IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case no _51550/21_____

In the matter between

ESKOM HOLDINGS SOC LIMITED	**Applicant**

and

NATIONAL ENERGY REGULATOR OF SOUTH AFRICA	**First Respondent**
MINISTER OF MINERAL RESOURCES AND ENERGY	**Second Respondent**
MINISTER OF FINANCE	**Third Respondent**
SOUTH AFRICAN LOCAL GOVERNMENT ASSOCIATION	**Fourth Respondent**

FOUNDING AFFIDAVIT

I, the undersigned

CALIB CASSIM

state under oath that:

1 I am the Chief Financial Officer of the applicant of Megawatt Park, Maxwell Drive, Sunninghill, Johannesburg.

2 The facts contained herein are within my own personal knowledge and are true and correct.

3 I am duly authorised by Eskom to depose to this affidavit in support of the relief sought in the notice of motion.

THE PARTIES

4 The applicant is Eskom Holdings Limited ("**Eskom**"), a state-owned company established in terms of the Eskom Conversion Act 13 of 2001, with its address at Megawatt Park, Maxwell Drive, Sunninghill, Sandton, Gauteng.

5 The first respondent is the National Energy Regulator of South Africa ("**NERSA**"), a regulatory body established in terms of the National Energy Regulator Act 40 of 2004 with its address at Kulawula House, 526 Madiba Street, Pretoria, Gauteng. NERSA is the energy regulator in South Africa which, amongst other duties, is responsible for approving the electricity tariffs which Eskom is permitted to charge. It made the decision which is challenged in this litigation.

6 The second respondent is the Minister of Mineral Resources and Energy, whose address is 192 Visagie Street, Pretoria. The Minister of Mineral Resources and Energy is the member of the national executive with political oversight over NERSA and policy oversight over Eskom. The second respondent is cited as a respondent in this application because of his potential interest in this matter. No relief is sought against him.

7 The third respondent is the Minister of Finance, whose address is 40 Church Square, Old Reserve Bank Building, Pretoria. The third respondent is cited as a

respondent in this application because of his potential interest in this matter. No relief is sought against him.

8 The fourth respondent is the South African Local Government Association ("**SALGA**"), a voluntary association with capacity to sue and be sued and having its principal place of business at 33 Hoofd St, Braampark, Johannesburg. The SALGA is a voluntary association of municipalities and the national organisation representing local government as contemplated by section 163 of the Constitution. The SALGA is cited as a respondent in this application because of its interest in the imposition of electricity tariffs. No relief is sought against the SALGA.

INTRODUCTION

9 The principal relief sought in Part B of this application is an order reviewing and setting aside a patently irrational and unlawful decision taken by NERSA on 30 September 2021 to reject Eskom's multi-year tariff application for the 2022/23 to 2024/25 tariff years ("**the MYPD decision**") and to invite Eskom to submit a new tariff application in accordance with the notional principles of an as yet undetermined future methodology.

10 The urgent interim relief sought in Part A is an order directing NERSA to process Eskom's existing revenue application under the existing tariff methodology to fix a lawful tariff for the 2022/23 financial year. This relief is necessary to provide a lawful route to determining an Eskom tariff for the 2022/23 financial year in the limited time remaining before 15 March 2022 when that tariff has to be tabled in Parliament in accordance with the requirements of section 42(5)(a) of the Local Government (Municipal Finance Management) Act 56 of 2003 ("**the MFMA**").

11 In this regard, the interim relief sought by Eskom is a procedure that was supported by 50% of NERSA Board members who voted at that meeting of 30 September 2021 (including the Chair designate) and which would have been adopted by NERSA had not the acting Chair of the meeting of 30 September 2021 exercised his casting vote in favour of a fanciful tariff determination process that is simply incapable of lawful completion in time for the 15 March 2022 deadline.

12 The interim relief sought by Eskom is of national importance because without a validly determined tariff for 2022/23, Eskom will be financially unsustainable. Eskom will have zero revenue for the FY 2022/23. The required revenue to allow Eskom to continue operating will be more than the total allowable revenue for the 2021/22 financial year of over R260bn. Moreover, because more than R350 billion worth of Eskom debt is linked to over R900 million in interlinked national government guarantees, if Eskom's finances collapse, the finances of the entire National Government are at risk.

13 The problem giving rise to this application, and its urgency, are entirely of NERSA's making.

13.1 Eskom prepared its tariff application in accordance with the current prevailing tariff methodology document issued by NERSA ("**the MYPDM**"), as published in 2016 ("**the 2016 MYPDM**") and furnished NERSA with a draft of its tariff application 16 March 2021.

13.2 Eskom formally submitted its tariff application on 2 June 2021.

13.3 NERSA sat on Eskom's tariff application from 2 June 2021 before deciding on 30 September 2021 that it would reject the tariff application because it wanted to introduce a new tariff methodology that did away with the basic propositions underlying the 2016 MYPDM and all of its predecessors that have governed Eskom tariffs since 2006.

13.4 However, NERSA has yet to decide what the new tariff methodology will be beyond apparently requiring that it do away with the concept of "allowable revenue" which has underpinned all previous Eskom tariff determinations since 2006.

13.5 NERSA has got no further than putting out for public comment a consultation paper to determine a new price determination methodology. This is not the actual methodology. It apparently hopes to assess the responses received by 19 November 2021. NERSA apparently intends this consultation paper to result in a methodology. However, what is required is that a draft methodology (with formulas) be produced and published for a further round of consultation. This is likely only to be finalised after the 15 March 2022 timeframe. In the past, NERSA has consulted on a draft methodology for a period of 9 (methodology published in 2016) to 13 months (methodology published in 2012).

13.6 In the meantime it expects Eskom to prepare a new tariff application to comply with the requirements of unascertainable principles that may or may not be enshrined in the new methodology if it is finally adopted by NERSA some time after November.

13.7 The process of determining an Eskom tariff must be complete in time for the tariff to be tabled in Parliament by 15 March of the year in which the tariffs will take effect. When it takes place in terms of an established and well understood methodology, it has historically taken

13.7.1 At least 9 months for Eskom to prepare its application and to comply with the 40 day statutory consultation requirements with Treasury and SALGA under section 42(2) of the MFMA before submitting that application to NERSA; and

13.7.2 At least 6 months for NERSA to conduct a public consultation process, complete its analysis of the tariff application and to take a final decision on the tariff.

13.8 NERSA's MYPD decision means that this process, which ordinary takes 15 months in relation to a well-defined methodology, will now be compressed into a period that

13.8.1 will only start when NERSA takes a decision on its new methodology some time after November 2021,

13.8.2 will run through the December/January break, and

13.8.3 will have to be complete by the first week of March 2022.

14 Having regard to the rigid statutory requirement of 40 days' consultation with SALGA and National Treasury and the additional obligation resting on Eskom to engage with Government in terms of the Government Support Framework Agreement <u>before formulating its tariff application</u>, on a very best case scenario,

14.1 Eskom will have less than a month (if at all) in the end of year break rather than nine months to formulate a new tariff application on the basis of a completely unprecedented methodology for which its systems have not been designed and with which it will have to familiarise itself;

14.2 That tariff application will then have to be put out to consultation with SALGA and the National Treasury for 40 days under section 42(2) of the MFMA, before it can be submitted to NERSA;

14.3 NERSA and the public will have less than a month to conduct the public participation, complete analysis and decision making processes that usually take at least six months when they are dealing with a known methodology as opposed to an unknown methodology.

15 It is clearly not possible for the process now being pursued by NERSA to yield a legally valid tariff determination in time for tabling in Parliament by 15 March 2022, and NERSA's decision to attempt to do so is patently irrational and calculated to give rise to a tariff determination that is vitiated by procedural unfairness.

16 The MYPD decision was, itself, vitiated by procedural unfairness because Eskom had a legitimate expectation that its tariff application for the 2022/23 to 2024/25 tariff years would be determined in accordance with the tariff methodology then applicable and that NERSA would not, unilaterally decide 4 months after receipt of the tariff application that it should be determined in accordance with an as yet unascertainable new methodology.

17 Moreover, as I show below, the MYPD decision, by attempting to do away with the notion of "allowable revenue" for future tariff determinations, unconstitutionally deprives Eskom of more than R50 billion in revenue that past decisions of this Court and NERSA require to be added to its "allowable revenue" over the 2022/23 and 2023/24 tariff years. It is unclear how the requirements of the Electricity Regulation Act 4 of 2006 ("**the ERA**") with regards to the recovery of efficient costs and a fair return will be determined.

AN OUTLINE OF THIS AFFIDAVIT

18 I have structured this affidavit as follows:

18.1 First, I describe the statutory and regulatory framework governing NERSA decisions on Eskom tariff decisions;

18.2 Then I address the broader context to the present application

18.2.1 I outline Eskom's liquidity problems and the manner in which the inadequate provision of tariff revenue to Eskom has led to a threat to the finances of Eskom and the National Government; and

18.2.2 I describe the history of successful applications that Eskom has been required to institute to force NERSA to act lawfully in relation to the determination of Eskom tariffs;

18.3 I set out the chronology relevant to the MYPD decision challenged in this application;

18.4 I demonstrate the patent irrationality, unlawfulness and unconstitutionality of the MYPD decision;

18.5 I then address the requirements for interim relief;

18.6 Finally I describe the urgency of the present application and show how the urgent timetable has been tailored to balance the requirements of urgency with the requirements of a fair process.

REGULATORY FRAMEWORK

19 There are various legislative and regulatory instruments, which are relevant to this application. They all relate to the subject-matter of the MYPD decision – ie, the question of determining the electricity tariffs which Eskom should be permitted to charge.

The Electricity Regulation Act

20 The ERA vests NERSA with the power to determine tariffs for all electricity licensees. The ERA does not differentiate between public and private licensees and provides, in section 15, one set of rules that applies to NERSA in relation to its tariff determinations in respect of all licensees. The basic principle of tariffs under the ERA is that electricity generation, transmission and distribution is not to be subsidised and that a licensee's overall tariffs must be cost reflective. This basic principle is embodied in the first rule binding on NERSA in section 15(1) of the ERA which states:

"(1) A licence condition determined [by NERSA] 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".

The Electricity Pricing Policy

21 The Electricity Pricing Policy ("**the EPP**") is national policy issued by the Department of Energy and Mineral Resources pursuant to the ERA. It is obviously subordinate to the ERA and cannot override section 15(1)(a). It does not purport to do so. On the contrary, it reconfirms that overall tariffs must be cost reflective. So, the first two principles set out in the EPP are the following:

21.1 Policy position 1 which states: "*The revenue requirement for a regulated licensee must be set at a level which covers the full cost of production, including a reasonable risk adjusted margin or return on appropriate asset values."*

21.2 Policy position 2 which states: *"Electricity tariffs must reflect the efficient cost of rendering electricity services as accurately as practical.*

- *The average level of all the tariffs must be set to recover the approved revenue requirement."*

22 The following further aspects of the EPP must be emphasised because they are relevant to some of what is said below:

22.1 In paragraph 8.9 of the EPP, the following is noted: “Customers respond to the signal provided by the electricity prices. The question arises: should the tariff be modified from the COS [ie, cost of sales] with the objective of creating a specific signal to customers to achieve a specific objective? In response, policy position 30 is stated as follows:

> *“Cost reflective tariffs are considered the most effective pricing signal to be provided to customers. Any additional pricing signals over and above the costs must be motivated specifically and be approved by NERSA.”*

22.2 The importance of cost-reflective tariffs as a pricing signal is emphasised again later on in the EPP (see paragraph 10.1 and policy position 56).

22.3 In concluding by summarising the steps necessary to ensure the efficient execution of the EPP (in paragraph 11), the EPP again emphasises that “[t]he acceptance of a fair return on capital employed is necessary. Returns in line with the risks involved should be the aim and should include full costs as well as a reasonable margin.”

The Multi-Year Price Determination Methodologies

23 The Multi-Year Price Determination Methodology (“**the MYPDM**”) is the methodology developed by NERSA to determine the allowable tariffs and tariff increases to be charged by licensees to consumers. The MYPDM provides for Eskom tariffs to be determined by NERSA at intervals of 3 to 5 years. The MYPDM published in 2006, applied to three revenue determinations covering the period from 1 April 2006 to 31 March 2013. The MYPDM published in 2012

applied to the revenue decision for the period 1 April 2013 to 31 March 2018. The 2016 MYPDM applied to two revenue decisions applicable for the period 1 April 2018 to 31 March 2022. (A copy of the 2016 MYPDM is attached as Annexure **"ESKOM1"**). A version of the MYPDM has never been linked to a particular cycle. This is illustrated in para 4.1 of the MYPDM published in 2012 and para 4.2 of the 2016 MYPDM, that the "**methodology" (singular)** shall be used for the evaluation of Eskom's MYPD and Regulatory Clearing Account ("**RCA**") applications **(plural)**.

24 Since its inception, the MYPDM has always been a cost based methodology. While there have been minor tweaks to the methodology over its three iterations, the central features of the methodology have remained unchanged:

24.1 NERSA determines the reasonable cost of providing Eskom's licenced activities in the relevant tariff year, including a reasonable rate of return for Eskom;

24.2 NERSA deducts from that cost the revenue that Eskom is likely to generate from sales on contracts which are not governed by standard tariffs (bulk sales under negotiated pricing agreements and international sales) to derive a net cost for providing the licensed activities that are to be recovered by standard tariffs;

24.3 NERSA projects the amount of electricity that Eskom is likely to sell in the relevant tariff year to customers paying standard tariffs;

24.4 NERSA derives an Eskom average standard tariff for the relevant year by dividing the net cost figure in paragraph 24.2 above by the projected sales figure in paragraph 24.3 above.

25 These central features of the MYPDM which have remained constant for over fifteen years, can be illustrated with reference to the 2016 MYPDM:

25.1 Tariffs under the MYPDM are to be set to recover Eskom's "allowable revenue" on the basis of projected electricity consumption.

25.2 The formula in the MYPDM for determining "allowable revenue" is set out in section 5.2 which states the following:

"The following formula must be used to determine the AR [Allowable Revenue]:

$$AR=(RAB\times WACC)+E+PE+D+R\&D+IDM\pm SQI+L\&T\pm RCA$$

Where:

AR = *Allowable Revenue*

RAB = *Regulatory Asset Base*

$WACC$ = *Weighted Average Cost of Capital*

E = *Expenses (operating and maintenance costs)*

PE = *Primary Energy costs (inclusive of non-Eskom generation)*

D = *Depreciation*

$R\&D$ = *Costs related to research and development programmes/projects*

IDM = *Integrated Demand Management costs (EEDSM, PCP, DMP, etc.)*

SQI = *Service Quality Incentives related costs*

$L\&T$ = *Government imposed levies or taxes (not direct income taxes)*

RCA = *The balance in the Regulatory Clearing Account (risk management devices of the MYPD)"*.

25.3 Sections 6 and 8 to 16 of the MYPDM provide details of how each one of these cost components and the projected sales volumes are to be determined so that there is a detailed system for projecting the total revenue upon which the tariffs will be based.

25.4 The last element in the allowable revenue formula is the balance in the RCA, or more accurately the amount of the RCA balance that is allowed to be recovered or paid back in a particular financial year. This is addressed in section 17, and in particular section 17.2, of the 2016 MYPDM. The RCA is a risk management device which ensures that Eskom (and consumers) are protected against the consequences of projection-based tariffs that prove to be inappropriate in the light of actual experience. The RCA provides for allowable revenue to be adjusted *ex post facto* on the basis of a retrospective comparison of actual financial facts in respect of a particular financial year with the projections upon

which the tariff for that year was determined. Any "under recovered" revenue that is not attributable to negligence on the part of Eskom is then recoverable by Eskom through additional increases to tariffs in subsequent years. Conversely, if the allowable revenue is shown to have been excessive, tariffs in subsequent years will be adjusted downwards to reverse this effect.

25.5 In addition to "allowable revenue", section 6 of the 2016 MYPDM requires NERSA to determine sales volumes that will be used to calculate tariffs.

26 The 2016 MYPDM is a policy document that is not rigidly binding on NERSA. Section 4.6 of the MYPDM states:

> *"The development of the Methodology does not preclude the Energy Regulator from applying reasonable judgement on Eskom's revenue after due consideration of what may be in the best interest of the overall South African economy and the public."*

27 However, this flexibility recognised by section 4.6 is obviously subject to limits imposed by the ERA and the EPP because MYPDM is, on its own terms, subordinate to the ERA and the EPP. It states in section 4.1:

> *"The Methodology is subordinate to the requirements of the Electricity Regulation Act and the Electricity Pricing Policy. The requirements from these two documents will at all times supersede those of the Methodology."*

28 So, the Eskom tariff and RCA determination processes under the 2016 MYPDM remain subject to the principles of the ERA and EPP set out above. In particular,

NERSA cannot determine tariffs for Eskom at a level which is calculated to leave Eskom with less revenue that the efficient cost of providing its licensed service and a reasonable return.

29 The latest tariff determination is scheduled to come to an end on 31 March 2022. Accordingly, if NERSA intended to introduce a new tariff determination methodology, it would have had to finalise that methodology and make it known to Eskom well in advance of the need for Eskom to make its 2022/2023 revenue application. In this regard, I point out that that the introduction of a new timetable would have to take into account the following considerations:

29.1 The deadline for a NERSA decision on an Eskom tariff application for the 2022/23 tariff year is sufficiently in advance of 15 March 2022 for Eskom to be able to table those tariffs in Parliament by that date as required by section 42(5)(a) of the MFMA.

29.2 The preparation of an Eskom tariff application (even on the basis of a known and well understood methodology) is an extremely complex and time consuming process. Eskom has historically taken at least 9 months to prepare its tariff applications under the MYPDM.

29.3 After an Eskom tariff application is accepted by NERSA, it has to engage in an extensive public consultation process on that tariff application. Historically, the accommodation of this consultation process has required NERSA to take taken between 6 and 9 months from the submission of Eskom’s tariff application to the date on which NERSA takes its final decision on the tariff application.

30 So if NERSA intended to introduce a new methodology for the determination of Eskom tariffs in the 2022/23 financial year, the time to have finalised that new methodology was well before the end of 2020.

31 However, by June 2021, when Eskom submitted its 2022/2023 revenue application, no new methodology (or even a draft) had been published. Since no new methodology had been published by NERSA, Eskom made its 2023-2025 revenue application in terms of the 2016 MYPDM.

32 Eskom had a legitimate expectation that NERSA would apply the 2016 MYPDM, in deciding its application, since no further methodology had been published and there is no principle of law which provides that a particular MYPDM lapses after a specific period of time. Put differently, a published methodology remains valid until replaced or varied by NERSA. Moreover, as pointed out above, the central elements of the 2016 MYPDM were the same central elements that had consistently been applied to Eskom tariff determinations for the last 15 years.

33 In 2010, NERSA published the Minimum Information Requirements for Tariff Applications Guidelines ("**the MIRTA**"). A copy of the MIRTA is attached as Annexure **"ESKOM2"**. Paragraph 1.3 of the MIRTA, which is designed to aid applicants in formulating their tariff applications, provides that tariff applications that do not meet the minimum information requirements will be referred back to the applicant within two weeks of receipt by NERSA of the application in question. In this case, NERSA did not refer Eskom's MYPD5 application back to it, within two weeks or at all. After the expiry of two weeks from the date of submitting the application on 2 June 2021, Eskom therefore took comfort that the application met the minimum requirements and was considered by NERSA to be complete.

THE GENERAL CONTEXT IN WHICH THE IRRATIONAL MYPD DECISION WAS MADE

34 The MYPD decision was not taken in a vacuum. Rather, it was the latest in a long line of conduct by NERSA which, directly or indirectly, has created a liquidity crisis for Eskom. This general context in which the MYPD decision was taken, is discussed below.

The liquidity problem

35 Eskom has been engaged in a series of High Court applications relating to NERSA's failure to give proper effect to the regulatory framework summarised above. Some of this litigation is described below. In the founding affidavit in each of these applications, Eskom has provided great factual detail on the liquidity crisis which it now faces, as a result of the history of under-recovery of tariffs at the hands of NERSA and its inability to make a reasonable return and, indeed, even cover its costs. Because of the urgent timeframe in which this application has been brought, I do not wish to burden this affidavit with a lengthy exposition of this background. Instead, I give a summary below, and annex, as **ESKOM3**, an extract from the founding affidavit in the most recent review application, which substantiates the position described below in more detail. I note that the allegations contained in annexure ESKOM3 and summarised below have never been meaningfully disputed by NERSA in the litigation in which they have made.

36 In short, the position facing Eskom now is the following:

36.1 Over the last two decades electricity prices in South Africa were maintained at artificially low levels by pricing electricity without

adequately accounting for the cost of generating, transmitting and distributing electricity.

36.2 Over the last ten years, the dire implications of this historical position began to be felt because Eskom has had to embark on an ambitious build program with the construction of 3 large-scale power stations and the upgrading of its transmission network. Eskom's balance sheet weakened over this period owing to prices, approved by NERSA, which did not cover its prudent and efficient costs.

36.3 The harm caused by NERSA's inadequate revenue determinations has been compounded by egregious delays on the part of NERSA in applying the RCA mechanism which, as pointed out above, is designed to remedy inadequate revenue determinations. NERSA only decided the RCA applications for the financial years 2014 to 2017 in June 2018, and the R32.69 billion which NERSA acknowledged was due to Eskom in respect of under-allowed revenue for those three financial years will not be fully recovered until the end of the 2022/23 financial year (and even that is now in doubt, as a result of the MYPD decision).

36.4 Moreover, NERSA conceded in 2020 that its decision to grant only R32.69 billion to Eskom in relation to these RCA applications was one which fell to be reviewed and set aside. So, it acknowledged that it had to reconsider Eskom's application for an additional R33.91 billion in respect of the 2014 to 2017 financial years. The full extent of the additional amounts found to be due to Eskom may only be capable of

being recovered after the 2022/23 financial year, 8 to 10 years after the relevant amounts ought to have been paid to Eskom in tariffs.

36.5 Eskom's revenue shortfall caused by a decade of inadequate NERSA revenue determinations that do not cover costs and return on capital has grown steadily since 2012 and exceeded R300 billion by 2018/19. With no other options open to Eskom, these shortfalls have had to be funded by raising additional debt.

36.6 As of 30 June 2021, Eskom's debt burden stood at R396 billion. Much of this debt is interlinked. So, default on one facility can trigger default on other facilities with full outstanding capital and interest amounts becoming immediately payable on demand by lenders.

36.7 Eskom's debt imperils the finances of the State because, as of 30 June 2021, R283 billion of Eskom debt is guaranteed by the South African State. Moreover, much of the South African national debt is itself interlinked. So a failure by the SA state to meet any demand made on it as guarantor of Eskom, would potentially trigger acceleration of the full liability of national debt, exposing the State to demands for immediate repayment of an amount of probably over one R1 trillion.

37 In this context, equity injections of R23 billion per annum were implemented by Government to stave off a crisis in Eskom's finances that presents a material risk to the finances of the Republic as a whole. In his two State of the Nation addresses of 7 February 2019 and 20 June 2019, President Ramaphosa explained the need for these equity injections in the following terms:

"Eskom is in crisis and the risks it poses to South Africa are great. It could severely damage our economic and social development ambitions. We need to take bold decisions and decisive action. The consequences may be painful, but they will be even more devastating if we delay."

"[Government accordingly decide that it] will support Eskom's balance sheet"

"The utility's financial position remains a matter of grave concern. With the current committed funding from government, outlined in the 2019 Budget, Eskom has sufficient cash to meet its obligations until the end of October 2019. For Eskom to default on its loans will cause a cross-default on its remaining debt and would have a huge impact on the already constrained fiscus. We will, therefore, have to address this matter by tabling a Special Appropriation Bill on an urgent basis to allocate a significant portion of the R230 billion fiscal support that Eskom will require over the next 10 years in the early years. This we must do because Eskom is too vital to our economy to be allowed to fail."

"It is imperative that we undertake these measures without delay to stabilise Eskom's finances, ensure security of electricity supply, and establish the basis for long-term sustainability."

38 Despite the gravity of the crisis facing Eskom, and as shown in the next sub-section below, NERSA misappropriated the government equity injections and Eskom was forced to litigate to get them back.

39 Eskom has already illustrated that for more than a decade its electricity price and thus its revenue has been too low to enable prudent and efficient operational costs to be covered, as well as to replenish or redeem the capital and pay the cost of the capital. In the current financial year of 2021/22 this revenue gap exceeds R40bn. The cumulative revenue gap, adjusted for company tax and interest, exceeded R360bn as at 31 March 2021. This is the main cause of Eskom's debt securities and borrowings of R404bn as at 31 March 2021.

40 Eskom's financial analysis and modelling, adjusted for quarter 1 projections as at 30 June 2021, indicates that it is likely to incur an income statement loss (pre-tax) of R7.7bn for the current financial year of 2021/22, resulting in a negative cash balance of approximately R24.7bn by 31 March 2022. This revenue gap and negative cash would otherwise result in a further increase in debt. However, given the difficulty in raising further debt it necessitated taxpayer-funded equity support by the shareholder i.e. the state. A total of R31.7bn state support for the year has been approved and has already been received and has improved the negative cash balance of R24.7bn to a positive balance of R7.1bn by 31 March 2022, based on quarter 1 projections as at 30 June 2021. This follows government equity support of R49bn during financial year 2019/20 and R56bn during financial year 2020/21.

41 The state support of R49bn for 2019/20, R56bn for 2020/21 and R31.7bn for 2021/22, in total R136.7bn and mainly necessitated by the understated regulated revenue, would already have severely stretched state resources, before factoring in the further demands on the fiscus owing to the COVID-19 pandemic and the economic response plan which was necessitated. Yet as described above it will

still leave Eskom in an extremely precarious situation by 31 March 2022 and with a very weak platform from which to enter the financial year of 2022/23. This in turn translates to a high-risk scenario for the sovereign, given its guarantees of Eskom's debt.

42 In this context, it is crucial to the finances of Eskom and the National Government that an appropriate valid Eskom tariff must be put in place for the 2022/23 tariff year. Neither Eskom, nor the South African State can afford the consequences of NERSA's proposed irrational truncated process that threatens both to compromise the substantive appropriateness of the tariff NERSA determines for 2022/23 and to place that tariff determination at risk of being set aside for procedural unfairness.

Litigation history

43 NERSA's long history of inadequate tariff determinations and misapplication of the various applicable methodologies has forced Eskom to bring multiple applications in terms of the Promotion of Administrative Justice Act 3 of 2000 ("**PAJA**") to remedy NERSA's unlawful conduct.

<u>The delays in the 2013/14 to 2016/17 RCA applications</u>

44 During 2016 and 2017, Eskom made three applications in respect of the RCA. Those decisions were finally announced in June 2018 and the reasons for the decisions given on 7 December 2018. Eskom took the view that NERSA's decisions ("**the 2015/17 RCA decisions**") were unlawful and irrational in various respects and, in February 2019, launched a review application in which it sought to set them aside. On 29 June 2020, this Court upheld the review and set aside

NERSA's 2015/17 RCA decisions, after NERSA belatedly conceded the merits of that application (it filed a notice of intention to oppose but not an answering affidavit and eventually conveyed an intention no longer to oppose the application).

45 In the founding affidavit in that application, Eskom explained in detail NERSA's unconscionable delay in deciding first the 2013/4 RCA application that Eskom had made and then the 2015/17 applications. In short, the position was the following:

45.1 On 10 November 2015, Eskom made its 2013/14 RCA application. NERSA made its decision in respect of that application on 1 March 2016. A private company, Borbet, took this decision on review and it was set aside by the High Court on 16 August 2016. This then led to a process of appeals, which culminated in NERSA's decision being reinstated (after the SCA overturned the High Court decision and the Constitutional Court thereafter refused Borbet's application for leave to appeal).

45.2 In the meantime, in May 2016, Eskom made its 2014/2015 RCA application. Shortly thereafter, Eskom made its 2015/16 RCA application (in July 2016). NERSA inexplicably took the view that it would not determine these applications, until the *Borbet* litigation was resolved. Eskom attempted on many occasions, set out in detail in the founding affidavit in the 2015/17 RCA review application, to explain to NERSA the highly prejudicial implications of its delay in determining those applications. NERSA was unmoved, and simply took no steps to process them. On 27 July 2017, Eskom submitted its 2016/17 RCA application.

Pursuant to its unilateral decision to down tools because of the *Borbet* litigation, NERSA failed to process that application too.

45.3 NERSA finally decided the 2015/17 RCA applications on 14 June 2018, almost a year after the Constitutional Court dismissed the *Borbet* application for leave to appeal on 16 August 2017.

46 As a result of these delays, Eskom sought, and was granted, declaratory relief in the 2015/17 RCA application to the effect that NERSA's delays in finalising that application were in breach of its constitutional duties.

The 2018/19 revenue application and judgment of Kollapen J

47 On 19 June 2017, Eskom submitted its revenue application for the 2018/19 financial year. On 15 December 2017, NERSA announced its decision in respect of the 2018/19 tariff application. Instead of the 19.9% increase that Eskom had sought, NERSA awarded a tariff increase of only 5.23%. Eskom launched a review application in respect of the decision on 29 May 2018.

48 Because of NERSA's dilatory conduct, both in respect of the 2018/19 tariff review and the 2015/17 RCA review, Eskom eventually applied successfully for the appointment of a case manager. Kollapen J was appointed to this role, and he heard the 2018/19 tariff review application in January 2020. Kollapen J handed down his decision in the review of the 2019 tariff determination on 10 March 2020. In his order, he upheld the review and granted leave to Eskom to make a supplementary revenue application. As shown below, NERSA's decision in that application is also now the subject of pending litigation.

The misappropriation of R69bn and the judgment of Kathree-Setiloane J

49 On 14 September 2018, Eskom applied to NERSA for the approval of electricity tariffs for the financial years of 2019/20, 2020/21 and 2021/22 ("**the 2019/2022 revenue application**").

50 On 9 October 2019, NERSA published its reasons for its decision in respect of Eskom's application. NERSA's reasons made clear that in determining the allowable revenue that Eskom's tariffs were calculated to realise, NERSA had impermissibly and irrationally deducted "equity injections" from Eskom's shareholder (ie, the state) of R23bn for each of the financial years covered by Eskom's application (amounting to R69bn in total).

51 As a result, Eskom instituted a judicial review of the 2019/2022 revenue decision. This Court upheld the review and set aside NERSA's 2019/2022 revenue decision. It also granted the substitutionary relief, designed to ensure that the three annual amounts of R23bn that NERSA had misappropriated would be returned to Eskom over the three financial years from 2021/22 to 2023/24 by adding these annual amounts to Eskom's allowable revenue over each of the three financial years. NERSA has appealed the decision to grant substitutionary relief, and that appeal is pending before the SCA (leave to that Court having been granted by Kathree-Setiloane J, who presided over Part B of the application). For present purposes we make the point that the only clear feature of the new tariff methodology that NERSA seeks to adopt is that it will do away with the notion of allowable revenue. But if NERSA does away with the concept of allowable revenue in relation to tariff determinations for the 2022/23 and 2023/24 years it will render meaningless the order handed down against it by Kathree-Setiloane J.

The Section 18 Application in Respect of the Order of Kathree-Setiloane J

52 Following, NERSA's application for leave to appeal against the order of Kathree-Setiloane J, Eskom brought an application in terms of section 18 of the Superior Courts Act to implement Kathree-Setiolane J's judgment pending NERSA's appeal.

53 That application was settled, and this Court made the attached court order, by agreement between the parties. The order is attached as "**ESKOM4**". For present purposes, we point out that the order merely regulated arrangements for the 2021/22 tariff year. The 2022/23 and 2023/24 tariff years still fall to be determined by the order of Kathree-Setiloane J unless NERSA's appeal is successful. As already pointed out, the course of action NERSA is apparently now embarking upon is calculated to render that order meaningless with effect from the end of the 2021/22 tariff year because NERSA plans to do away with the concept of allowable revenue. So NERSA's proposed course of conduct is calculated to deprive Eskom of the R46 billion rand in allowable revenue that this Court has ordered NERSA to provide for it in the 2022/23 and 2023/24 tariff years.

The supplementary tariff decision and 2018/9 RCA decision

54 As noted briefly above, in paragraph 3 of this Court's order in the review of the 2018/19 tariff decision, Kollapen J granted leave to Eskom to make a supplementary tariff application to enable Eskom to recover "any additional amounts which it has expended in the 2018/19 tariff year and to which it would have been entitled had the original tariff determination been made lawfully". On 13 July 2020, Eskom make a supplementary tariff application of R5.440bn

(including R1bn for carrying costs). On 28 January 2021, NERSA announced its decision in the supplementary tariff application ("**the supplementary tariff decision**"). In the supplementary tariff decision, NERSA disallowed R4.152bn of the revenue for which Eskom applied, awarding only R1.288bn.

55 After the end of the 2019 financial year, in August 2019, Eskom submitted an RCA application for R27bn. NERSA made an RCA balance decision of R13bn ("**the 2019 RCA decision**") on 14 May 2020 and provided Eskom with its reasons on 12 October 2019.

56 Eskom takes the view that both the 2019 RCA decision and the supplementary tariff decision are unlawful, irrational and unreasonable. This is, amongst other reasons, because they fail to take account of the judgments of this Court in the review applications in respect of the 2019 tariff decision and the 2015/17 RCA decisions. Eskom therefore launched a review in terms of PAJA to set aside the decisions. The rule 53 record has only recently been provided, and that review remains pending.

57 For present purposes, however, we point out that pursuant to the RCA decision, NERSA has accepted that it must provide Eskom with additional allowable revenue of R6.636 billion in the 2022/23 tariff year. I refer in this regard to NERSA's decision of 28 January 2021, on the liquidation of the RCA balance which is attached as "**ESKOM5**". Once again, I point out that the course of action NERSA is apparently now embarking upon to do away with the concept of allowable revenue is calculated to render that decision meaningless and thus to deprive Eskom of R6,636 billion to which it is entitled in the 2022/23 tariff year

THE SPECIFIC CONTEXT IN WHICH THE IRRATIONAL DECISION WAS MADE

58 I now proceed to describe the specific context in which the MYPD decision was taken, by describing the facts relevant to this urgent application.

The present application

59 The MYPD5 revenue application was submitted on 2 June 2021. As explained above, the application was prepared in terms of the principles established by the 2016 MYPDM because NERSA had not, by the time that Eskom commenced preparation of the application (and indeed, by the time it was submitted), published a new methodology. I do not wish to burden these papers by annexing the whole, extremely lengthy, application. The covering letter is "**ESKOM6**".

60 The application took approximately 13 months to be prepared. This excludes a long-lead requirement of the independent Regulatory Asset Base ("**RAB**") valuation exercise, as required by the MYPDM – which started approximately 10 months before the preparation of the application commenced. The reason why this had to be commenced so far in advance was because of the procurement process that needed to be finalised to allow for an independent valuation of the RAB.

61 During the 13-month process in which the application was prepared, two consultation processes, in accordance with legislative requirements, were undertaken.

61.1 The first was in terms of the ERA, in which Eskom was required to request the approval of the Department of Energy and Mineral Resources, the Department of Public Enterprises and National Treasury for Independent Power Producers to be included in the revenue application. In terms of

the applicable legislation, this required a consultation process of at least 40 days.

61.2 The second consultation was at a much later stage, when a draft revenue application had been developed. At that stage, a period of 40 days for consultation with the SALGA (ie the fourth respondent in this matter) and National Treasury was required in terms of section 42(2) of the MFMA. This was done from 16 March 2021.

62 As noted above, paragraph 1.3 of NERSA's MIRTA requires NERSA to return an application within 14 days, if it does not meet "applicable minimum requirements". In this case, NERSA did not invoke this power and did not, therefore, seek to return Eskom's application. Instead, as I show in the next subsection below, NERSA spent more than three and a half months without reverting to Eskom at all and then summarily rejected the application. The acceptance by NERSA of the application, and the failure to return it after two weeks, is inconsistent with the decision subsequently taken by NERSA to reject the application. If NERSA considered the application to be defective, then it ought to have referred it back to Eskom within two weeks of receipt.

The rejection of Eskom's application

63 On 22 September 2021, the Special Electricity Sub-Committee of NERSA ("**the ELS**") met. A transcript of the meeting is annexed as "**ESKOM7**". I cannot confirm the veracity of the transcript because I was not present at the meeting. However, I can confirm that it is an accurate reflection of the recording of the meeting by annexing, as I do here, a confirmatory affidavit of the typist who prepared the

transcript. NERSA is invited to indicate any disagreement with the contents of the transcript in its answering affidavit.

64 The following may be noted about the meeting:

64.1 The ELS has six members. Four members are needed for a quorum.

64.2 At the meeting on 22 September, four out of the six members on the ELS were present. In particular, those present were:

64.2.1 Mr Gumede (Chair);

64.2.2 Mr Mkhize;

64.2.3 Mr Sibanda;

64.2.4 Ms Mpungose; and

64.2.5 Mr Mokoena (who is not a member of the ELS but who is the chairman-designate of NERSA).

64.3 Two members were absent. They were:

64.3.1 Ms Maseti; and

64.3.2 Advocate Sithole.

64.4 There were three items on the agenda which are relevant for present purposes:

64.4.1 First, the Treatment of the MYPD5 revenue application submitted by Eskom on 2 June 2021. In this regard:

64.4.1.1 A proposal was made to recommend to the NERSA Board that Eskom's MYPD application made on 2 June 2021 should be rejected. It was proposed that Eskom should be requested to make a new application in accordance with a new methodology to be determined in due course.

64.4.1.2 After discussion, three out of the four members present (Gumede, Sibanda and Mpungose) voted in favour of this proposal.

64.4.2 Secondly, the consultation paper to determine a new price determination methodology ("**the new methodology consultation paper**") was discussed. All members present approved this document. In this regard, I should note:

64.4.2.1 The new methodology consultation paper is annexed here as "**ESKOM8**". It has since been published with a view to triggering the public consultation process which could ultimately lead to the adoption of the ideas reflected in the new methodology consultation paper as the new methodology applied by NERSA in deciding electricity prices.

64.4.2.2 Given the extremely late publication of this document, even NERSA appreciated that it was too

late to determine a final methodology for 2022/2023. It therefore indicated that the new methodology consultation paper would form the basis of an interim methodology, to apply for 2022/23 (see paragraph 2.1 of the new methodology consultation paper).

64.4.2.3 The new methodology consultation paper is not particularly clear, but the one feature of it that is clear is that it proposes to reject the current approach of using “allowable revenue” to determine Eskom tariffs. The premise of the proposed new approach appears to be that the entire pricing approach reflected in the current methodology (and its predecessors) needed to be replaced because there are “challenges in verifying the prudency of costs incurred to determine the revenue requirement” (at paragraph 4.1 of the discussion document).

64.4.3 Thirdly, the interim arrangement to apply to Eskom from FY 2022/23 was discussed. This is a reference to the question of what tariffs Eskom would be allowed to charge as an interim measure (while the new methodology is being finalised) and the legal mechanism in terms of which the tariffs should be determined. Unfortunately, this part of the meeting was held in

camera and so Eskom has no knowledge of what was discussed.

65 On 30 September 2021, there was a meeting of NERSA's Board. I annex the transcript as "**ESKOM9**". I repeat what I said above about the ELS meeting transcript in respect of the transcript of the meeting of NERSA and rely, again, on the confirmatory affidavit of the typist.

66 I wish to note the following about this meeting:

66.1 The NERSA Board has seven members. All were present at the meeting. These were:

66.1.1 Mr Sibanda (the acting chairman);

66.1.2 Mr Gumede;

66.1.3 Mr Mkhize;

66.1.4 Ms Mpungose;

66.1.5 Mr Mokoena (who has recently been nominated as NERSA Chair by Cabinet, and is awaiting confirmation of his qualifications);

66.1.6 Ms Maseti; and

66.1.7 Adv Sithole.

66.2 There were two items on the agenda relevant to the present application:

66.2.1 First, the treatment of the MYPD5 application submitted by Eskom on 2 June 2021. In this regard:

66.2.1.1 The meeting put two proposals to the vote. The first proposal was to reject Eskom's application and to require Eskom to reapply in terms of the principles reflected in "a new approach that is under consideration". This proposal was supported by three of the members present: ie, Gumede, Mpungose and Sibanda.

66.2.1.2 The second proposal was to consider Eskom's MYPD 5 application, as submitted in June 2021, but to make a decision for one year only (ie, 2022/2023), with a view to applying a new methodology for future financial years. This proposal was supported by Mokoena, Mkhize and Sithole.

66.2.1.3 Ms Maseti abstained from voting, which meant that there was a three-three split.

66.2.1.4 The acting chair then exercised his casting vote to vote in favour of the proposal to reject Eskom's application.

66.2.1.5 I point out that if Mr Mokoena's position as Chair designate had already been confirmed in advance of the meeting of 30 September 2021, the casting

vote would have ensured a decision to consider Eskom's MYPD 5 application but to make a decision for one year only (ie, 2022/2023) – this is effectively the relief that ESKOM seeks in Part A of this application.

66.3 The second item was the process to be followed to determine Eskom's tariffs for 2022/2023. Flowing from what had already been decided, NERSA decided to request Eskom to make a new application in terms of the "new approach that is under consideration".

67 On the same day – ie, 30 September 2021 – NERSA issued the media statement which I annex as "**ESKOM10**". It serves to confirm the decisions that I have described above.

The timetable for the determination of the new policy

68 I have already annexed the new methodology consultation paper as ESKOM8 above. It may be seen from the concluding section of that document that NERSA intends to adopt the following timetable:

68.1 The document implies that somewhere between 23 September 2021 and 22 October 2021 there would be a meeting of the ELS to recommend "publication of the applications and indicative timelines" to NERSA. It is not clear whether that meeting has taken place yet.

68.2 Between 25 and 29 October 2021 would be the closing date for stakeholder comments.

68.3 There would then be 6 days of public hearings conducted virtually, over Microsoft Teams, between 29 October 2021 and 5 November 2021. In the same document, on the same page, contrary indicative dates for public hearings to be held between 25 to 29 October 2021 are given.

68.4 There would then be 6 days in which the ELS would analyse the public comments and then draft the proposed reasons for the decision to adopt a particular methodology. This would be complete by 12 November 2021.

68.5 There would then be an extended ELS Workshop, between 12 November 2021 and 19 November 2021, during which the draft reasons for the decision would be discussed. Thereafter, there would need to be a decision by NERSA on the new methodology. Notably, the new methodology consultation paper does not give a deadline for this stage of the process. But it is likely to take many months, given that an entirely new methodology is proposed.

69 I return to discuss the relevance of this timetable below.

Changes to the EPP and ERA

70 Before concluding the discussion of the context in which the MYPD decision has been taken, it is necessary for me to mention briefly the prospect that the ERA and the EPP may be amended:

70.1 The Department of Energy and Mineral Resources has communicated at the National Economic Development and Labour Council (NEDLAC) that it is reviewing the ERA and EPP.

70.2 Indications are that significant changes in the structure of the industry will be proposed.

70.3 The intention was for both of these reviews to be initiated by Cabinet consideration at the end of September 2021. If initiated by September 2021, they would be finalised by the end of November 2021. However, as far as I am aware, the process has not been initiated yet.

71 I mention this development because NERSA will need to await legislative changes in relation to any impending restructuring of the industry before being able to implement revenue and tariff changes. As noted in the section on the regulatory framework above, the methodology is made in terms of the ERA and EPP and attempts to give effect to them. It follows that, if government intends to change the framework in which electricity pricing and similar issues are to be determined, the logical place to start, and indeed the only lawful place to start, is with the amendment of the ERA and EPP to give effect to the new approach. This would then guide the making of future subordinate legislation, methodologies and tariff determinations.

72 It is not lawful for NERSA to attempt to anticipate what changes may be made to the relevant provisions of the ERA and the EPP and to require a tariff application that will be determined before such changes come into effect to conform, not to the existing legal and regulatory framework but to the notional legal and regulatory framework that NERSA thinks may be in force if Parliament amends the ERA in a manner predicted by NERSA.

IRRATIONALITY OF NERSA'S APPROACH

73 Before discussing the requirements for interim relief (which also serves to set out Eskom's grounds of review), it is necessary to emphasise the gross irrationality of NERSA's approach. That will provide the necessary context for the discussion that follows. For the reasons given in this section, the MYPD decision is indefensible.

The timetable for the normal process

74 The implication of NERSA's decision is that a fresh application will need to be made by Eskom and lawfully decided by NERSA in time to be implemented by the 2022/2023 financial year. This is simply impossible. I do not make this statement lightly and I explain the impossibility below. If NERSA maintains that it is possible to take a lawful decision on a notional Eskom tariff application to be submitted in terms of a new notional methodology, I invite it to set out a timetable detailing each necessary stage in the process towards a lawful decision that can be taken in time to be tabled in Parliament before 15 March 2022.

75 I have already explained that the process leading up to the submission by Eskom of the MYPD5 application on 2 June 2021 took 13 months. This included the two statutory consultation processes, which must take a minimum combined period of three months.

76 Eskom has been preparing tariff applications under the MYPD methodology for over 15 years. So it is familiar with the methodology and knows what is required for a tariff application brought under the methodology. As stated above, Eskom

has never taken less than 9 months to prepare a tariff application in these familiar circumstances.

77 There is, as yet, no new methodology in place to govern the tariff application which Eskom is expected to bring to NERSA. So Eskom will have to wait for the new methodology to be put in place before it can commence work on its new tariff application.

78 When NERSA finally gets round to putting the new methodology in place, Eskom will have none of the benefit of its past experience in preparing the tariff application. So it would ordinarily require more than the historical nine months to prepare a brand new tariff application in terms of a previously unknown methodology. Assuming that Eskom could somehow compress its own internal tariff application formulation processes to shorter periods under the new methodology, it could not shorten the statutory consultation processes described above because those are imposed by law. On an extremely optimistic scenario, Eskom may be able to be in a position to submit a tariff application to NERSA under the notional new methodology in six months from the date on which the new methodology is published. But six months from today already takes us a month past the 15 March 2022 statutory deadline for 2022/23 tariffs to be tabled in Parliament.

79 Moreover the submission of a tariff application to NERSA is only the start of the NERSA decision making process. Time has to be factored in for NERSA to decide the application (including a public participation process). In previous discussions between National Treasury, Eskom and NERSA, NERSA gave two timeframes for the consideration by it of Eskom's applications: an ideal timeframe

and an accelerated timeframe. According to NERSA, the ideal timeframe would be 14 months and the accelerated timeframe would be 8 months. To the best of my knowledge, NERSA has never processed an Eskom tariff application from submission date to decision date in less than five months. By way of illustration, the MYPD4 revenue application for financial years 2020, 2021 and 2022 (in respect of which NERSA's decision has subsequently been set aside on review) was submitted by Eskom on 14 September 2018 and decided by NERSA on 7 March 2019 – indicating that NERSA took approximately six months to conduct public hearing and decide the application.

80 One would have thought that the time required for public consultation and decision making on a proposed tariff application under a new methodology would be longer than on the standard MYPDM applications of the last 15 years. In this regard, like Eskom, NERSA and the public will need additional time to familiarise themselves with the requirements of the new methodology and the intricacies of its application in relation to a tariff application. On a best case scenario, it would be fanciful to expect the consultation and decision making process on a new application to be capable of completion within less than three months.

81 There is accordingly no prospect of compressing the Eskom application process, the public consultation making process and the NERSA decision making process into a period of less than 9 months without violating the rights of Eskom and the public to procedurally fair and lawful administrative action. That takes matters four months past the 15 March 2022 statutory deadline for new tariffs to be tabled in Parliament.

A fresh application in terms of a non-existent methodology

82 Of course, the problems set out above do not describe the full extent of the untenable situation NERSA seeks to impose on Eskom and the public. This is because the aggregate nine month compressed period described above only commences when Eskom is able start work on the preparation of a fresh application. But it has an immutable obstacle preventing it from doing so: NERSA has still not determined the methodology with which that application must comply. At present, the process of putting a new methodology in place has not progressed beyond the issue of the new methodology consultation paper in September 2021 (which has been attached above as annexure "ESKOM8").

83 As shown above:

83.1 At all relevant times since 2006, NERSA has finalised its methodology in good time to enable Eskom to apply the current methodology to the relevant revenue application. This is what led Eskom to apply the 2016 MYPDM to the MYPD5 application – when it began preparing its application in May 2020, the 2016 MYPDM was the methodology in force.

83.2 In this unprecedented case, NERSA decided to abandon the extant methodology more than a year after Eskom had commenced preparing its application, six months after a draft application was copied to NERSA and almost four months after Eskom had submitted its application.

83.3 NERSA has now indicated that it will finalise the consultation process in regard to the new methodology consultation paper by 19 November 2021. It has not, however, undertaken to develop and consult on a draft

methodology before finalising the methodology by a particular date. It is likely to take many months.

83.4 For this reason, NERSA has seemingly come up with the idea of an interim arrangement, in terms of which, as reflected in the 30 September media statement, it seems to expect Eskom to begin now to prepare an interim application in terms of unspecified "principles of a new approach that is under consideration". It has given no guidance as to what those principles might be. It has simply informed Eskom by letter dated 5 October 2021 (attached as Annexure **"ESKOM11"**) that it

> *"Is requesting Eskom to submit a new application in line with the revised principles which are to be approved once the consultation and internal NERSA approval processes are finalized".*

84 So, as things stand, only four months before Eskom's 2022/23 tariffs have to be tabled in Parliament, Eskom has no way of knowing what methodology will govern its tariff application and therefore is unable to identify what issues to address in its application. This Kafkaesque state of affairs is manifestly inconsistent with the rule of law. It is also irrational – section 14(1)(e) of the ERA empowers NERSA to determine the methodology in terms of which tariffs are to be determined. Acting in terms of this provision, NERSA has applied different versions of the methodology since 2006 and has expected Eskom to make its tariff applications in terms of the principles in those methodologies. It is wholly irrational for NERSA now to expect Eskom to make a fresh application in terms of as yet undisclosed principles that may or may not inform a new methodology that may or may not be adopted at some stage in the future.

A fresh application in the face of proposed amendments to the ERA and EPP

85 I have explained above that, to the knowledge of NERSA, government is in the process of considering amendments to the ERA and EPP. It simply makes no sense for NERSA to embark on the formulation of a new methodology before that process is complete. The 2016 MYPDM (and its predecessors) is designed to, and does, give effect to the principles established by the ERA and EPP. If government intends to change those principles, logic and the hierarchy of legal instruments required by the rule of law demand that this should be done first, and then future methodologies determined under the amended principles. It is both unlawful and irrational – for NERSA to invert the proper order of enquiry by attempting to abandon the entire methodology, and formulate a new one, before the new principles apparently to be expressed in amendments to the ERA and the EPP have been given statutory force.

Summary – a wholly irrational and indefensible decision

86 On 11 October 2021, Mr Sibanda, the Acting Chair of NERSA, wrote to Eskom. His letter was in response to three letters sent by Eskom, on 17 August 2021, 16 September 2021 and 29 September 2021. I annex those letters, in a bundle, as "**ESKOM12**" to provide the necessary context. I then annex Mr Sibanda's letter as "**ESKOM13**". What I wish to emphasise about Mr Sibanda's letter is his statement in paragraph 7. In that paragraph, he referred to the ongoing litigation between Eskom and NERSA described above. He expressed the view that it was

necessary to “highlight one central cause of this, it has been the methodology, either deviation from it or improperly applying it [sic]”.

87 This statement reveals the true motives of NERSA in making the MYPD decision. As Mr Sibanda concedes in his letter, NERSA has repeatedly misapplied or deviated from the methodology, resulting in the constant need for Eskom to launch litigation to correct the errors. Instead of acting on this realisation, and resolving to do better in the future, NERSA appears to have decided that the only way to escape the implications of its ineptitude is to adopt a new methodology.

88 In and of itself, this would be an irrational way to approach a regulator’s historic incompetence. But taken together with everything that I have said above, the MYPD decision is clearly indefensible in every respect.

REQUIREMENTS FOR INTERIM RELIEF

89 I now proceed to explain why, in Eskom’s submission, it has made out a case for the relief sought in the notice of motion. This affidavit stands as the founding affidavit in both Parts A and B of this application. The section on Eskom’s prima facie right set out below is also, therefore, the basis for Eskom’s review application in Part B. Eskom reserves the right to supplement the grounds of review in Part B, after receiving the rule 53 record in due course.

Prima facie right

90 It is submitted that, on the basis of the discussion above, the MYPD decision is reviewable under PAJA on several bases.

Irrationality

91 I have explained above how the MYPD decision is irrational in several fundamental respects. The discussion above demonstrates why the MYPD decision stands to be reviewed in terms of the following provisions of PAJA:

91.1 Section 6(2)(e)(iii) of PAJA – the highly relevant considerations highlighted above (the impossibility of deciding the fresh application in sufficient time; the absence of a new methodology; the irrationality of changing the methodology when government is about to amend the ERA and EPP) were clearly not considered at all by NERSA while an irrelevant consideration (NERSA's repeated losses in litigation and its desire to avoid future embarrassment) appears to have been the sole basis for the MYPD decision.

91.2 Section 6(2)(f)(ii)(cc) – the MYPD decision bears no rational connection to all of the information available to NERSA at the time when it made its decision.

91.3 Section 6(2)(h) – the MYPD decision is wholly beyond the scope of the range of decisions that a reasonable decision-maker could take.

92 In addition to all of the above, the MYPD decision has all of the hallmarks of falling foul of the doctrine of procedural irrationality, acknowledged repeatedly by the Constitutional Court. This will be addressed further in argument.

Unlawfulness

93 NERSA intends for Eskom to make a 2022/23 revenue application before the methodology in terms of which the application has been made has been finalised. This is inimical to the rule of law, which requires an applicant to be apprised of the rules of the game before making an application.

94 The MYPD decision is therefore fundamentally at odds with section 1(c) of the Constitution, which enshrines the rule of law in South Africa. This renders the decision unlawful and unconstitutional as envisaged by section 6(2)(i) of PAJA.

Procedural unfairness

95 The MYPD decision is procedurally unfair in two respects, one backward looking and one forward looking.

96 Viewed retrospectively, the MYPD decision is procedurally unfair because Eskom had a legitimate expectation that the 2016 MYPDM would apply to its MYPD5 application. The reason why this expectation was legitimate has been described above. No other methodology was in force when Eskom made its application and it was given no advance warning that NERSA would abandon the 2016 MYPDM four months after Eskom submitted its application.

97 But the fresh process envisaged by NERSA also cannot be fair. NERSA expects Eskom to begin preparing a fresh application in circumstances where the new methodology will only be finalised at some indeterminate, but advanced, stage in the process. This is unfair because Eskom is entitled to know what rulebook applies before it makes its application.

98 The prospective procedural unfairness applies equally in relation to the rights of members of the public who will have to pay Eskom's tariffs. In its desire to force

through its notional new methodology, NERSA is apparently intent on compressing the 2022/23 tariff application process into a form and timetable that cannot be compatible with the fundamental rights of electricity consumers to procedural fairness.

99 The MYPD decision therefore falls to be set aside under section 6(2)(c) of PAJA.

Constructive contempt and Arbitrary Deprivation of Property

100 As shown above, Eskom has successfully reviewed and set aside several decisions of NERSA.

101 In the judgment of Kathree-Setiloane J, NERSA has been ordered to add R23 billion to Eskom's allowable revenue in each of the 2022/23 and 2023/24 tariff years.

102 Pursuant to the redetermination of the 2018 RCA application after Eskom's successful review of the original NERSA decision, NERSA has accepted that it must add R6.636 billion to Eskom's allowable revenue for the 2022/23 tariff year.

103 Eskom has pending review applications against other NERSA decisions which, if decided in its favour, will require additional allowable revenue to be provided to it in respect of past tariff years.

104 NERSA's position is now that all future tariff applications must be determined in accordance with an as yet unknown new methodology. Although the new methodology is as yet unknown, the central proposition of the new methodology consultation paper is that the new tariff methodology must not be based on allowable revenue.

105 If the concept of allowable revenue is done away with, Eskom will be deprived of

105.1 R23 billion that the order of Kathree-Setiloane J requires to be provided to it in allowable revenue in the 2022/23 tariff year;

105.2 R6.636 billion that the NERSA 2018 RCA decision requires to be provided to Eskom in allowable revenue in the 2022/23 tariff year;

105.3 R23 billion that the order of Kathree-Setiloane requires to be provided to it in allowable revenue in the 2023/24 tariff year; and

105.4 As yet undetermined additional amounts of allowable revenue that would have to be provided to it if its remaining pending review applications against NERSA are successful.

106 These consequences amount to the unconstitutional arbitrary deprivation from Eskom of property in the form of tens of billions of rands. In the case of the two amounts of R23 billion required to be provided in allowable revenue under the order of Kathree-Setiloane J, the unconstitutional deprivation of property is compounded by the fact that it frustrates an existing order of court against NERSA.

107 These present a further basis on which the MYPD decision falls to be set aside under section 6(2)(i) of PAJA.

<u>Summary – the MYPD decision cannot stand</u>

108 It follows from what I have said above that, even before NERSA has furnished the rule 53 record, a conclusive case has been made out that the MYPD decision

cannot stand. It follows that Eskom has made out, at the very least, a prima facie entitlement to the relief in Part B.

Balance of convenience and irreparable harm

109 When considering the balance of convenience and irreparable harm, the following issues must be taken into account:

109.1 First, it is no exaggeration to say that, for the reasons given above, there is a risk of catastrophic harm to Eskom and South Africa's finances if the Part A relief is not granted. Eskom's liquidity crisis has been explained above. It has, in particular, been demonstrated what the implication will be if there is no valid and appropriate tariff determined for the 2022/23 financial year. So, the prejudice to Eskom and the country will be immense, if the interim relief is not granted. There would be a zero revenue decision.

109.2 Second, the ERA requirement that a licensee **must** recover its costs and a fair return is unlikely to be met by the new approach reflected in the new methodology consultation paper.

109.3 Third, if interim relief is refused, NERSA's decision will do away with the concept of "allowable revenue" for the 2022/23 tariff year and thus deprive Eskom of approximately R30 billion rand in revenue that is due to it under NERSA's own decision and the order of Kathree-Setiloane J.

109.4 Fourth, NERSA appears intent (and least if the decisions of the meetings held on 22 and 30 September are to be taken at face value) to adopt some sort of process to arrive at a 2022/23 tariff determination on a

truncated timetable and without any predetermined rulebook. Any tariff determined in terms of that process will be liable to be set aside on review. For this reason and also because (as shown above) it is impossible for NERSA to make a proper tariff decision in the time left to it, it is necessary to proceed on the basis that, in terms of NERSA's proposed approach, no lawful tariff decision could possibly be made in time to be implemented in the 2022/23 financial year.

109.5 Finally, I repeat that three out of the six voting members at the 30 September meeting voted in favour of the very approach proposed by Eskom in this application; ie, that the 2022-23 tariff decision be decided in terms of the 2016 MYPDM and on Eskom's application made on 2 June 2021 and for Eskom to be left to make a fresh application for 2023-24 onwards under the new methodology. The only reason why the MYPD decision was taken is that Mr Sibanda effectively voted twice and used his position as acting Chair to push through the MYPD decision. In this regard, it should be noted that Cabinet has already nominated Mr Mokoena to serve as the new chair and it is simply a question of his credentials being validated before he is formally appointed. Mr Mokoena voted for the approach proposed by Eskom in this application; had his appointment been confirmed at the time of the meeting, the present application would not be necessary. NERSA can hardly be said to be prejudiced by following an approach that 50% of its members, and its chairman designate, favoured.

110 These considerations demonstrate that the balance of convenience overwhelmingly favours Eskom. Eskom, and the country, will suffer profound prejudice if the interim relief is not granted. NERSA, on the other hand, will suffer no prejudice at all, if it is. Furthermore, the harm that Eskom will suffer will be irreparable. On each occasion on which Eskom has been awarded insufficient revenue in the form of tariffs, its liquidity crisis has grown exponentially. On each occasion that Eskom has gone to court to challenge inadequate NERSA tariff decisions it has succeeded. However, success in Court does not solve the liquidity crisis – it only results in revenue that ought to have been made available years ago being paid back in the future without interest while Eskom has had to finance the intervening shortfall at steep interest rates. By way of illustration, Eskom is still feeling the effects of the NERSA's delay in deciding the 2015/17 RCA application and is still owed money from that process. Eskom's balance sheet cannot afford any further delays in its ability to earn appropriate revenue.

URGENCY

111 This application was launched as soon after the MYPD decision was taken as possible. It may be seen from the above that this is a substantial application, and it was necessary and reasonable for Eskom to take approximately two weeks to launch the application. It simply could not have been done sooner.

112 The more important issue, when it comes to urgency, is whether the truncation of the normal timetable in the Uniform Rules envisaged by the notice of motion in Part A is warranted. It is submitted that it is:

112.1 The notice of motion is premised on the assumption that, simultaneously with the launching of this application, an approach will be made to the

Deputy Judge President for the allocation of a hearing date for Part A. It will be explained to the DJP that a hearing date of no later than 1 December 2021 will be sought. This date indicates the last possible day on which the hearing can be held if one accepts that this Court will need approximately two weeks to render a judgment. That in itself is hardly ideal, but the urgency of this situation requires it. If one takes this as the starting point, then the relief sought, if granted, will take effect from 15 December 2021.

112.2 On the assumption that issues of confidentiality may be resolved in one day (because NERSA has had access to the application for several months now), this means that the application may be published on 17 December 2021.

112.3 On the assumption that four weeks is the most that may now be left for public comment, a deadline of 14 January 2022 may be fixed for submissions to be made by interested parties. That will then enable public hearings to be held between 17 and 21 January 2022.

112.4 This will then give NERSA more than a month to decide the application by 25 February 2022, leaving enough time for the decision to be implemented by the 15 March 2022 deadline envisaged by the MFMA.

113 It may be seen from this discussion that the timetable adopted in Part A is the only appropriate timetable in the circumstances. If the envisaged hearing date is any earlier (and the timetable for the exchange of papers accordingly further truncated), there would be insufficient time for this Court or the respondents to prepare adequately. If the timetable were to envisage a later hearing date, there

would be insufficient time for a proper process to be followed and for an appropriate decision to be taken in time for the 15 March 2022 deadline.

114 I am advised that, in order to be accommodated on the urgent roll, an application must justify, in proper detail, the extent of the truncation of the normal timeframes applicable to litigation. It is submitted that, in the discussion above, Eskom has discharged this burden.

CONCLUSION

115 Eskom reserves the right to supplement its submissions on both the merits and remedy, after it has been given access to the rule 53 record. In the meantime, it is submitted that a proper case has been made out for the MYPD decision to be set aside and for the relief sought in Part A of the notice of motion to be granted.

_____

DEPONENT – CALIB CASSIM

I HEREBY CERTIFY THAT THE DEPONENT HAS ACKNOWLEDGED THAT HE KNOWS AND UNDERSTANDS THE CONTENTS OF THIS AFFIDAVIT, WHICH WAS SIGNED AND SWORN BEFORE ME AT _____ ON THIS ____ DAY OF _____ 2021, THE REGULATIONS CONTAINED IN GOVERNMENT NOTICE NO. R1258 OF 21 JULY 1972, AS AMENDED, AND GOVERNMENT NOTICE NO. R1648 OF 19 AUGUST 1977, AS AMENDED, HAVING BEEN COMPLIED WITH.

_____

COMMISSIONER OF OATHS

NAME :

ADDRESS:

CAPACITY: