REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 2024-061993

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

[redacted]

Date: 19 August 2024

SOUTH AFRICAN LOCAL GOVERNMENT ASSOCIATION First Applicant

NATIONAL ENERGY REGULATOR OF SOUTH AFRICA Second Applicant

and

AFRIFORUM NPC Respondent

JUDGMENT

DE VOS AJ

[1] NERSA and SALGA seek leave to appeal against an order from this Court. The order declared NERSA's methodology for determining electricity tariff increases unlawful, invalid, and unenforceable (paragraph 2 of the order). The method was unlawful as it failed to require tariff increases to be based on cost of supply studies. In addition, the Court ordered that NERSA must use a methodology premised on a cost of supply

study (paragraph 3 of the order) and is prohibited from using a methodology absent a cost of supply study (paragraph 4). As for municipalities, they would only be permitted to levy a tariff increase based on a cost of supply study (paragraphs 5 – 6 of the order). For municipalities who had not conducted a cost of supply study, the order provided an opportunity to conduct a cost of supply study and apply for an increase (paragraph 7 of the order). Lastly, the Court granted a costs order against NERSA.

[2] In essence, the Court made a substantial finding that NERSA's methodology was unlawful and consequently ordered NERSA and the municipalities to only increase tariffs based on the cost of supply studies.

[3] NERSA seeks leave to appeal against all aspects of the order, including the substantive finding of invalidity, consequential relief, and costs order. SALGA does not seek leave to appeal against the substantive finding of invalidity or the order that prohibits NERSA from applying unlawful methodology. SALGA seeks leave to appeal solely against the consequential relief against municipalities (paragraphs 5 – 7). Afriforum opposes leave to appeal.

[4] First, NERSA's request for leave to appeal against the substantive finding of invalidity is considered.

The substantive finding of invalidity (paragraphs 2 – 4 of the order)

[5] Some context is required. Afriforum brought an urgent application aimed at the tariffs for electricity that end-users pay municipalities. It was common cause that end-users had been overpaying for years, and electricity had become unaffordable. Municipalities were increasing tariffs, and NERSA was approving these tariffs despite overpayment and unaffordability. The reason for the overpayment and unaffordability was that the increases were not based on the cost of supply of electricity. Therefore Afriforum challenged NERSA's methodology used to approve municipal requests for tariff increases. Whilst the methodology must be cost-based and, specifically, based on a cost-of-supply study, it appears that for years, end-users have been paying for tariff increases that were not based on the cost of electricity supply.

[6] Whilst NERSA's 2023 methodology required a cost-of-supply study, it did away with that requirement in 2024 in response to municipalities' failure to conduct cost of supply

studies. Afriforum challenged the 2024 methodology. This was the crux of Afriforum's case: end-users were paying tariffs not based on the cost of electricity supply.

[7] The Court held that a lawful method to determine tariff increases had to be based on a cost of supply study. This finding is premised on the Electricity Pricing Policy ("Policy") read with section 27(h) of the Electricity Regulation Act 4 of 2006 ("ERA"). The Policy mandates municipalities "shall conduct a cost of supply study". Section 27(h) of ERA provides that NERSA's methodology must comply with the Policy which in turn mandates a cost of supply study. The legislative mandate in section 27(h) of ERA is that NERSA must comply with the Policy. The Court concluded that the 2024 methodology did not require a cost-of-supply study; and consequently, the 2024 methodology was unlawful.

[8] NERSA seeks leave to appeal against this substantive finding that its 2024 methodology was unlawful. NERSA's position in the application for leave to appeal is that it is entitled to consider and approve applications for tariff increases based on something less than an application for a tariff increase supported by a cost of supply study.

[9] For NERSA to be successful in an appeal, it would have to convince an appellate Court that the Policy does not require a cost of supply study. There is no real chance that NERSA will be successful as the Policy mandates, expressly, and repeatedly that municipalities conduct cost of supply studies.

[10] Worse, section 27(h) of the Electricity Regulation Act provides that NERSA's methodology must comply with the Policy. To be successful on appeal, NERSA would have to convince an appellate Court that despite the Policy and the ERA, it could approve the cost of supply increases absent a cost of supply study.

[11] To be successful on appeal, NERSA would have to persuade an appellate Court not to apply section 27(h) of ERA and to deviate from clear and binding Policy, absent any legal justification to do so. There is no reasonable chance of NERSA being successful in this regard.

[12] In addition, NERSA would have to explain to an appellate Court how it can approve tariff increases absent cost of supply studies when its own pleaded case was that such studies were required for increases to be lawful. NERSA pleaded that each

municipality "must support its respective application with the actual cost of supply studies". NERSA would also have to convince an appellate Court that no cost of supply study was required, despite NERSA's frameworks requiring cost of supply studies. There is no real prospect of NERSA being successful in this regard.

[13] The Policy is clear: a cost of supply study is required. The ERA is clear: NERSA's methodology must comply with the Policy. NERSA's deviation from the Policy is clear; in fact, NERSA tells the Court that in 2024, it moved away from requiring the cost of supply studies as municipalities were not compliant. This case concerns NERSA's move from a lawful method used in 2023 to an unlawful method in 2024. As a regulator, it cannot deviate from the legislature and executive's standards because those it has to regulate are not complying with the law.

[14] The Court concludes that there are no reasonable prospects that NERSA will persuade an appellate Court that its 2024 methodology was lawful.

[15] NERSA raises, under the same rubric, other grounds of appeal which must also be considered. NERSA believes its new methodology is lawful, as it is not based on a Guideline and Benchmarking methodology. In 2022, Her Ladyship Justice Kubushi declared NERSA's previous methodology, known as a Guideline and Benchmarking methodology, unlawful. Her Ladyship Justice Kubushi tested the Guideline and Benchmarking methodology against the Policy and found it lacking.

[16] The specifics of the challenge before Her Ladyship Justice Kubushi focused on the shortcomings of the Benchmarking methodology when tested against the Policy for its failure to be based on cost of supply methodology. The specific challenge here is that the 2024 methodology falls short of the Policy as it does not require a cost-of-supply study. As did her Ladyship Justice Kubushi, this Court tested NERSA's methodology against the Policy. The similarity between the case before Justice Kubushi and the present matter, is found in testing the methodology against the Policy. The judgment of Her Ladyship Justice Kubushi required a cost of supply methodology; the present case builds on that finding and requires a cost of supply study.

[17] NERSA contends that as its 2024 methodology is not based on the Guideline and Benchmarking methodology, its methodology is lawful. This does not follow. The

standard against which the methodology must be tested is that the Policy sets. NERSA errs in its reasoning that the 2024 methodology is lawful as it is no longer the Guideline and Benchmarking methodology. It is not enough for NERSA to state that it desists from unlawful methodology; it has to show that its methodology is lawful. NERSA has to show that anything less than a cost of supply study is lawful. It has not referred the Court to a legal basis to support this position. It has to do so in light of the clear provisions of the Policy.

[18] It is, insufficient for NERSA to defend its 2024 methodology against the Benchmarking methodology; it has to defend its 2024 methodology against the Policy. NERSA cannot defend the 2024 methodology as it fails to require a cost of supply study.

[19] As for the Policy, NERSA accepts that it is binding and requires a cost-of-supply study. NERSA submits that its 2024 methodology "substantially complies with the policy". Nothing more is said in this regard, no facts are pleaded, and no further explanation is provided. It is raised for the first time in its application for leave to appeal. As no such case had been made out, there is no prospect of NERSA convincing an appellate Court to reach a different conclusion.

[20] The Court is not persuaded that another Court would conclude that NERSA's methodology is lawful. Leave to appeal against paragraph 2 is therefore refused. The Court is also not persuaded that NERSA has any real chance of convincing another Court that it should be permitted to use an unlawful method. Therefore, leaving to appeal against paragraphs 3 and 4 was also refused.

Forward-looking relief against the municipalities (paragraphs 5 – 7 of the order)

[21] The Court granted relief, which halted further use of an unlawful methodology. SALGA seeks leave to appeal against this relief. SALGA contends the appropriate relief would be to suspend the finding of invalidity and allow municipalities to charge tariffs based on the unlawful methodology. The reason SALGA presents for suspending the invalidity finding is that municipalities cannot afford to pay Eskom for the bulk supply of electricity without the tariff increases.

[22] The argument is that Eskom has increased its tariffs, and the municipalities will not be able to afford the increased Eskom tariffs if they cannot increase their tariffs. The knock-on effect will be that these municipalities cannot provide electricity to their

customers and will be bankrupt or suffer severe financial hardship. To prevent this outcome, SALGA submits that a just and equitable remedy would be to allow the municipalities to levy the tariffs based on the unlawful methodology for the time being and allow them to comply with the law in future, within an undefined timeframe.

[23] SALGA's case is that the substantive finding of invalidity is correct, but that the court must suspend this finding, indefinitely, and in the meantime municipalities should be permitted to charge tariffs based on the unlawful method, which results in overpayment from end-users.

[24] The Court concluded it would not be just and equitable to suspend the operation of invalidity, firstly, based on the facts that had been presented. SALGA proffered only its mere say-so that municipalities could not afford to supply electricity. No numbers were provided. No factual case was pleaded. SALGA presented the position as a logical conclusion to be drawn that if Eskom's bulk supply of cost had increased and municipalities could not increase their tariffs, the municipalities could not afford the bulk cost increase. The argument is presented as one that follows as a matter of logic.

[25] The reasoning assumes municipalities were charging the supply cost and were not overcharging end-users. The Court cannot make this assumption, as the undisputed fact before the Court is that municipalities have been overcharging end-users for a long period. As the overcharging is common cause; SALGA's assumption of the unaffordability of bulk electricity does not follow.

[26] As municipalities have been overcharging for years, it cannot be assumed that they cannot afford an increase in bulk electricity costs.

[27] In addition, SALGA provided no facts to support its argument that municipalities could not afford to reticulate electricity. The only facts SALGA pleaded related to four municipalities. SALGA pleaded specifically that four municipalities could not afford to provide electricity if they could not charge tariffs on the unlawful (2024) method. SALGA's pleaded case was internally contradicted. On the one hand, SALGA pleaded that if the relief sought was granted, four municipalities would be bankrupted. However, it also pleaded that if the relief was granted, three of these four municipalities would not be affected by the relief as they had conducted cost of supply

studies. The only specific facts pleaded by SALGA to suspend the finding of invalidity were contradicted by SALGA's own pleaded case.

[28] In the application for leave to appeal, SALGA contends the Court erred in not considering the pleaded case properly. SALGA refers to the allegations it had pleaded regarding municipalities' inability to afford to reticulate electricity. SALGA has identified the specific allegations it relies on to contend it had pleaded this case.

[29] These allegations are repetitions of a conclusion of logic which does not follow. Nor was it based on any specific factual allegations, contravened by its pleadings and at odds with the common cause allegation that municipalities had been overcharging end-users for years. The Court was not persuaded that SALGA had made out a case for the devastating consequences it was presenting as a conclusion.

[30] The Court is not persuaded that another Court would come to the conclusion that it ought to suspend a finding of invalidity when the basis for the suspension is not proven or pleaded. A just and equitable remedy cannot bend to cater to a situation that, on the facts, does not arise. The Court did not and could not attach much weight to SALGA's allegations of municipal interests, due to the weakness of the facts relied on.

[31] In addition, a just and equitable remedy weighs all affected parties' interests. The interests of municipalities are only one side of the scale. However, to weigh only this would be myopic.

[32] Against the case SALGA presented, the Court has to weigh the interests of the end-users. NERSA's consultation paper concluded that failing to set cost-reflective tariffs meant that "tariffs are increasingly unaffordable" for end-users. The finding of Her Ladyship Justice Kubushi relied on NERSA's indication that tariffs were increasingly unaffordable. None of the parties before this Court sought to undo that finding, which was not disputed. It takes little imagination to grasp the effects of end-users being overcharged for electricity and it being unaffordable. The pleaded case before this Court was that tariffs were becoming increasingly unaffordable. The Court must weigh against NERSA's unproven case in the interests of these end-users.

[33] The Court had to, in deciding whether it was just and equitable to suspend the finding of invalidity, weigh a weak, disputed and contradicted case by SALGA against the common cause impact of overpayment and unaffordability on end-users.

[34] Aside from the unaffordability, the Court was faced with unlawful conduct. NERSA and the municipalities have known that it must comply with the Policy since 2006 when ERA came into force. Both have known of the obligation to conduct a cost of supply study since 2008, when the Policy was adopted. Her Ladyship Justice Kubushi gave NERSA and the municipalities a year grace period to get their houses in order. Before Ladyship Justice Kubushi, the evidence was that the switch to a cost-of-supply study approach would not present difficulties and that municipalities had already, at the stage of the hearing before Kubushi J, started to report on the information required for cost-of-supply studies and "it is thus anticipated that compliance in this regard will not be a hurdle".[1]

[35] The Court rejected SALGA's proposal to indefinitely suspend the finding of invalidity in light of the weakness of SALGA's case, which weighed against end-users' interests and the importance of the rule of law.

[36] This Court cannot grant leave to appeal in circumstances where the challenge to the remedy is one premised on a factual case which has not been proven, internally contradicted, disputed and which is, in any event, outweighed by other considerations, including the interests of end-users and upholding the rule of law.

[37] Afriforum submits that SALGA's approach in the leave to appeal only factors in one side of the scale. The Court is persuaded by this argument.

[38] SALGA submits that the Court erred in finding that its powers to grant just and equitable relief does not extend to permit an illegality to continue. SALGA points to the Court's powers to suspend an order of invalidity as proof that courts can and do grant relief which permits illegalities to continue. The Court declined to grant an order suspending the invalidity as it did not conclude it would be just and equitable in the circumstances. The Court accepts that part of its powers to grant just and equitable

[1] Kubushi J at para 171

relief would be to suspend the declaration of invalidity. However, the Court concluded that, in this case, it would not be just and equitable to do so.

[39] The circumstances weighed with the Court, set out in the introduction and expanded on in its reasons, were it was being asked to permit illegality to continue without any explanation from the municipalities for non-compliance (paragraph 13); budgetary constraints were insufficient to justify a deviation from the law (paragraph 14), and SALGA had not pleaded a strong factual case to support a suspension of invalidity (paragraph 15). The Court set out, from the outset, that it would not be "just and equitable to permit non-compliant municipalities to continue charging unlawful tariffs, particularly where there was already an order in place providing them a year to address their non-compliance" (paragraph 17). The Court cited these reasons as the basis for rejecting the notion that a just and equitable remedy would be to suspend the declaration of invalidity.

[40] The limits on the Court's discretion are set by what is just and equitable. The discretion this Court exercised is one where it is granted wide decision-making powers with several options or variables. There is a range of permissible decisions. It is the type of discretion that appellate courts are slow to interfere with unless the Court's choice is at odds with the law.[2] Appellate Courts, for reasons sourced in appellate restraint and the preservation of judicial comity will unlikely interfere only because they favour a different option within the range of options available to the Court. The approach fosters certainty in applying the law and favours finality in decision-making.

[41] It weighs with the Court that the true difference between the relief granted by the Court and that sought by SALGA, is that SALGA sought an indefinite suspension of the finding of invalidity. The relief proposed by SALGA would permit municipalities to continue to overcharge end-users, indefinitely, against the back-drop of such overcharging being ongoing for years. This relief, of an indefinite suspension, holds no incentive for municipalities to comply with the law and subjects end-users to further – and indefinite – overpayment. The Court was also not provided with an explanation as to why further grace was required for municipalities to comply as the requirement to conduct a cost of supply study became law in 2008. In addition, the facts before

[2] Florence v Government of the Republic of South Africa 2014 (6) SA 456 (CC) para 113

Kubushi J was that to conduct such studies would present no difficulty and had already commenced, in 2022. The Court concluded that such relief, permitting an indefinite suspension, was not just and equitable. Instead the Court concluded that an order which compelled municipalities to comply with the law, halted overpayment but also permitted municipalities who had not complied a 60 day period within which they could redeem the situation, would be just and equitable. If municipalities could not do so in the 60 days, laced into the relief was the opportunity to approach the Court and explain why non-compliance within 60 days was not possible. The relief protected the rule of law, end-users and ensured a culture of justification for non-compliance.

[42] To be successful on appeal, SALGA would have to persuade an appellate Court that it was unjust and inequitable not to indefinitely suspend the finding of invalidity in circumstances where the Court expressly permitted municipalities to correct the situation and even approach the Court for more time to do so. The Court is not persuaded that SALGA will be able to convince an appellate Court that such relief is inequitable and unjust.

[43] SALGA submits that an order which permitted the municipalities an opportunity to place facts before the Court regarding the impact of not being permitted to use the unlawful method was the appropriate relief. SALGA relies on the Constitutional Court's decision in *Allpay*[3] as support of this relief is appropriate. The Court has considered *Allpay* and specifically that the opportunity to file additional pleadings was sourced in the delay of 20 months between the award of the tender and the decision on the merits. During these 20 months, the successful tenderer took various infrastructural steps. In those circumstances, the Court provided the parties an opportunity to set out the changes since the award. These are not the facts before this Court. The municipalities were cited from the outset. They could tell the Court the impact if NERSA could not use an unlawful method. They failed to do so. This is not an instance of a change of circumstances – it is one of the municipalities not placing facts before the Court and then at the stage of leave to appeal, contending it is unjust and inequitable to grant relief against them.

[3] Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (CCT 48/13) [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) (29 November 2013)

[44] In any event, the reasons of the Court expressly provides that if the 60 day redemption period is too short, then municipalities can come to court can explain the situation. There is, already weaved into the judgment, an opportunity for municipalities to explain the basis of their non-compliance.

[45] For these reasons, the Court concludes that there is no real chance of another Court coming to a different conclusion.

Prohibition of tariff increases absent a cost of supply study

[46] The Court granted an order which prohibited municipalities from increasing their tariffs absent such an increase being based on a cost of supply study. The order only applies to non-compliant municipalities. SALGA submits that this order was erroneously granted and that another Court will come to a different conclusion. Here SALGA makes, broadly, two arguments.

[47] The first is that the Court ought to have confined itself to the pleadings, the relief was not sought and SALGA was not permitted an opportunity to respond to such relief.

[48] The impact of this relief was debated at the hearing of the matter. In addition, Afriforum filed a draft order in which this relief was sought in paragraph 5. SALGA filed written submissions in response to the draft order filed by Afriforum which included paragraph 5 (paragraph 6 of the Afriforum draft order). Therefore, SALGA had an opportunity to make oral submission to court as well as additional written submissions, in these written submission there was no indication of prejudice on the basis of not being afforded an opportunity to place specific facts before the Court.

[49] The second is that the Court did not have regard to the fact that municipal budgets are approved and adopted by democratically elected bodies, whose actions are not easily set aside by a Court.

[50] The process is that municipalities must set their budgets based on the tariffs approved by NERSA. Already at the hearing of the matter it was apparent that the budgets were set prior to this determination.

[51] More principally, the primary duty of courts is to the Constitution and the law, “which they must apply impartially and without fear, favour or prejudice”. These duties will often result in decisions that have an impact on budgets. This does not mean that the courts are interfering with budgetary determinations.

[52] The Constitutional Court recognised this more than 20 years ago when it held that courts' determinations "may in fact have budgetary implications, but are not in themselves directed at rearranging budgets."[4] In this way, the judicial, legislative and executive functions achieve appropriate constitutional balance.[5] The fact that a court's decision impacts a budget is not a basis to conclude that the relief granted was unjust and inequitable. It is often the case that an order to comply with the law will have budgetary consequences.

[53] The Court concludes that there is not a reasonable chance that SALGA will persuade an appellate Court that the relief it granted is unjust and inequitable on this basis.

The 60-day redemption period

[54] SALGA submits that an order granting non-complaint municipalities 60 additional days to conduct their cost of supply study was not properly before the Court. The ground of appeal is that the Court did not confine itself to the pleadings or the evidence before it. Specifically, SALGA contends that the order was not asked for in Afriforum's notice of motion. SALGA submits that properly the Court ought to have provided the parties an opportunity to show cause as to why such an order should not be granted.

[55] SALGA's submission that the 60-day additional period to comply was not in Afriforum's notice of motion is correct. However, the suggestion for a redemption period to comply with the requirement of a cost of supply study is sourced from SALGA's proposed draft order provided to the Court. In paragraph 6 of SALGA's proposed draft order, it suggested that:

> "Municipalities shall be permitted to supplement electricity tariff applications with cost of supply studies, and the first respondent shall consider and, if they are legally compliant, approve such electricity tariff applications by municipalities as are based on the municipalities' cost of supply studies submitted after the date of this order, within one month of receipt of the requisite cost of supply studies."

[56] SALGA would have to persuade an appellate Court that it was improper for the Court to grant a redemption period, as it was not sought by Afriforum, in circumstances where SALGA itself suggested such a redemption period. The Court is not persuaded

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[4] Minister of Health and Others v Treatment Action Campaign and Others (No 2) (CCT8/02) [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) (5 July 2002) para 38

[5] Id

that an appellate Court would find it inappropriate that the Court erred in granting such a redemption period in circumstances where SALGA suggested a redemption period.

[57] As for the 60 days, SALGA is correct because it is not found in Afriforum's notice of motion. The 60-day period operates in favour of the municipalities. The judgment specifically referred to the fact that the 60 days was not a period intended to be sufficient to conduct a cost of supply study; it was a further grace period on top of the 20 months the order of Kubushi J provided. In addition, the duty to conduct a cost of supply study is sourced from a 2008 Policy. Municipalities' obligations to conduct the cost of supply study are sixteen years old. The judgment also indicated that if a municipality could not comply – it could seek a variation of this time period.

[58] The core of the argument by SALGA is that it is prejudiced by relief being granted, which did not appear in the notice of motion of the applicant. The Court is not persuaded by this submission, particularly as the redemption period was a suggestion of SALGA's. It also weighs with the Court that the 60-day redemption period, subject to variation, favours SALGA's constituencies.

[59] The true difference between the order granted and SALGA’s position is that it suggested an indefinite period for municipalities to comply with the requirement to conduct cost of supply studies. Such relief would not be effective and would hold no incentive for municipalities to comply with their obligations. The limitation of 60 days must be seen in light of the lengthy years-long non-compliance and overcharging; the Policy being a 2008 document and the parties before Kubushi J stating that conducting such studies would not present a problem. This period is any event, based on the express reasoning of the Court subject to variation.

Mootness

[60] NERSA submits that it considered and approved tariff applications before this Court handed down its order. NERSA argues that, in this way, the issue had become moot before the Court handed down its order. NERSA refers to communication made and uploaded to case lines before receiving the order which conveyed NERSA’s tariff decisions.

[61] For the order to be moot, it has to be without any practical consequences. The order contains not only a substantive declaration but also regulates the position going

forward – it is exactly this relief and its impact on municipalities going forward attract SALGA's application for leave to appeal. The matter was not rendered moot before the order was handed down. In any event, the communication was not evidence, was not placed under oath, and none of the parties were allowed to respond to the communication. The communication was uploaded between the court reserving judgment and the order being handed down.

[62] The Court further notes that NERSA, before Kubushi J raised the same mootness argument. Her Ladyship Justice Kubushi held that "the submission made by NERSA is that serious material events have overtaken the relief which the applicants are seeking in these proceedings."[6] The material events, before Justice Kubushi were that NERSA had taken a new decision. Her Ladyship Justice Kubushi considered NERSA's reliance on mootness. The Court dismissed the claim as "there are strong public interest considerations in favour of this Court determining the lawfulness of the method".[7]

[63] This Court rejects NERSA's regurgitated allegations of mootness, for the same reasons on which Her Ladyship Kubushi rejected them.

Costs

[64] NERSA complains that this Court granted costs in favour of SALGA. The structure of this argument is that SALGA was a respondent and SALGA's papers opposed the relief sought by Afriforum. This is correct, but as pointed out by SALGA, NERSA, the day before the hearing, filed a letter stating that applications for tariff increases would be considered absent a cost of supply study. This changed the landscape of the matter and clarified to SALGA the unlawfulness of NERSA's method. With this letter in hand, SALGA approached the Court on the basis that NERSA's method was in fact unlawful. SALGA, at the hearing, supported the substantive relief sought by Afriforum.

[65] NERSA's failure to comply with its central duty to act as a regulator and to rather yield to municipal non-compliance with the Policy and ERA, is the cause of the litigation. NERSA then opposed the relief on grounds that had largely been rejected by Her

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[6] Kubushi J para 33

[7] Kubushi J para 41

Ladyship Kubushi J and was in clear conflict with the Policy, ERA and its own frameworks. NERSA's conduct should attract a costs order.

[66] It must also be remembered that whilst the municipalities failed to comply with the longstanding policy position – SALGA is not the municipalities, and no criticism for the municipal non-compliance can be laid at SALGA's feet. In these circumstances, it is appropriate that NERSA be liable for SALGA's costs.

Conclusion

[67] The Court orders:

a) The applications for leave to appeal are dismissed.

I de Vos
Acting Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be e-mailed to the parties/their legal representatives.

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Date of the hearing:	29 July 2024

Date of judgment: 19 August 2024