risk between Eskom and its customers;
4. to provide efficiency incentives without leading to unintended consequences of regulation on performance;
5. to provide a systematic basis for revenue/tariff setting; and
6. to ensure consistency between price control periods.

The development of the Methodology 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.'

The qualification in the last part of the introduction is significant. It allows NERSA latitude to exercise 'reasonable judgment' after due consideration of what may be in the public interest.

[19] The MYPDM3 reflects, in large part, government's electricity pricing policy, issued by the Department of Minerals and Energy.[8] The MYPDM3 and the pricing policy are in line with the tariff principles set out in s 15 of ERA. It provides for the recovery of the full costs of licensed activities, including a reasonable margin or return and provides for prescribed incentives for continued improvement of technical and economic efficiency. Section 3 of the MYPDM3 sets out a formula to determine the allowable revenue for Eskom within the interval, which includes taking into account, inter alia, its asset base, weighted average cost of capital, expenses and other factors which for present purposes are not material.

[20] Before Eskom applied for the additional 1,4 per cent increase in terms of MYPDM3 it had, during April/May 2015, applied for what is termed a 'selective reopener of the MYPD[M]3', based on a shortfall on electricity sales of approximately R22 billion in respect of expected revenue of approximately R143 billion, recorded as part of the earlier MYPDM3 tariff approvals. Eskom applied for a 'selective reopener' because, so it alleged, its operating costs had increased due to unexpected events such as a boiler explosion at one of its units, the collapse of a power station silo, challenges related to the quality of coal, and delays in the commissioning of new power stations.

[21] After receipt of Eskom's application, NERSA published it on its website and called for public comment. NERSA went further and held public hearings on 23 and 24 June 2015. A total of 225 written comments were received. On 29 June 2015 NERSA decided to decline the application on the basis that the MYPDM3 did not provide for a 'selective reopening', but stated that Eskom could resort to the risk management control and pass-through mechanism which is described in the MYPDM3 as 'The Regulatory Clearing Account' (RCA).

[8] See fn 7 above.

The Regulatory Clearing Account – s 14 of the MYPDM3 – Eskom's application

[22] In response, Eskom, on 10 November 2015, submitted an RCA application to NERSA, seeking an adjustment in respect of the tariff for the 2013/2014 tariff year of approximately R22 billion, purportedly in terms of s 14 of the MYPDM3. In para 3 of Eskom's RCA submission to NERSA, the following appears:

'Eskom's 2013/14 RCA Submission is driven substantially by revenue under-recovery and higher primary energy costs to meet demand, whilst operating in a constrained electricity system. The determined RCA balance is motivated with evidence for prudent scrutiny by NERSA.

Variances can be linked to two key sources:

- Increases in costs due to a changing environment and assumptions after the MYPD3 decision;
- Assumptions made for purposes of the MYPD3 revenue decision which did not materialise.'

[23] Under para 3.1 of its RCA submission Eskom stated the following:

'The revenue variance of R11 723m was primarily as a result of lower electricity sales volumes attributable to standard tariff customers.'

Paragraph 3.2 reads as follows:

'Due to the constrained electricity system and level of Generating plant performance, Eskom was required to operate a more expensive mix of generating plant compared to the assumptions in the MYPD3 decision in order to avoid/minimize load shedding. This included a combination of higher levels of supply from local and regional [Independent Power Producers] (IPPs), more [Open Chamber Gas Turbines] (OCGT) usage and a change in the mix of the coal fleet which was required in trying to meet demand and more importantly to protect the stability of the overall electricity system.

This resulted in R8 024m higher OCGTs fuel spend, extra net coal burn of R2 000m, more from local IPPs of R580m, regional IPP supply of R1 136m and additional other primary energy of R2 491m compared to the assumptions in the MYPD3 decision. The other primary energy variance was substantially linked to costs for startup gas and oil and nuclear fuel costs.

The coal burn variance of R2 000m is a result of a combination of the positive volume variance of R1 378m in favour of the consumer and the negative coal price variance of R3 378 in favour of Eskom. The coal volume variance is attributable to lower coal production volumes because of lower sales volumes and reduction in Generation coal plant performance levels compared to that assumed in the MYPD3 decision.'

In its RCA submission, Eskom also alluded to under-expenditure in relation to the environmental levy of R312 million, which would inure to the benefit of consumers. There were also other items in relation to over – and under-expenditure that, for present purposes, are not material.

[24] Because of its importance in the determination of this appeal it is necessary to quote s 14 of the MYPDM3 in full:

'14.1 Risk Management Device

The risk of excess or inadequate returns is managed in terms of the RCA. The RCA is an account in which all potential adjustments to Eskom's allowed revenue which has been approved by the Energy Regulator is accumulated and is managed as follows:

14.1.1 The nominal estimates of the regulated entity will be managed by adjusting for changes in the inflation rate.

14.1.2 Allowing the pass-through of prudently incurred primary energy costs as per Section 8 of the Methodology.

14.1.3 Adjusting capital expenditure forecasts for cost and timing variances as per Section 6 of the Methodology.

14.1.4 Adjusting for prudently incurred under-expenditure on controllable operating costs as may be determined by the Energy Regulator.

14.1.5 Adjusting for other costs and revenue variances where the variance of total actual revenue differs from the total allowed revenue. In addition, a last resort mechanism is put in place to trigger a re-opener of the price determination when there are significant variances in the assumptions made in the price determination.'

[25] Section 14.2 bears the heading, 'The Regulatory Clearing Account', and provides:

'The RCA is used to debit/credit all the aforementioned potential adjustments to Eskom's allowed revenue and must be used as follows:

14.2.1 The RCA will be created at the beginning of the financial year and continuously monitored. The evaluation of the account (for the purpose of determining the pass-through and/or claw-back) will be done with actuals for the full financial year.

14.2.2 This account must be updated quarterly so as to use it for regular alerts to customers of any possible adjustment in the coming year. Eskom must therefore submit actual financial data on a quarterly basis.

14.2.3 The RCA balance will be measured as a percentage of total allowed revenue and will act as a trigger for re-opener as follows:

14.2.3.1 If the RCA balance is less than or equal to 2 % of the allowable revenue, then there will be no immediate pass-through adjustment, but the RCA balance will be carried over to the next financial year.
14.2.3.2 If the RCA balance is between 2 % and 10 %, the amount is allowed as a pass-through in the next financial year without the need for a full stakeholder consultation process.
14.2.3.3 If the balance is greater than 10 % of the allowable revenue, there will be a full stakeholder consultation process before any pass-through is allowed.
14.2.4 The adjustments to be included in the RCA and balance of the RCA will be approved by the Energy Regulator in terms of the MYPD Methodology. The Energy Regulator will only have to determine the timing of when it should be passed through or clawed-back.
14.2.5 Eskom will, on a quarterly basis, present the Energy Regulator with possible adjustments based on the Methodology, the costs to date and the projections to year-end.
14.2.6 The Energy Regulator will then review Eskom's submission and make a preliminary assessment of any adjustments required in the subsequent financial year's tariff adjustment.
14.2.7 The review will be performed on receipt of audited statements from Eskom.'

[26] As can be seen, the RCA exists to facilitate *ex post facto* adjustments to the approved revenues under the MYPDM3 determination. Variations between projected and actual revenues and expenses can only be finally determined after the end of a financial year. Variances may arise because expected revenues do not materialise or expenses increase beyond those contemplated. They might also occur due to revenues being beyond expectation and expenses less than those envisaged. This very rarely might ultimately redound in favour of the consumer. In theory, the RCA allows Eskom to obtain adjusted revenues for prior years by after-the-fact adjustments to the electricity price. If NERSA approves it, subject to the requirements of s 14 of the MYPDM3, the adjustment is effected through price increases in subsequent years. Unlikely though it might seem the same would apply in the event that consumers were entitled to the benefit of over recovery and the claw-back provisions applied.

[27] Because the adjustment sought, namely R22 billion, as against expected revenue of R143 billion, fell within the provisions of s 14.2.3.3 of MYPDM3 – ten per cent greater than the allowable revenue – the matter had to be dealt with by way of 'a full stakeholder consultation process before any pass-through [was] allowed'.

The public participation process

[28] Thus, on 13 November 2015, NERSA published Eskom's RCA application for public comment and held public hearings. The Chamber, made written representations. In its covering letter to the submissions made by it, the Chamber stated that it was strongly opposed to the application. The following part of the letter bears repeating:

'The current submission by the [Chamber] is a plea to Nersa to play its crucial role in ensuring Eskom gets back on track. Eskom has to get out of its vicious circle of spiraling costs and lack of delivery: it is imperative that Eskom turns a situation where it is doing ever less with ever more, into a situation where it will be doing more with significantly less.'

[29] The Chamber provided a summary of its written submissions, part of which is reproduced hereunder:

'Having reviewed the RCA submissions by Nersa, the submissions by the [Chamber] may be summarized as follows:

- Eskom is unable to sustain itself in a competitive environment. As a result of this Eskom cannot support an industry which needs to be globally competitive;
- If the RCA submission by Eskom were accurate, the complete and substantial inability by the MYPD3 process and decision to forecast a stable energy price, with any measure of reliability, strongly suggests that the entire MYPD3 process was tainted by unlawfulness;
- The tariffs are serving as an investment disincentive to South Africa;
- Eskom has failed to make a full disclosure and in so doing has deprived Nersa of the opportunity of making an informed decision;
- And Eskom is seeking to recover the cost of its inefficiency. The ERA only allows for the recovery of efficient costs.'

[30] It made the following recommendations:

- 'With regards to the revenue variance, Eskom should not get compensated for the lost revenue as claimed in the RCA submission, and that the request to reclaim R11.9723 billion be rejected;
- No further cost increases beyond the scope of the original MYPD3 decision must be allowed;
- The 2016/17 tariff decision be based on the tariff per the original MYPD3 decision;

- All inefficient costs incurred by Eskom be absorbed or funded by its shareholders, the Government;
- And Eskom must be encouraged to operate more efficiently, reduce costs and then pass these on to South African consumers.'

[31] In its oral submissions during the public hearings arranged by NERSA, the following that appears from a transcript, seems to have been the primary thrust of the Chamber's contention that Eskom was not following the RCA methodology:

'**Eskom is not following Nersa's RCA Methodology**

- Eskom refers to a 2011 *consultation* document as the basis for its application
- Eskom's application does not comply with Nersa's MYPD Methodology (Nov 2012)
    - Timing and frequency:
        - The RCA has to be created during the year the deviations are incurred.
        - Eskom must present possible adjustments to Nersa on a quarterly basis
        - The review is done prior to financial year end adjusted upon receipt of FS [financial statements]
            - The current application comes 1,5 years after the end of FY [financial year] (un-procedural)
            - No evaluation of the RCA in the Annual Financial Statements 2013/14

    Eskom's RCA did not follow the MYPD methodology in relation to IPP's and OCGT's and it ignoring RCA methodology.

The RCA is to be rejected on this basis alone.'

This complaint was repeated as a primary contention on behalf of Borbet in the court proceedings that followed.

[32] The public participation process to deal with Eskom's RCA application was undoubtedly extensive. More than 18 stakeholder comments were received and included comments from individuals, small users, energy-intensive users, environmental activists and government. Public hearings were conducted at various locations nationwide. Forty-two oral representations were made. It is necessary to record that during the public participation process small users noted that Eskom had failed to follow the MYPDM3 RCA methodology, in that it did not provide quarterly

financial updates during the 2013/2014 year. Eskom had instead submitted bi-annual reports.

NERSA's electricity sub-committee and its deliberations and report

[33] Following on the public hearings, notice was given to the public on NERSA's website, of a special meeting of its electricity subcommittee (ELS) to be held during February 2016.[9] Section 8(9)*(a)* of NERA dictates that any meeting of NERSA must be open to the public, 'unless the quorate meeting passes a resolution to the effect that, for the part of the meeting concerned, the information to be discussed during that part of the meeting would create a record that would in turn oblige the Energy Regulator to refuse access to that information…'.

[34] The purpose of the meeting was to consider and make a decision surrounding Eskom's RCA application. It is clear from the record of proceedings that the ELS took into account written stakeholder comments. The report of the ELS chairperson to NERSA that followed the meeting contained summaries of stakeholder comments, which included comments from small and intensive users and government departments.

[35] Small users noted that the MYPDM3 provided a clear price path and predictability and that Eskom had deviated from it by not producing quarterly updates during 2013/2014. NERSA was urged to 'either reject the application due to procedural failure or penalise Eskom for not following the process prescribed in the MYPD methodology'. In addition, NERSA was urged to disregard Eskom's claims for *all* customers to compensate it for under-collections due to low prices charged to some, in terms of negotiated price agreements. Small users complained that the over-utilisation of Open Chamber Gas Turbines (OCGTs) was a result of Eskom being an inefficient operator and that the RCA did not allow for recovery of losses as a result of inefficiency. Small users contended that Eskom's failure to implement new capacity generation projects was related to inefficient project management.

[9] The ELS was established in terms of s 8(10)*(a)* of NERA, which provides:
'The Energy Regulator may establish subcommittees of its members to perform such functions of the Energy Regulator as it may determine, including conducting hearings and enquiries and sitting as a tribunal.'

[36] Like small users, intensive users also complained about *all* customers being penalised for agreements with *certain* customers who had been charged at lower rates, resulting in lower revenue. Intensive users did not consider it fair to allow a tariff adjustment for variances in costs resulting from the use of more expensive coal and because of the delays in new power producing plants being implemented. They also objected to oil and gas costs being passed on to consumers. They were adamant that the cost occasioned by OCGT usage should not be imposed on consumers. Government departments were concerned about the additional cost caused by the use of OCGTs.

[37] The ELS agreed that quarterly reports had not been submitted. It noted that the evaluation of the RCA for determining pass-through or claw-backs is only finally done with actual audited annual financial accounts for the full year. It noted that quarterly reports are used for monitoring purposes. It took the view that actual audited financial accounts had been submitted in line with MYPDM3. The ELS recorded that costs considered not to be prudent would not be allowed. The following is recorded in the report that followed:

'It is a fair comment to say that the factors resulting in the need for the over-utilisation of OCGT were all within Eskom's control. Eskom's plant performance deteriorated from 80 % to 75 %. Although the system as a whole had a reserve margin of 31,7 %, this was made futile by the low availability of the coal fleet.

The new generation capacity that was due to come on line in the form of Medupi and Ingula would have made a significant difference in the capacity shortfall and would have resulted in less OCGT usage.'

[38] The report of the ELS deals fairly extensively with the economic impact of a tariff adjustment. Its negative impact on inflation, the GDP and employment were all considered. The ELS indicated that there was an endeavor to strike a balance between Eskom's financial sustainability and the impact on the South African economy.

[39] The report of the ELS also stated that in terms of the provisions of MYPDM3, coal burn costs and coal handling costs were subject to automatic pass-through. The following also appears:

'The [MYPDM3] methodology prescribes that OCGT price variance is automatic pass-through however limited to the allowed volumes. Since Eskom has applied for the total OCGT variance, the price variance is factored in already.'

[40] On 22 February 2016 the ELS, as appears from the minutes of that meeting, noted that the implementation of the RCA balance as determined is the prerogative of NERSA, after consideration of the interests of both the licensee and its customers. It resolved, inter alia, as follows:

'The Subcommittee approved:

Based on the available information and the analysis of Regulatory Clearing Account (RCA) Application – third Multi Year Price Determination (MYPD3) Year 1 (2013/14) the Subcommittee, at its meeting held on 25 February 2016 recommended the following to the Energy Regulator:

(a) The RCA balance of R11 243m be recoverable from the standard tariff customers, local SPAs and international customers. The recovery of the RCA balance is proportional to the respective customers groups' forecasted sales volumes for the year of implementation (2016/17).

(b) The RCA balance of R11 243m be implemented for the 2016/17 financial year only.

(c) The amount of R10 259m be recoverable from standard tariff customers for the 2016/17 financial year only.

(d) The disallowed amount for other primary energy of R1 589m will in future be made available to Eskom provided that Eskom demonstrates improvement in the plant performance and coal handling costs. This may only be available after the 2016/17 financial year.

(e) The average tariff for standard tariff customers be increased [to] 9.4% for 2016/17 financial year only.

(f) The amount of R984m be recoverable proportionally from Eskom's local SPA customers and international customers for 2016/17 financial year only.

(g) Eskom must submit a new MYPD application based on revised assumptions and forecasts that reflect the changed circumstances.'

[41] On 24 February 2016, the chairperson of the ELS signed the written report referred to above and submitted it to NERSA, which was requested to approve the resolution and the underlying reasons. The report contained the synopses of written stakeholder comments referred to above.

NERSA's decision

[42] After receipt of the ELS report, notice was given on NERSA's website of a meeting it intended to convene on 1 March 2016. The meeting took place as scheduled. It considered the ELS report and required 18 changes to be made to the draft decision and reasons.

[43] On 1 March 2016 NERSA announced its decision to approve Eskom's RCA application, in terms of which the latter would be able to obtain an additional price increase in relation to the 2013/2014 tariff year of R11,2 billion to take effect on 1 April 2016. The decision by NERSA had the consequence that Eskom was allowed an additional tariff increase of 1,4 per cent over and above the eight per cent already approved in terms of the MYPDM3. The reasons for the decision were not immediately made available. Borbet had to request reasons.

[44] On 29 March 2016 NERSA published the reasons for its decision. It is a 54 page document that sets out in detail the history leading up to the RCA application. In dealing with revenue variance, NERSA had regard to MYPDM3. It noted the under-recovery in revenue from the estimated amount which had led to the prior eight per cent approval. NERSA considered the energy availability performance targets it had set for Eskom for the 2013/14 financial year and recorded that it fell short by 6,4 per cent. It required Eskom to revise its maintenance strategy and implementation. In respect of OCGTs it allowed a pass-through of variances up to the MYPDM3 allowance. It decided as follows:

'Eskom is therefore allowed a total of R1 252m for OCGTs made up of R647m for OCGT generation compensation and R578m for fuel price variance against the R8 024m that is applied for by Eskom.'

[45] In respect of higher coal costs, NERSA said the following:

'45. The MYPD methodology allows coal to be treated as a single cost centre without differentiating between the various coal sources (contract types).

46. The methodology did not anticipate scenarios where the coal variances will result in higher average coal costs due to purchasing of coal from different suppliers.

47. In light of the above, the methodology must be reviewed.

48. The R2 000m coal burn cost is allowed in favour of Eskom.'

[46] It dealt with Independent Power Producer costs as follows:

‘49. The Independent Power Producer (IPP) costs were based on approved Power Purchase Agreement (PPA) contracts submitted by Eskom.

50. Therefore Eskom is allowed the variance of R580m with regard to IPP costs in its favour.’

[47] In respect of costs in relation to a regional independent power producer, NERSA said the following:

‘51. The purchase of power from the regional IPP was approved by the Energy Regulator when generation performance deteriorated as a cheaper option.

52. Therefore Eskom is allowed the variance of R1 136m with regard to regional IPP costs in its favour.’

[48] In relation to reduced water costs, it had regard to the variance of R295m in favour of the consumer.

[49] NERSA had regard to the startup gas and oil variances and dealt with it as follows:

‘55. Eskom’s start-up oil and gas variance (R1 549m in its favour) is adjusted by R1 184m to R365m as shown in Table 9 above. The adjustment is because the costs were inefficiently incurred as they relate to issues that were within management control (e.g. maintenance related).

56. Eskom is allowed R365m due to the unfavourable fluctuation in the Rand/Dollar exchange rate and issues that were outside management control (e.g. torrential rainfall).’

[50] It reasoned as follows on coal handling costs:

‘57. The additional costs resulted from the misaligned performance of the generation fleet compared to what was anticipated in the MYPD3 (EAF of 75.1 % as opposed to the approved 81.5 % in Table 8).

58. As a result, Eskom’s application for the variance of R377m for coal handling is disallowed.’

[51] It dealt with water treatment costs as follows:

‘59. The Eskom application for R55m water treatment variance is with respect to poor water quality and an increase in the volume of water processed. Part of the variance (R27m) was

with respect to poor water quality and the rest (R28m) was because of an increase in the volume of water processed.
60. The additional water treatment cost of R27m is allowed because of water quality issues, which are outside Eskom's direct control.
61. However, the increase in the volume of water processed and the associated costs of R28m is considered to be within management control as it deals with issues such as boiler tube leaks due to poor maintenance and is therefore disallowed.'

[52] NERSA went on to consider other variances, such as in relation to the environmental levy.[10]

[53] The economic impact of the increased tariff was considered by NERSA. The following appears in the written decision:
'124. The electricity industry plays a significant role in enabling economic activity and growth within the South African economy. It is evident that an increase in electricity tariffs will have a negative economic impact. The Energy Regulator conducted a macroeconomic impact assessment of a 9,4 % electricity price increase on the economy.
125. The main focus of this assessment was on Consumer Price Increase (CPI), Producer Price Index (PPI), Gross Domestic Product (GDP), export and the impact on low-income households.'
They concluded as follows:
'132. After due consideration, [NERSA] has endeavoured to strike a balance between Eskom's financial sustainability and the impact on the South African economy.
133. [NERSA] is of the view that the approved RCA balance puts Eskom in a favourable financial position. The impact the increase will have on key macroeconomic indicators and low-income households is noted given the current state of the economy.'

[54] As can be seen from the above, the public participation process leading up to the decision was extensive and interactive. Even from the brief synopsis in the preceding paragraphs one can see that the decision making by NERSA was well motivated and detailed.

[10] This was a R312 million variance in favour of the consumer.

The respondents' engagement with NERSA and Eskom

[55] Aggrieved at NERSA'S decision, the first, second, third and sixth respondents, urgently engaged with NERSA. It is necessary to record that even before launching the urgent application culminating in the present appeal, more particularly during the public participation process, Borbet sought information from NERSA and Eskom in terms of the Promotion of Access to Information Act 2 of 2000 (PAIA). Subsequent to NERSA's decision referred to in para 1 above, which is the subject of the present appeal, the second to fifth respondents sought reasons for the decision both from Eskom and NERSA. NERSA and Eskom required time to consult each other. NERSA expressed concerns about Eskom's confidential commercial information being made available to the public, an aspect to which I shall return later in this judgment.

[56] Frustrated at being thwarted in its quest to obtain the information sought, Borbet launched an urgent application in the North Gauteng Division of the High Court, Pretoria, in which it sought relief in two parts. First, it sought an order directing NERSA and Eskom to supply NERSA's reasons for its decision to approve Eskom's RCA application for the year 2013/14. In addition, it sought an interdict restraining NERSA and Eskom from giving effect to the decision.

[57] The urgent application was scheduled to be heard on 31 March 2016. The day before the first scheduled hearing, reasons for the approval in question were supplied. The parties then reached agreement in relation to further affidavits to be filed and an expedited date for the hearing of the application was arranged with the Judge President of that division, obviating the need for the interdictory relief.

The application in the high court

[58] At the outset, the primary thrust of Borbet's attack on the decision was that the MYPDM3 had not been followed because the RCA process should have been initiated during the 2013/2014 tariff year and completed that year.

[59] According to Borbet this was a peremptory provision of the MYPDM3. The respondents contended that the interdictory relief had been sought because, once the approval of the increased tariffs was implemented, millions of consumers would

be forced to pay unlawful increases and recovering those amounts later would be difficult. Their fears seem to have been allayed by the undertaking by Eskom that it would credit particular customers in the event of an order in that regard by the court. This does not explain how the credit system would work in relation to municipalities and consumer accounts sent out by them.

[60] In their challenge, Borbet contended that it was clear that NERSA's decision was administrative action and subject to review in accordance with the Promotion of Administrative Action Act 3 of 2000 (PAJA). In this regard, they had ss 9 and 10 of NERA in mind.

[61] Section 9 reads as follows:

'Members of the Energy Regulator must –

(a) act in a justifiable and transparent manner whenever the exercise of their discretion is required;

(b) at all times act in the interests of the Energy Regulator and not in their own sectoral interests;

(c) act independently of any undue influence or instruction;

(d) recuse themselves from and refrain from voting on or discussing any matter, pending before the Energy Regulator in which they have a direct or indirect pecuniary interest;

(e) act in a manner that is required and expected from the holder of a public office; and

(f) act in the public interest.'

[62] Section 10 provides:

'(1) Every decision of the Energy Regulator must be in writing and be –

(a) consistent with the Constitution and all applicable laws;

(b) in the public interest;

(c) within the powers of the Energy Regulator, as set out in this Act, the Electricity Act, the Gas Act and the Petroleum Pipelines Act;

(d) taken within a procedurally fair process in which affected persons have the opportunity to submit their views and present relevant facts and evidence to the Energy Regulator;

(e) based on reasons, facts and evidence that must be summarised and recorded; and

(f) explained clearly as to its factual and legal basis and the reasons therefor.

(2) Any decision of the Energy Regulator and the reasons therefor must be available to the public except information that is protected in terms of the Promotion of Access to Information Act [Act 2 of 2000].
(3) Any person may institute proceedings in the High Court for the judicial review of an administrative action by the Energy Regulator in accordance with the Promotion of Administrative Action Act [Act 3 of 2000].
(4)*(a)* Any person affected by a decision of the Energy Regulator sitting as tribunal may appeal to the High Court against such decision.
(b) The procedure applicable to an appeal from a decision of a magistrate's court in a civil matter applies, with the changes required by the context, to an appeal contemplated in paragraph *(a)*.'

[63] With reference to s 15(1)*(a)* of ERA, referred to in para 7 above, the respondents argued that only an 'efficient licensee' is entitled to recover the full costs of its licence activities, including a reasonable margin of return. Thus, they submitted, Eskom was in deficit because of its own inefficiency and was therefore precluded from seeking an RCA adjustment.

[64] In its answering affidavit, directed principally at resisting the interdictory relief, Eskom contended that the respondents' case was baseless. It stated that the challenge to NERSA's decision offended against the doctrine of the separation of powers, as the approval of electricity tariffs was classically polycentric in nature and fell outside the sphere of administrative law. It was argued that these were policy decisions and could only be challenged on very narrow bases which were not present in this instance.

[65] In a further founding affidavit, the case for Borbet mutated somewhat. Although they continued to insist that Eskom ought to have applied for an adjustment during the 2013/14 tariff year, they did concede that an adjustment could only be brought into effect in the following financial year (2014/2015).

[66] They continued to be adamant that the quarterly updates by Eskom, required in terms of MYPDM3, were integral to the RCA process. It was submitted on behalf of Borbet that the early warning system was to enable consumers to plan ahead rather than be overtaken by events and attendant increased costs. It was also

contended on behalf of Borbet that quarterly reports might provide an early basis for corrective action leading to possible production schedules being amended by Eskom. In this regard, Borbet relied on the affidavit of Professor Nattrass, a professor of sociology and economics, particularly in relation to businesses being informed timeously and the negative impact on their future planning.

[67] Borbet contended that paras 14.2.1 to 14.2.7 of the MYPDM3, which deals with the RCA, had to be satisfied in all respects before a price adjustment could be approved by NERSA. Borbet pointed out that the first time Eskom submitted the required information remotely to NERSA was during November 2015, some 27 months after they were required to commence with quarterly submissions. In accepting bi-annual reports, so it was contended, NERSA simply adopted the attitude that it could deviate arbitrarily from the MYPDM3.

[68] Furthermore, Borbet adopted the attitude that 'efficiency' is a persistent theme in the MYPDM3 and that expenses are therefore to be prudently and efficiently incurred and thus Eskom should not be allowed to recover expenditure brought about by its own inefficiency.

[69] In relation to purchase agreements with independent power producers (IPPs), it was contended on behalf of Borbet that NERSA was required to review the efficiency and prudence of these agreements before *and after* they were concluded.

[70] In relation to the over-utilisation of OCGTs Borbet took the view that this was all within Eskom's control. In respect of under-recovery in relation to lower electricity sales, Borbet adopted the position that this was due once again to Eskom's own inefficiency.

[71] In NERSA's answering affidavit to the further founding affidavit, it was emphatic that there should be 'judicial deference' to the Regulator's decision. It was contended on behalf of NERSA that the principle of the separation of powers required that interference with the Regulator's functions should only be done if the Constitution so mandated.

[72] In dealing with Borbet's contention that the quarterly reports served an important signaling function, NERSA pointed out that the MYPDM3 provided that an RCA application could only be finally decided after the audited financial statements of Eskom became available, which meant that the earliest that the tariff increase or decrease could be assessed, was in the financial year following the year in which the revenue was generated and/or the expenditures were incurred and could at best only be affected in a subsequent financial year. It was submitted that to the extent that there was non-compliance with the MYPDM3, it was not a material failure which defeated the purpose of the RCA.

[73] In dealing briefly with Borbet's contention of an inadequate consultation and public participation process, NERSA referred to the processes described in considerable detail earlier in this judgment. It was submitted that a fatal flaw in Borbet's approach was that, should a tariff increase be set aside, there would be no tariff applicable at all. The previous tariff, it was submitted, could never be the default or fall-back position to the existing tariff, were it to be set aside. It was contended that the previous tariff, did not take into account 'actual revenue generated' and 'expenditure incurred' during the financial year.

[74] In relation to the RCA account, NERSA was adamant that it was created at the beginning of each financial year and continuously monitored. According to NERSA the MYPDM3 contained clear indicators that the Regulator had to balance the interests of the consumer and Eskom and that it served as a guide to that end. It was repeated on behalf of NERSA that the MYPDM3 involved the implementation of policy that had been translated into legislative form, which was protected from judicial interference by the doctrine of the separation of powers. It may not, so it was contended, be translated into an immutable role. Eskom echoed NERSA's contentions in relation to the doctrine of the separation of powers.

[75] In respect of the temporal requirements of MYPDM3, the following parts of Eskom's answering affidavit are of importance:

'17.3 An entity such as Eskom has an obligation to report its financial statements to the public, and it must have its financials audited. The audited financial statements are the ones used in the RCA application. The financial year ordinarily ends at 31 March. Although the

financial year ends during 31 March, for Eskom's books to be closed takes a month or more. Then the auditors have to audit the financial results. This is done by external auditors including the Auditor General's office. It takes Eskom over two months to finalise this process. Eskom traditionally makes its financial statements in July of every year. It is on this basis that Eskom was ready to launch the MYPD3 RCA 2013/14 application during January 2015.

17.4 There are variables that create a delay in the production of annual financial statements. This has occurred and consequently occasioned delays in Eskom launching its RCA application during the 2013/14 tariff year. On this basis, Eskom couldn't submit its financial statements during July 2014. This is so as it was also finalising the MYPD2 RCA which was finalised during November 2014. Eskom could only apply itself to the RCA application from November 2014 once MYPD2 RCA process (the first ever RCA process) was concluded.'

[76] The following further paragraphs of Eskom's answering affidavit are also significant:

'22.3 Furthermore, the 2013/14 RCA cannot be recovered in the 2014/15 year because the audited financial results are finalised and released by end-July 2014. By that time the 2014/2015 year has already commenced and the tariffs for that year have already been finalised. It must be borne in mind that Eskom cannot charge any tariff that has not been approved by NERSA, and that that process must be completed by March preceding the next financial year in which the decision is to be implemented. It is therefore not possible to have the decision of the RCA implemented in the year immediately after the end of the financial year implicated.

22.4 Eskom gives NERSA, six monthly reports. These regulatory reports are a reflection of Eskom's actual results for 6 months. This is in line with the Regulatory Financial standard. Clearly Eskom provides sufficient information to NERSA in this regard amounting to substantial compliance.'

[77] In respect of the MYPDM3 process, Eskom too pointed to the extensive public participation process and reminded Borbet that it had not received all that it had sought in its application for a tariff adjustment.

[78] According to Eskom, it is notable that there is no prescribed time within which an application for an RCA approval is to be made.

[79] Insofar as variances in relation to OCGTs were concerned, Eskom pointed out that NERSA did not allow for any variance above the allowed variance for OCGTs. What was allowed was the price variance due to fluctuations in the diesel price and the coal equivalent costs for the OCGT costs above the allowed levels.

[80] According to Eskom, NERSA expected the energy from OCGTs to have been provided by coal fired power stations. On that basis NERSA only provided the coal equivalent costs for that energy category. The determination meant that Eskom was restricted in running its OCGTs to what was allowed in MYPDM3. Eskom pointed out that NERSA did not allow any compensation for decreased revenues as a result of low sales.

[81] In relation to IPP's, locally and internationally, NERSA approved power purchase agreements, including their related costs and all other agreements as part of its licencing process. This allowed Eskom to recover its costs in terms of the rules for power purchase cost recovery.

[82] Those then were the opposing positions adopted by the parties.

The high court judgment

[83] Pretorius J prepared and finalised a comprehensive 63 page judgment. After considering the regulatory framework, she dealt with the submissions on behalf of NERSA and Eskom, namely, that Borbet was precluded by the doctrine of the separation of powers from challenging the approval of the additional 1,4 per cent. She also had regard to the contentions on behalf of Eskom and NERSA concerning deference to specialised administrative bodies. She dealt with the submission concerning NERSA's non-compliance with the MYPDM3 and the contention that the decision was rationally and procedurally unfair.

[84] Pretorius J agreed with Borbet that NERSA had not complied with the temporal and procedural requirements of MYPDM3. She held it against NERSA that it was contending simultaneously that it had complied with MYPDM3 and that it was empowered to depart from it. She held that NERSA had departed from the MYPDM3

and that its reliance on the introduction did not absolve it from justifying a decision to deviate and to publish the reasons for such a deviation.

[85] The court a quo thought it significant that the requirement that quarterly updates be submitted was couched in 'peremptory language'. The court took into account that financial statements for the 2013/14 year had been available at the latest in July 2014. It went on to say that:

'[T]he tariff increase could and should have been assessed in the 2014 tariff year.'

It considered 14.2.6 of MYPDM3 important in relation to time limits.

'The Energy Regulator will then review Eskom's submission and make a preliminary assessment of any adjustments required in the subsequent financial year's tariff adjustment.'

[86] Pretorius J went on to hold that the concession by both Eskom and NERSA that quarterly reports had not been submitted and the further concession by Eskom as to the purpose of the quarterly reports, compelled a finding that in that regard non-compliance with the MYPDM3 was irrational, unfair and therefore unlawful.

[87] In respect of efficiency, the court below agreed that one could not have a fixed rule, but went on to state that it was nonetheless a factor to be considered and held that NERSA did not pay sufficient heed to the efficiency test in relation to contracts with IPP's. According to the court below the efficiency and prudency of the IPP contracts should be checked before and after contracts were concluded.

[88] Pretorius J held it against Eskom that it encouraged customers to use less electricity and then sought to recover the resultant variance. She felt that NERSA's failure to take this into account was irrational.

[89] It appears that the court below, wary of the submissions on behalf of NERSA and Eskom, namely, that courts should be slow to interfere with policy decisions and careful not to offend against the doctrine of the separation of powers, based its findings primarily on the basis that NERSA had acted irrationally in the manner referred to above.

[90] The court below then went on to make the following order:

'1. The decision published by the first respondent on 1 March 2016 in relation to the Regulatory Clearing Account ("RCA") application by the second respondent – third Multi Year Price Determination (MYPD3) Year 1 (2013/2014) (the "Decision") is reviewed, set aside and remitted to the first respondent.

2. It is directed that all future RCA applications by the second respondent in relation to the MYPD3 must be submitted and evaluated in accordance with paragraph 14 of the MYPD3 Methodology, or any future amendment thereof.

3. The first and second respondents are to pay the costs of this application jointly and severally, as well as the costs occasioned by the interim application of 31 March 2016, including the costs of three counsel.'

[91] It is against those orders and the conclusions referred to above that the present appeal is directed.

Conclusions

[92] I propose to deal first with the legal nature of NERSA's decision-making in relation to Eskom's RCA application, which implicates the question whether courts will be offending against the doctrine of the separation of powers in reviewing such a decision. It also dictates the scope of such a review.

[93] The introduction to the MYPDM3 set out in para 18 above, makes it clear that it was developed for the 'regulation of Eskom's required revenues'. That introduction states that the MYPDM3 would form the basis on which NERSA would evaluate price adjustment applications received from Eskom. NERSA performs a regulatory function. When it makes decisions concerning adjustment applications, it is acting in an administrative capacity even though it is applying policy. The MYPDM3 states that it is applying NERA and ERA, which, as discussed above, reflects in substantial parts, government policy.

[94] As stated in *Grey's Marine Hout Bay (Pty) Ltd & others v Minister of Public Works & others* 2005 (6) SA 313 (SCA) para 24, '[a]dministrative action is rather, in general terms, the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the State, which necessarily involves the application of policy, usually after its translation into law, with direct and

immediate consequences for individuals or groups of individuals'. In this regard, the decision of the Constitutional Court in *President of the Republic of South Africa & others v South African Rugby Football Union & others* 2000 (1) SA 1 (CC), at para 136, was relied upon. That paragraph reads as follows:

'136. The principal function of s 33 is to regulate conduct of the public administration and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common-law principles developed over decades. The question that arises in this case is what is included within the concept of "administrative action" as it is employed in s 33.'

[95] The legislature, conscious of what is set out in the preceding paragraph, enacted s 10(3) of NERA referred to above, which entitles any person to institute proceedings in the high court in terms of PAJA for the judicial review of an administrative action by NERSA.

[96] Of course, proceedings for judicial review of an administrative action, can be instituted on any of the grounds set out in s 6(2) of PAJA, including on the basis that it was not rationally connected to: the purpose for which it was taken, the purpose of the empowering provision, the information before the administrator or the reasons given by the administrator.[11] A review is also justified on the basis of action that was procedurally unfair.[12]

[97] To sum up, NERSA's decision-making in relation to an RCA application is an administrative action reviewable in terms of PAJA. The scope of review is therefore wider than contemplated by the appellants and the court below.

[98] Considering the correctness of the approach and the conclusions of the high court in relation to the legality of the 1,4 per cent adjustment approved by NERSA, there should, at the outset be careful scrutiny of MYPDM3 weighed against the statutory framework.

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[11] Sections 6(2)*(f)*(ii)*(aa)-(dd)*.
[12] Section 6(2)*(c)*.

[99] As explained in para 12 above, licences issued by NERSA may be made subject to conditions relating to the MYPDM3 to be used in the determination of rates and tariffs. As pointed out in para 13, clause 4.6 of the Eskom licence obliges it, as licensee, to comply with the price and tariff methodology.

[100] In para 14 above, sections 17, 18 and 19 of ERA were discussed. It appears clearly from those provisions that they were intended primarily to regulate the relationship between NERSA and a licensee and that non-compliance by a licensee was not necessarily fatal to its continued operations. So, for example, a licensee might not be scrupulous or punctual in the keeping of its financial statements. Such failure might mean that financial penalties could be imposed by NERSA as sanction for non-compliance and as a disincentive to continued maladministration. As was indicated in para 14 above, non-compliance with the MYPDM3 or any other condition of the licence does not act as a guillotine resulting in an immediate cancellation of the licence and or the cessation of licenced activities. That is not to say, if the licenced activity was no longer viable, that NERSA could not resort to s 17 and revoke a licence. However, s 17(3) dictates that the Minister must prescribe the form and procedure to be followed in revoking a licence. In short, there has to be some form of due process.

[101] It is clear that the MYPDM3 and the statutory framework provides for best and worst-case scenarios, in the collection of revenues and concomitant expenditure, and indicates how either or a combination ought to be dealt with. The introduction to the MYPDM3, as appears in para 18 above, specifically 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'. That is an overall power, the propriety of the application which can be tested by whether the ultimate decision is indeed in the interest of South Africa. As discussed earlier, Eskom is the major bulk supplier of electricity in South Africa and the State is its only shareholder. Its continued operation is a matter of national importance. It is against that background that NERSA's role and the application of the MYPDM3 has to be seen.

[102] It is clear from what appears above that the statutory framework and the MYPDM3 imposes certain obligations on licensees, but they also recognise that these obligations may not always be met and that corrective or remedial measures on the part of NERSA might ensue. What they are to be is entirely within NERSA's compass.

[103] The RCA account was established to deal with the possibility of plans and estimates going awry. In Eskom's case, for the reasons articulated above, the variance between estimates and actual revenue and expenditure was wide. That variance led to the RCA application by Eskom.

[104] It is true that 14.2.2 of MYPDM3 requires the RCA account to be updated quarterly 'so as to use it for regular alerts to customers of any possible adjustment in the coming year'. Section 14.2.2 goes on to state 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'. As pointed out earlier, 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, it does 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 the proper balance between the liability of Eskom and continued electricity supply and the public interest, would 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 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.

[105] A careful reading of the affidavit filed in support of Borbet's case reveals that it vacillated and was confused in respect of the core of its case concerning Eskom's failure to supply the quarterly reports. It was never unequivocally suggested that the failure to submit the quarterly reports operated as an absolute bar to the bringing of an RCA application. Rather, the complaint in essence appeared to have been that the RCA application should not have been approved because of the failure to submit the quarterly reports.

[106] Sections 14.2.5 and 14.2.6 of the MYPDM3, set out to in para 25 above, have to be viewed in context. The following is envisaged:
(a) On a quarterly basis Eskom has to present NERSA with 'possible adjustments' based on MYPDM3, the costs to date and projections to year end.
(b) NERSA then has to review Eskom's submission and make a preliminary assessment of any adjustments required in the subsequent year's tariff adjustment.
This caters for a situation where the quarterly reports form a basis for possible future tariff adjustments. The quarterly reports, in these circumstances, are to be accompanied by submissions requiring a preliminary assessment with an eye towards future tariff adjustments. We now know that Eskom did not make such submissions and much later thought that the correct path to follow was the ill-fated application for a 'selective re-opener'.

[107] I am mindful of submissions on behalf of Borbet's counsel that one must guard against being too readily dismissive of the value of the early customer alerts catered for by s 14.2.2 of the MYPDM3. It was contended that they served an important purpose and enabled customers to plan for the future. I accept that had quarterly reports been filed customers might have been alerted earlier to future adjustments. I do not intend to minimise or negate the need for the alerts by way of the quarterly reports. In the present case the first bi-annual report would no doubt, particularly having regard to the extent of Eskom's financial woes, already have signalled trouble. As stated above, the failure to present the quarterly reports can be met by corrective and/or penal action by NERSA. It would be salutary practice for NERSA to insist on this. However, it is entirely within NERSA's province to determine how to deal with shortcomings by licensees.

[108] As far as the timing of the RCA is concerned, it should be borne in mind, as pointed out above, that final reviews can only realistically be conducted, in the year subsequent to the one in which the audited financial reports are made available. In this regard, it is necessary to bear in mind what is stated by Eskom in paras 75 and 76 above concerning the timing of the closure of its books of account after 31 March each year and that the audit involves external auditors, including the Auditor-General's office. Eskom pointed out that there are variables that create delays in the production of annual financial statements that caused delays in lodging its RCA application. It is against that factual background and the realities of commercial accounting that the timing of the RCA application has to be adjudicated.

[109] The delay was compounded by Eskom misconstruing its remedy to seek tariff adjustments by way of a 'selective re-opener'. Eskom only brought the RCA application, after it was informed by NERSA that its remedy to deal with the variances lay down that path.

[110] Faced with the RCA application, NERSA was obliged to deal with it in the manner contemplated in s 14.2.3.3 of the MYPDM3, namely, because the variance was more than ten per cent, a full stakeholder participation process had to be conducted. If it failed to follow that process, NERSA would, as Regulator, have been remiss in not dealing with the very real problem of a variance of billions of rands threatening the lifeblood of a key national asset. Its task, as stated above, is to maintain a balance between Eskom's sustainability as a business and reasonable tariff stability as well as to appropriately allocate commercial risk between Eskom and its customers. That is not to say that NERSA is obliged to approve variances due to maladministration on Eskom's part. The RCA application has to be dealt with on its merits and in terms of the MYPDM3.

[111] As pointed out earlier, the imposition of sanctions for non-compliance by a licensee with its licence obligations or the condonation thereof, are entirely within NERSA's remit. In justifiable circumstances NERSA is empowered to apply to the high court for an order suspending or revoking a licence. The contention by Borbet that the failure by Eskom to supply quarterly reports vitiates the entire RCA process is inconsistent with the regulatory and licencing structure catered for by the

legislative framework. Casting it in the manner suggested by Borbet would lead to absurd results and would render nugatory the entire statutory scheme.

[112] The question of Eskom's failure to submit quarterly reports was pertinently raised during the RCA process. All stakeholders made their submissions in this regard. The public participation process concerning the RCA application was conducted nationwide and was extensive and interactive. The lack of quarterly reports was specifically, carefully and extensively dealt with by the ELS and NERSA, as referred to earlier in this judgment. The RCA process can hardly, in light thereof, be described as unfair.

[113] As to the timing of the implementation of the tariff increase, as pointed out above, in terms of s 14.2.4 of the MYPDM3, it is wholly within NERSA's power. Realistically, given the financial years of both Eskom and municipalities, the decision that it be imposed from the beginning of the year following the one during which the decision was made, appears to be realistic and rational.

[114] Borbet's contention in relation to IPPs referred to above is, in my view, without any foundation. Once contracts are approved and concluded one might rightly ask how one could review them midstream without incurring contractual liability, thereby incurring further potential costs for Eskom. It is necessary to note that the legality of those contracts have in the present case not been challenged. As correctly pointed out by NERSA, a review of those contracts is not part of the MYPDM3 process. That is not to say that Eskom and NERSA can act beyond Treasury requirements or outside of the parameters of any legislative provisions which serve to ensure transparency and accountability.

[115] The MYPDM3 pre-approved, on estimates, an eight per cent year-on-year increase. This appears to have been based on some degree of differentiated pricing, hence the complaint by stakeholders concerning such differentiation. The RCA process was concerned not with a review of the underlying basis for the MYPDM3 projected year-on-year tariff increases but rather with the question of the variance and what ought rightfully to be allowed in terms of the RCA.

[116] The high court also held it against Eskom that it urged less electricity usage and then complained about under recovery of revenue. As accepted in the Chamber's submissions, consumers heeded a call to reduce electricity usage in order to prevent power outages. In this regard Eskom appears to have been caught between a rock and a hard place. The variance was due to failure by Eskom to take steps to ensure that its capacity was not overtaken by consumer demand. This was due to the reality of historical primary inefficiencies and lack of foresight (a period long before the financial year in question).

[117] I do not intend to deal with each individual pass-through that was allowed by NERSA, referred to in greater detail in paras 44 to 53, save to note that this was not a case of a rogue Regulator but one that was cautious and motivated in each of the constituent parts of its overall decision. The economic impact of the adjustment was considered by NERSA and the amounts allowed were within the bounds set by the MYPDM3. As far as efficiency is concerned, NERSA was astute to ensure Eskom did not obtain a benefit from its own inefficiency. One has to bear in mind the balance to be achieved between Eskom's sustainability and the impact on the consumer and the South African economy. This is a case in which there has to be a degree of judicial deference to a specialised administrative body engaged in an administrative action. In this regard the words of the Constitutional Court in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others* 2004 (4) SA 490 (CC), are apposite:

'[48] In treating the decisions of administrative agencies with the appropriate respect, a Court is recognising the proper role of the Executive within the Constitution. In doing so a Court should be careful not to attribute to itself superior wisdom in relation to matter entrusted to other branches of government. A Court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a Court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the Courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a Court should pay due respect to the route selected by the decision-maker. This does not mean, however, that where the decision is one which will not reasonably result

in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a Court may not review that decision reasonably. A Court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker.'

The following part of an article by Professor Hoexter, cited with approval by the court in *Bato Star*, bears repeating:

'[A] judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretations of fact and law due respect, and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinize administrative action, but by a careful weighing up of the need for – and the consequences of – judicial intervention. Above all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies; not to cross over from review to appeal.'[13]

[118] In my view, Borbet and the court below misconceived the manner in which the MYPDM3 operates and how it is to be applied. They both erred in considering that Eskom's failure to submit quarterly reports, without more, precluded the approval of an RCA application. Furthermore, they misconstrued the role of NERSA as Regulator.

[119] I appreciate 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.

[13] C Hoexter 'The Future of Judicial Review in South African Administrative Law' (2000) 117 *SALJ* 484 at 501-502.

Those are matters that have to be addressed prospectively by NERSA and with government oversight. They are matters beyond the adjudication in this case.

[120] One further aspect requires brief consideration. State owned enterprises have to resist the impulse to immediately resist constitutionally permissible judicial scrutiny. This includes resistance to making information available that rightly belongs in the public domain. After all, they are, through the State, owned by the nation. I appreciate that there might well be commercial confidentiality that attaches to certain commercial contracts but the default position should be to make information available subject to justifiable redaction. It is a pity that Eskom and NERSA did not, in the early stages when it was evident that litigation would follow, adopt that attitude.

[121] For all the reasons set out above, the following order is made:
1 The appeal is upheld with costs including the costs of two counsel.
2 The order of the court below is set aside and replaced with the following:
‘The application is dismissed with costs including the costs of two counsel.’

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M S Navsa

Judge of Appeal

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