

*Take
Fidelity note*
CASE NO: 24364/16

In the matter between:

| | |
|--|------------------|
| BORBET SA (PTY) LTD | First Applicant |
| PG GROUP (PTY) LTD t/a SHATTERPRUFE | Second Applicant |
| CROWN CHICKENS (PTY) LTD | Third Applicant |
| AGNI STEELS SA (PTY) LTD | Fourth Applicant |
| AUTOCAST SOUTH AFRICA (PTY) LTD t/a AUTOCAST PORT ELIZABETH | Fifth Applicant |
| THE NELSON MANDELA BAY BUSINESS CHAMBER | Sixth Applicant |

and

| | |
|--|-------------------|
| THE NATIONAL ENERGY REGULATOR OF SOUTH AFRICA | First Respondent |
| ESKOM HOLDINGS SOC LIMITED | Second Respondent |
| MINISTER OF ENERGY | Third Respondent |
| NELSON MANDELA BAY MUNICIPALITY | Fourth Respondent |
| SOUTH AFRICAN LOCAL GOVERNMENT ASSOCIATION | Fifth Respondent |

FILING SHEET

PRESENTED FOR SERVICE AND FILING:

- The First Respondent's Notice of Application for Leave to Appeal

SIGNED at PRETORIA on this the 6th day of SEPTEMBER 2016.

C. F. ERASMUS

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TO:

**THE REGISTRAR OF THE
ABOVE HONOURABLE COURT**

AND TO:
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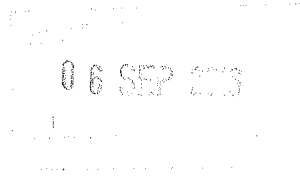


Sonder benadeling van Regte
Without Prejudice

Handwritten signature/initials

AND TO:

LEDWABA MAZWAI ATTORNEYS
Second Respondent's Attorneys
Ledwaba Mazwai Building
141 Boshoff Street
Nieu Muckleneuk
Pretoria
(Ref: LIT46/16)



Handwritten signature and initials

AND TO:

THE MINISTER OF ENERGY
Third Respondent
192 Visagie Street
Cnr. Paul Kruger & Visagie Streets
Pretoria

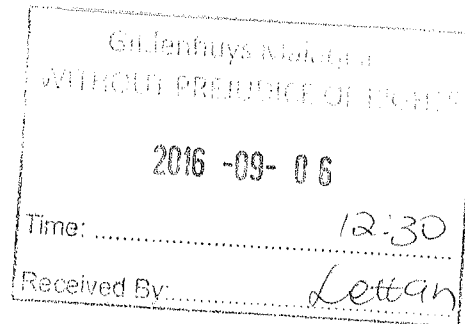
RECEIVED BY THE DIRECTORATE:
LEGAL SERVICES
DEPARTMENT OF ENERGY

DATE 06/09/2016 TIME 13h25

SIGNATURE M. M. M. M.

AND TO:

LE ROUX INC.
Fourth Respondent's Attorneys
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(Ref: M Rambau/BC)



AND TO:

SOUTH AFRICAN LOCAL GOVERNMENT ASSOCIATION
Fifth Respondent
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Cnr. Garsfontein & Corobay
Waterkloof Glen, Ext. 11
Pretoria



Received on this 06 day of September
2016 at Menlyn

REGISTRAR OF THE HIGH COURT OF
SOUTH AFRICA (GAUTENG DIVISION)

IN THE HIGH COURT OF SOUTH AFRICA

PRIVATE BAG/PRIVAATSAK X67
PRETORIA 0001

GAUTENG DIVISION, PRETORIA

2016 -09- 06

E. S. DREYER
REGISTRAR'S CLERK

GRIFFIER VAN DIE HOË HOF VAN
SUID AFRIKA GAUTENG AFDELING, PRETORIA

CASE NO: 24364/16

In the matter between:-

BORBET SA (PTY) LTD First Applicant

PG GROUP (PTY) LTD t/a SHATTERPRUFE Second Applicant

CROWN CHICKENS (PTY) LTD Third Applicant

AGNI STEELS SA (PTY) LTD Fourth Applicant

AUTOCAST SOUTH AFRICA (PTY) LTD Fifth Applicant

t/a AUTOCAST PORT ELIZABETH

THE NELSON MANDELA BAY BUSINESS Sixth Applicant

CHAMBER

and

THE NATIONAL ENERGY REGULATOR OF First Respondent
SOUTH AFRICA

ESKOM HOLDINGS SOC LIMITED Second Respondent

MINISTER OF ENERGY Third Respondent

NOTICE OF APPLICATION FOR LEAVE TO APPEAL

KINDLY TAKE NOTICE THAT the first respondent seeks leave to appeal to the Supreme Court of Appeal against the whole of the judgment and order handed down by her Ladyship Madam Justice Pretorius on 16 August 2016, including leave on the issue of costs, on the following grounds:

THE FIRST GROUND OF REVIEW

The procedural point

1. The learned Judge erred when she held that the fact that quarterly reports had not been submitted by Eskom had to result in the Court finding that the non-compliance with the MYPD Methodology in this regard was irrational, unfair and therefore unlawful.
2. The learned Judge should have found that:
 - 2.1. The Regulatory Clearing Account (“RCA”), of which the quarterly reports are part, and the consideration of the RCA Application are discrete processes and should have been regarded as such.
 - 2.2. Even if they are not discrete processes, the stated purpose of the quarterly updates in the MYPD Methodology to provide regular alerts to customers of any possible adjustments in the coming

year, is only one aspect of the RCA and it does not constitute the purpose of the whole RCA process.

- 2.3. Furthermore, quarterly alerts are not a reliable basis for customers to do forward planning as to future expenses, as the second respondent's RCA balance varies through different times of the year. It is not logical or probable that alerting customers on a quarterly basis to possible adjustments throughout the year will affect their forward planning.
- 2.4. Even if the creation of the RCA account and the RCA Application is regarded as a single process, the enquiry is whether the steps in the process were rationally related to the end to be achieved.
- 2.5. In the present case, the process followed by the first respondent was rationally related to the end sought to be achieved by an RCA Application. The first respondent satisfied the threshold of rationality review that was applied by the Court.
- 2.6. The purpose of the outcome of the RCA Application is to ensure the second respondent's sustainability as a business balanced against the interests of electricity consumers.
- 2.7. The MYPD Methodology provides for the evaluation of an RCA Application for the purpose of determining a pass-through and/or

claw-back to be done with actual, audited financial statements for the full financial year. Accordingly, it cannot be done on the basis of quarterly reports, which are not audited, and which are for a signaling and monitoring purpose only.

- 2.8. If it had been intended that any deviation from the MYPD Methodology should result in the consequent decision being unlawful, this would have been stated in the MYPD Methodology in clear and unambiguous terms.

The temporal point

3. The learned Judge erred when she held, if not expressly, then by implication, that, since the audited financial statements for the second respondent's 2013/2014 tariff year were available by July 2014, the RCA Application should have been submitted and assessed in the 2013/2014 tariff year, and any consequential tariff adjustment should have been made in the subsequent financial year (viz, the 2014/2015 tariff year), with the result that this deviation from the MYPD Methodology was irrational, unfair and unlawful. (See paragraphs 86, 87 and 93 of the judgment.)
4. The learned Judge should have found that:
 - 4.1. The proper meaning and interpretation to be assigned to the MYPD Methodology read as a whole is that the steps in the

process leading up to the first respondent's decision must be rationally related to the end to be achieved.

- 4.2. In the present case, the process followed by the first respondent was rationally related to the end sought to be achieved by the RCA process and an RCA Application.
- 4.3. The purpose of considering an RCA Application is to ensure the second respondent's sustainability as a business balanced against the interests of electricity consumers.
- 4.4. The first respondent satisfied the threshold of rationality review that was applied by the Court.
- 4.5. On a proper interpretation of the language of the MYPD Methodology, whether express or implied, read as a whole, and in accordance with its purpose –
 - 4.5.1. An RCA Application does not have to be initiated in the tariff year to which it relates.
 - 4.5.2. The failure to initiate an RCA Application in the tariff year to which it relates or in the subsequent tariff year does not non-suit the second respondent or preclude the first respondent from considering the RCA Application.

- 4.5.3. Any tariff adjustment consequential on an RCA Application does not have to be effected in the tariff year subsequent to the tariff year to which it relates.
 - 4.5.4. The timing and implementation of the adjustment is within the discretion of the first respondent.
 - 4.5.5. An RCA Application must be considered with reference to the actual, audited annual financial statements of the second respondent.
 - 4.6. Accordingly, the first respondent was entitled to consider the RCA Application when it did and to determine the timing of when the RCA balance should be passed through or clawed back.
 - 4.7. If it had been intended that any deviation from the MYPD Methodology should result in the consequent decision being unlawful, this would have been stated in the MYPD Methodology in clear and unambiguous terms.
5. The learned Judge also erred in holding that there was no real explanation why the RCA Application was only launched in November 2015. The learned Judge should have found that:
 - 5.1. The second respondent adequately explained the delay in submitting its RCA Application, which explanation included that

there was an MYPD3 decision, an MYPD2 RCA Application and an MYPD3 selective re-opener.

The deviation points

6. The learned Judge erred in finding that the first respondent was inconsistent in, on the one hand, relying on compliance with the MYPD Methodology, but on the other hand, declaring that it was empowered to depart from the MYPD Methodology. The learned Judge should have found that:
 - 6.1. The first respondent's position is that the purpose of the regulatory law was met in the present case, which is to ensure the second respondent's sustainability as a business balanced against the interests of electricity consumers.
 - 6.2. The development of the Methodology does not preclude the first respondent from applying reasonable judgment on the second respondent's revenue, based on the actual, audited annual financial statements, after due consideration of what might be in the interests of the overall South African economy and the public.
 - 6.3. There is nothing in the MYPD Methodology, express or implied, which requires that the RCA Application be made or considered in the tariff year to which it relates, and that the consequential tariff adjustment be made in a particular tariff year. There is also

nothing in the MYPD Methodology which non-suits the second respondent from obtaining a tariff adjustment if it fails to initiate the RCA Application in the tariff year to which it relates.

7. The learned Judge also erred when she found that the first respondent did not notify the public of a deviation from the MYPD Methodology and that, as such, the public could not make an informed decision on whether or not to oppose such a deviation and whether to deal with such a deviation, with the consequence that the first respondent's decision was irrational. The learned Judge should have found that:

- 7.1. The purpose of the RCA process as a whole is not advanced by the quarterly reports. The purpose of the RCA process as a whole is to ensure the second respondent's sustainability as a business balanced against the interests of electricity consumers. Accordingly, the failure to notify the public of a deviation from the MYPD Methodology was not irrational.

- 7.2. In any event, the applicants could not rely on a legitimate expectation of notification because this issue was impermissibly raised only in reply.

The new reasons point

8. The learned Judge erred when she held that the first respondent produced new reasons *ex post facto* for its decision. The learned Judge should have found that:
 - 8.1. As the decision subject to review was that of the first respondent, only its reasons for its decision, and not those of the second respondent, are relevant.
 - 8.2. Since the first respondent was correctly of the view that the MYPD Methodology was complied with in relation to the timing of the RCA Application, its consideration and its implementation, there was no need to make express mention of the timing of the release of the second respondent's audited annual financial statements in its reasons.
 - 8.3. Insofar as quarterly reports are concerned, the bi-annual reports were not new reasons, but were effectively referred to in the first respondent's reasons for its decision (paragraph 15). This paragraph refers to a summary of written stakeholder comments as being attached as Annexure 1, which was not attached due to an oversight. This annexure would have comprised the summary of written stakeholder comments contained in the *aide memoire*, which in turn mentions the bi-annual reports.

- 8.4. The various discussions and clarifications between the first and second respondents which the applicants refer to as new reasons refer to the MYPD2 RCA, not to MYPD3, and took place in a period prior to the submission of the present RCA Application. Accordingly, these discussions are irrelevant.

THE SECOND GROUND OF REVIEW

9. The learned Judge erred in paragraph 103 when she found that, in considering the RCA Application, the first respondent did not deal with efficiency in an adequate manner, or at all, and that this was irrational.
10. The learned Judge should have found that:
- 10.1. The first respondent satisfied the threshold of rationality review that was applied by the Court.
- 10.2. The applicants failed to show that the first respondent had not tested for efficiency at all. The applicants alleged six instances of inefficiency that were condoned by the first respondent's decision. They only argued two instances of inefficiency and failed to address the first respondent's explanations in relation to the other four instances. Accordingly, only the two surviving

instances of alleged inefficiency were subject to the scrutiny of the Court.

11. In relation to the Independent Power Producers (“IPP’s”), the learned Judge should have found that:

11.1. In terms of the Regulatory Rules for Power Purchase Cost Recovery (“Rules”) and the MYPD Methodology, the costs which have been approved under a Power Purchase Agreement (“PPA”) are not subject to an efficiency review before they will be allowed through as a pass-through.

11.2. A sensible interpretation of the Rules and the MYPD Methodology is that the authorization for PPA costs recovery should remain valid for the duration of the relevant PPA. Investors will need to be confident in the buyer’s ability to make payments into the future, and the buyer will need an appropriate level of regulatory certainty in regard to its recovery of PPA costs.

11.3. An efficiency review was conducted of the IPP costs, as is evidenced by the first respondent’s calculations in this regard at page 1980 of the Record.

11.4. In light of the above, the first respondent dealt with inefficiencies and reviewed the IPP's in accordance with the Rules and the MYPD Methodology.

12. The learned Judge erred when she held that the first respondent took into consideration the decrease in the second respondent's revenue while it ignored the fact that the second respondent actively encouraged its customers to use less electricity and provided monetary incentives to consumers in this regard, and that this was irrational. The learned Judge should have found that:

12.1. An inefficiency does not enter the picture when the second respondent encourages its customers to reduce their consumption of electricity. Eskom is required to do so by the MYPD Methodology.

12.2. The reduction in the consumption of electricity that the second respondent is required to encourage has the effect of reducing its costs, which would result in lower tariffs and counter-balance the higher tariffs as a result of reduced consumption.

THE REMEDY

13. The learned Judge erred in holding that the tariff in terms of the MYPD3 decision can be separated from the tariff in terms of the RCA Application.

The learned Judge should have found that:

- 13.1. Section 15(2) of the Electricity Regulation Act 4 of 2006 (“ERA”) provides that a licensee may not charge any other tariff than that determined or approved by the first respondent. When the first respondent approved the RCA Application, it determined a new electricity price. When a Court sets aside the first respondent’s decision on an RCA Application, there is no default tariff to fall back on.
- 13.2. Each tariff is determined by the first respondent in terms of the realities of the second respondent’s business viewed as a whole. The first respondent has to strike a balance between the second respondent’s financial sustainability and the impact of a tariff on the South African economy and the interests of customers.
- 13.3. Every year of the MYPD cycle, the second respondent has to apply for the approval of a schedule of tariffs to be applied to the various customers. This approved schedule is published as a booklet.
- 13.4. Accordingly, once an RCA adjustment is set aside, it is not possible to revert to a tariff approved by the first respondent

before its decision in terms of an RCA Application, nor is there a published schedule of tariffs.

14. The learned Judge erred in ordering 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 (as amended) (alone). The learned Judge should have held that:
 - 14.1. The regulatory framework is made up of the ERA, the National Energy Regulator Act 40 of 2004 and the whole of the MYPD3 Methodology, as well as other legislation and policy documents.
 - 14.2. The MYPD3 Methodology gives the first respondent the discretion to weigh up several considerations, in particular the interests of the electricity consumer and the second respondent.
15. The learned Judge erred in making a declaratory order in paragraph 2 of her order, despite having held that it would not be in the interests of justice to hand down a declaratory order if regard was had to its impact on the whole economy and because it would intrude in the other spheres of government. The Judge should have had regard to the separation of powers doctrine, which entails that:
 - 15.1. When the law entrusts a functionary with a discretion, involving the weighing up of a number of considerations, the law gives

recognition to the evaluation made by the functionary, and it is not open to a court to second-guess his or her evaluation.

- 15.2. Judicial deference is appropriate in the present circumstances as the decision of the first respondent on the second respondent's RCA Application involves such a discretion, is very technical and is of a kind in which the Court has no particular proficiency.

SIGNED AT *Pretoria* ON THIS 6th DAY OF SEPTEMBER 2016

C. F. ERASMUS

Attorneys for the First Respondent

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C/O MacINTOSH CROSS &

FARQUHARSOM

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(Ref: Charl Erasmus)

TO:

The Registrar of the High Court

Gauteng Division

Pretoria

AND TO:

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Applicants' Attorneys

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(Ref: LIT46/16)

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AND TO:

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Fourth Respondent

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AND TO:

SOUTH AFRICAN LOCAL GOVERNMENT ASSOCIATION

Fifth Respondent

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