IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 2025/137620

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

04 DECEMBER 2025

....
SIGNATURE **DATE**

In the application of:

AFRIFORUM NPC	Applicant
and	
NATIONAL ENERGY REGULATOR OF SOUTH AFRICA	1st Respondent
SOUTH AFRICAN LOCAL GOVERNMENT ASSOCIATION	2nd Respondent
ESKOM HOLDINGS SOC LIMITED	3rd Respondent
AMAHLATHI LOCAL MUNICIPALITY	4th Respondent
BLOUBERG LOCAL MUNICIPALITY	5th Respondent
DIHLABENG LOCAL MUNICIPALITY	6th Respondent
DIPALESENG LOCAL MUNICIPALITY	7th Respondent
DITSOBOTLA LOCAL MUNICIPALITY	8th Respondent

eDUMBE LOCAL MUNICIPALITY	9th Respondent
KAMIESBERG LOCAL MUNICIPALITY	10th Respondent
MERAFONG CITY LOCAL MUNICIPALITY	11th Respondent
MOSSEL BAY LOCAL MUNICIPALITY	12th Respondent
CITY OF EKURHULENI LOCAL MUNICIPALITY	13th Respondent
CITY OF CAPE TOWN LOCAL MUNICIPALITY	14th Respondent
192 LOCAL MUNICIPALITIES	15th – 181th Respondents

JUDGMENT(2)

LABUSCHAGNE J

INTRODUCTION

[1] The applicant successfully challenged the 2025/2026 public participation process pertaining to the approval of municipal electricity tariff applications, and I made an order on 31 October 2025 providing for a return date on 18 November 2025 regarding a timeline for all parties concerned. This is the judgment following the hearing of 18 November 2025.

[2] The order I issued on 31 October 2025 reads:

"Having read the papers and having heard counsel

IT IS ORDERED

[1] That the forms, service and time periods provided for in the Uniform Rules of Court are dispensed with and the application is heard on the basis or urgency in terms of rule 6(12).

[2] NERSA's implementation of the public participation process of the notice and comment procedure elected by it by, as contemplated in section 4(1) and (3) of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA") utilised during the consideration and approval of the financial year 2025/2026 municipal tariff applications ("the approvals") is declared invalid in terms of section 172(1)(a) of the Constitution.

[3] In terms of section 172(1)(b) of the Constitution, and despite the declaration of invalidity set out in paragraph 2 above, the approvals are not set aside.

[4] A rule nisi is issued, returnable on 18 November 2025, calling on any respondent to show cause why the following order should not be made:

4.1 NERSA is directed to timeously comply with its obligations as public entity, and as envisaged in section 35(c)(ii) of the Municipal Finance Management Act, to timeously provide information and assistance to municipalities to enable municipalities to prepare their budgets in accordance with the processes set out in Chapter 4 of the MFMA. In pursuance of the aforesaid, the following directions are issued:

4.1.1 By 31 January of every year, NERSA must give municipal licensees written notice of bulk of wholesale tariffs at which municipal licensees shall purchase electricity from Eskom, or any other licensed generator, for the next financial year;

4.1.2 The notice referred to above shall in addition require municipal licensees to submit their electricity tariff applications by no later than 30 March of every year, failing which they run the risk of no tariff increase being approved;

4.1.3 NERSA is directed to comply with the provisions of section 4 of PAJA, and the regulations published in terms thereof, in respect of whichever procedure for public participation it chooses, in terms of section 4 of PAJA, for considering and approving municipal electricity tariff applications;

4.1.4 For purposes of meaningful public participation, NERSA is directed to publish every municipal electricity tariff application along with its cost of supply study for that particular financial year, in a manner that makes it accessible to the public, provided that, where a municipal electricity tariff application does not include a cost of supply study for the financial year, NERSA must specifically state the absence of such costs of supply study;

4.1.5 NERSA is directed to finalise the process of considering the municipal electricity tariff applications timeously

received and communicate its decisions on or before 05 May of every year;

4.1.6 NERSA must simultaneously also publish all of the respective decisions it reached on the municipal electricity tariff applications received; and

4.1.7 NERSA may not unilaterally extend or deviate from the aforesaid timeframes for applications timeously received without good cause and, if established, with prior notice to the parties affected.

4.2 Every municipality that submits an electricity tariff application must take all reasonable steps to ensure that the public participation process NERSA chooses regarding municipal tariff applications is brought to the attention of the public within its jurisdiction.

[5] AfriForum shall forthwith cause this order to be served:

5.1 On all participating respondents' attorneys of record, where such attorneys have been appointed, by email;

5.2 On the Chief Executive Officer of Eskom, by the sheriff; and

*5.3 On the municipalities in **Annexure FA2** to the notice of motion, other than those in paragraph 5.1 above, by email sent to the municipal managers.*

[6] NERSA is ordered to pay the costs of the application, including the costs consequent upon the employment of two advocates, on Scale C, where so employed."

[7] On the return day NERSA argued primarily that the imposition by the court of a timeline, or structural interdict, binding on it and the other parties constituted judicial overreach. None of the other parties took this point. The alternative contention was a refinement of the timeline that placed ESKOM on terms to file its Eskom Retail Tariffs Structural Adjustments("ERTSA") application timeously so that NERSA could in turn act timeously. Asked why NERSA could not do so itself, NERSA responded with a *non possumus* answer. It did not have the statutory power to do so. However, NERSA could in fact make it a licence condition of its licence with ESKOM requiring the filing of the ERTSA application by no later than 31 August of every year. Ordering NERSA to impose such a licence condition, would be judicial overreach.

[8] The timeline is merely aimed at streamlining and dovetailing statutory processes for the annual approval by NERSA of municipal electricity tariff applications and approval of municipal budgets. These processes are intertwined. Due to persistent failures of timeous and meaningful compliance by all involved, including NERSA, this requires deadlines to be imposed, but does not entail ordering NERSA on how discretionary powers are to be exercised.

IS THEISSUIN OF A TIMELINE JUDICIAL OVERREACH?

[9] The question is whether the court may, without judicial overreach, issue a structural interdict prescribing timelines for NERSA's municipal electricity-tariff process, in circumstances where NERSA's recurrent lateness has impaired municipalities' budget processes and the public's right to meaningful participation. Therefore, whether judicial deference to a specialist regulator precludes the court from directing NERSA, ESKOM and municipalities to act within reasonable timeframes, due to a persistent pattern of non-compliance, which results in constitutional harm, thus justifying relief under section 172(1)(b) of the Constitution.

LEGAL PRINCIPLES

Constitutional duties

[10] Section 237 of the Constitution,[1] underscores that all constitutional obligations must be performed diligently and without delay.[2] This provision, read with sections 33 and 195, impose a duty of timely administrative performance upon regulatory authorities such as NERSA.

[11] Section 35(c) of the Municipal Finance Management Act (MFMA),[3] requires national departments and public entities to "provide timely information and assistance to municipalities to enable them to plan and adopt their budgets". Municipal budgets must be tabled 90 days before the commencement of the

[1] Constitution of the Republic of South Africa, 1996.
[2] *Khumalo and Another v MEC for Education, KwaZulu-Natal* 2014 (5) SA 579 (CC).
[3] 56 of 2003.

financial year on 1 July; late tariff determinations by NERSA directly impede this obligation and frustrate the constitutional value of accountability.

[12] Section 15(1) of the Electricity Regulation Act,[4] mandates NERSA to regulate tariffs in a manner consistent with efficiency, transparency and equity. These statutory duties must be discharged within a constitutionally reasonable timeframe.

Judicial deference and the separation of powers

[13] The principle of judicial deference serves as a restraint upon the judiciary's interference with the policy-laden or technical choices of administrative agencies. As stated in Minister *of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd (Minister of Environmental Affairs and Tourism and Others)*,[5] "(j)udicial deference is particularly appropriate where the subject-matter of an administrative action is very technical or of a kind in which a court has no particular proficiency".

[14] The same judgment of the *Minister of Environmental Affairs and Tourism and Others* cautioned that deference does not entail abdication. It emphasised that "(j)udicial deference does not imply judicial timidity or an unreadiness to perform the judicial function. It simply manifests the recognition that the law itself places certain administrative actions in the hands of the executive, not the judiciary".[6]

[4] 4 of 2006.
[5] 2003 (6) SA 407 (SCA) at para 53.
[6] 2003 (6) SA 407 (SCA) at para 50.

[15] The Constitutional Court in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* (*Bato Star Fishing*),[7] reaffirmed this balance, as follows:

"The use of the word deference may give rise to a misunderstanding as to the true function of a review court. This can be avoided if it is realised that the need for Courts to treat decision-makers with appropriate deference or respect flows not from judicial courtesy or etiquette but form the fundamental principle of separation of powers itself".

[16] However, it is cognisant to note that the court in *Bato Star Fishing* further held:

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

[7] 2004 (4) SA 290 (CC) at para 46.

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

[17] In *Logbro Properties CC v Bedderson NO and Others,*[8] the court offered a nuanced definition of deference as:

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

[18] Judicial deference**,** within the doctrine of separation of powers, must also be understood in the light of the powers vested in the courts by the Constitution.[9] The Constitutional Court in *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency*

[8] 2003 (2) SA 460 (SCA) (18 October 2002) at para 21, the court quoted C Hoexter 'The Future of Judicial Review in South African Administrative Law' (2000) 117 *SALJ* 484 at 501-502, citing A Cockrell ' "Can You Paradigm?" – Another Perspective on the Public Law / Private Law Divide' 1993 Acta *Juridica* 227.
[9] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Limited and Another* 2015 (10) BCLR 1199 (CC) at para 45.

and Others(Allpay II),[10] took this further by linking deference directly to the remedial powers of courts. To this effect, Froneman J stated that:

"[42] There can be no doubt that the separation of powers attributes responsibility to the courts for ensuring that unconstitutional conduct is declared invalid and that constitutionally mandated remedies are afforded for violations of the Constitution. This means that the Court must provide effective relief for infringements of constitutional rights …

…

[45] Hence, the answer to the separation-of-powers argument lies in the express provisions of section 172(1) of the Constitution. The corrective principle embodied there allows correction to the extent of the constitutional inconsistency …"

[19] Finally, in *Kenton on Sea Ratepayers Association and others v Ndlambe Local Municipality and others*,[11] the court recognised, with approval, that "…Structural interdicts are particularly suited to remedying systemic failures or inadequate compliance with constitutional duties…' ".

[20] Accordingly, in the context of NERSA's chronic delays, judicial deference cannot translate into judicial passivity. The separation of powers doctrine requires respect for the administrative independence of specialist bodies, but it also demands judicial intervention when constitutional duties, such as

[10] [2014] ZACC 12; 2014 (4) SA 179 (CC); 2014 (6) BCLR 641 (CC) at paras 42 and 45.
[11] [2017] JOL 37639 (ECG) at para 99 citing LAWSA Volume 10(1).

facilitating timely and participatory tariff determinations, are consistently not timeously performed.

PAST CONDUCT OF NERSA

[21] The City of Cape Town has demonstrated before the court that NERSA has repeatedly communicated its municipal tariff approvals late:

i. 2022/23 - decision 29 June 2022

ii. 2023/24 - decision 28 June 2023

iii. 2024/25 - decision 3 July 2024

iv. 2025/26 - decision 1 July 2025.

This chronology shows a systemic pattern of delay spanning four consecutive financial years.

[22] The delays violate section 35 of the MFMA and undermine municipalities' ability to finalise budgets and facilitate the minimum 30 days public-participation period mandated by Regulation 18(2) of the Regulations on Fair Administrative Procedure.[12]

[12] *GN* R1022, *G* 23674 31 July 2002.

[23] NERSA attributes the delays to municipalities' late submissions and to Eskom's ERTSA tariff-application cycle. However, municipalities, through SALGA and the City of Cape Town, have accepted the concept or idea of a proposed annual timetable submission, which will bind them.

[24] Counsel for NERSA invokes *Bato Star Fishing* to contend that the court should exercise judicial deference and argues that NERSA must balance competing interests; therefore, an equilibrium needs to be struck between a range of competing interests or considerations, which NERSA is best equipped to determine as the expert. These competing interests may appear to be between municipalities' late submissions and Eskom's annual ERTSA process. However, NERSA has not demonstrated how Eskom's submission would necessitate deviation from its own statutory duties or cause the persistent delay. Its pleadings rather reflect that the delays stem from municipalities' late submissions. I accept nevertheless that it requires five months to assess the ERTSA application once ESKOM has submitted it.

[25] NERSA, as the regulator, bears both statutory power and a constitutional duty to enforce compliance and reject late applications when necessary to preserve the integrity of the budgeting process and the public participation timeline. By repeatedly accommodating non-compliance, NERSA has blurred accountability and penalised municipalities that meet deadlines. Judicial deference cannot be extended to condone regulatory inaction.

[26] Also, NERSA relies on *Bato Star Fishing* to argue that "often, a power will identify a goal to be achieved but will not dictate which route should be

followed to achieve that goal."[13] The reliance is misplaced as the principle presupposes that the goal in question is, in fact, being pursued and progressively realised. However, for four consecutive years, NERSA has failed to achieve its own statutory and constitutional goal, namely, to ensure the timeous approval of municipal tariffs and to facilitate meaningful public participation in the process (with a minimum of 30 days for public comments). In these circumstances, judicial deference cannot shield continued non-performance; rather, it militates in favour of a structural interdict to secure compliance and restore constitutional accountability.

[27] Furthermore, while tariff regulation entails technical expertise, the relief sought does not prescribe the substance of NERSA's determinations, but only the procedural discipline required to uphold constitutional rights to participation, accountability, and efficient governance. It thus regulates process within a statutory timeframe, not outcome. Therefore, this will not be an instance where the court usurps the functions of a specialist body.

[28] As the Constitutional Court explained in *Doctors for Life International v Speaker of the National Assembly*,[14] participatory democracy imposes an affirmative obligation on public institutions to facilitate reasonable opportunities for public involvement. NERSA's chronic tardiness has rendered such participation illusory.

[13] See n.7 at para 48.
[14] 2006 (6) SA 416 (CC) at paras 101 and 125.

[29] *Earthlife Africa Johannesburg and Another v Minister of Energy and Others*,[15] illustrates that when executive agencies disregard their transparency and consultation duties in energy governance, judicial intervention is not only permissible but also constitutionally required.

[30] NERSA's pattern of disregard for the rights of the public and municipalities is not unsystematic, sporadic, once-off, or intermittent; rather, it appears systemic and continuous. Judicial deference must yield when a specialist body's constitutionally non-compliant conduct becomes systemic. In particular, where NERSA's inaction has threatened constitutional values of public participation and the municipalities' budget process, the separation of powers cannot be invoked as a shield for inefficiency. A specialist body's technical expertise is not a shield that protects it from compliance with constitutional and statutory obligations.

[31] The persistent failure to meet deadlines has become a structural deficiency, eroding public confidence and impairing the rule of law. As noted by Froneman J in *AllPay II,* courts must provide effective relief for infringements of constitutional rights.

[32] A structural interdict prescribing reasonable procedural timelines within a statutory time frame, with flexibility for exceptional circumstances,ie requiring

[15] 2017 (5) SA 227 (WCC) (26 April 2017).

an application to the court, strikes the proper constitutional balance between judicial deference and accountability.

[33] Given NERSA's consistent failure to finalise municipal tariffs timeously and undermining public participation and municipal budgeting, a structural interdict under section 172(1)(b) of the Constitution would constitute a fair and equitable remedy. Such relief would enforce accountability without dictating the substantive outcome of NERSA's regulatory functions.

REFINEMENTS TO THE TIMELINE

[34] NERSA submitted in the alternative that refinements are required to ensure and enhance timeous compliance. It requires ESKOM to submit its ERTSA application by 31 August every year. That is fair. It is the first of a series of dominoes that must be in place for the statutory processes of tariff approval by NERSA and budget approval by municipalities to take place within statutory timelines. If NERSA does not impose this date as a licence condition, then ESKOM must be directed to comply by the court.

[35] The second proposal was that, in light of the need for a NERSA decision on the ERTSA to be published by 31 January of every year, municipalities should file their applications for tariff approvals by 28 February and NERSA should make known its decision on such applications by the end of May. Dealing with the first date, the filing date for municipal tariff applications, the rule nisi envisages a filing date of 30 March. Cape Town suggests that 20 March is

more appropriate and that six weeks for NERSA to consider the applications would be fair.

[36] As municipal budget adjustments need to be published at least 30 days before the commencement of the financial year on 1 July of every year, the NERSA suggestion of its decision being published by the end of May leaves insufficient time for adjusting municipal budgets based on the NERSA approved tariff by the end of May.

[37] I accept the proposal by the City of Cape Town in this regard as it strikes a balance between the tariff approval and budget approval processes.

[38] As these are the only date changes that were mooted, the order will adjust the dates accordingly.

[39] The rule nisi did not expressly provide for deviations from the timeline to be sanctioned by the court. As section 4 of PAJA gives NERSA a discretion to deviate in respect of public participation processes, the order should not detract from this statutory power. However, as the exercise by NERSA of its discretionary powers has a knock on effect on the budget approval process, and may impact parties adversely, a balance of the interests of all concerned is required to forge a just and equitable remedy. The Court is not empowered to legislate, but imposing judicial oversight over deviations from the time lines will provide a forum to balance competing interests in a manner that is just and equitable. In the premises the following order is made:

ORDER

[40] The following order is made final:

1. Eskom is directed to file its annual ERTSA application on or before 31 August to enable NERSA to comply with par 2.1 below.

2. NERSA is directed to timeously comply with its obligations as public entity, and as envisaged in section 35(c)(ii) of the Municipal Finance Management Act, to timeously provide information and assistance to municipalities to enable municipalities to prepare their budgets in accordance with the processes set out in Chapter 4 of the MFMA. In pursuance of the aforesaid, the following directions are issued:

   2.1 By 31 January of every year, NERSA must give municipal licensees written notice of bulk or wholesale tariffs at which municipal licensees shall purchase electricity from Eskom, or any other licensed generator, for the next financial year;

   2.2 The notice referred to above shall in addition require municipal licensees to submit their electricity tariff applications by no later than 20 March of every year, failing which they run the risk of no tariff increase being approved;

   2.3 NERSA is directed to comply with the provisions of section 4 of PAJA, and the regulations published in terms thereof, in respect of whichever procedure for public participation it chooses, in

terms of section 4 of PAJA, for considering and approving municipal electricity tariff applications;

2.4 For purposes of meaningful public participation, NERSA is directed to publish every municipal electricity tariff application along with its cost of supply study for that particular financial year, in a manner that makes it accessible to the public, provided that, where a municipal electricity tariff application does not include a cost of supply study for the financial year, NERSA must specifically state the absence of such costs of supply study;

2.5 NERSA is directed to finalise the process of considering the municipal electricity tariff applications timeously received and communicate its decisions on or before 05 May of every year;

2.6 NERSA must simultaneously also publish all of the respective decisions it reached on the municipal electricity tariff applications received; and

2.7 NERSA may not unilaterally extend, or deviate from, the aforesaid timeframes for municipal electricity tariff applications timeously received without good cause shown to the satisfaction of the court.

3. Every municipality that submits an electricity tariff application must take all reasonable steps to ensure that the public participation process NERSA chooses regarding municipal tariff applications is brought to the attention of the public within its jurisdiction.

4. ESKOM and each municipality is directed to comply timeously with the aforesaid timeline; provided that, on good cause shown to the satisfaction of the court, the court may sanction a deviation on such terms as it deems meet.

5. AfriForum shall forthwith cause this order to be served:

   5.1 On all participating respondents' attorneys of record, where such attorneys have been appointed, by email;

   5.2 On the Chief Executive Officer of Eskom, by the sheriff; and

   5.3 On the municipalities in **Annexure FA2** to the notice of motion, other than those in paragraph 5.1 above, by email sent to the municipal managers.

6. NERSA is ordered to pay the costs of the application, including the costs consequent upon the employment of two advocates, on Scale C, where so employed.

LABUSCHAGNE J
JUDGE OF THE HIGH COURT

APPEARANCES:

COUNSEL FOR APPLICANT: ADV BOTHA SC
ADV HUGO

INSTRUCTED BY : HURTER SPIES ATTORNEYS

CONSEL FOR RESPONDENTS : ADV SHANGISA SC

ADV CHARLIE

INSTRUCTED BY DM 5 INC. Illovo

ADV MAKHAJANE

COJ

: ADV SIBISI

INSTRUCTED BY : SSM ATTORNEYS

SALGA : ADV TSATSAWANE SC

: ADV NKABINDE

INSTRUCTED BY : HM CHAANE ATTORNEYS

CAPE TOWN : ADV BREITENBACH SC

: ADV REYNOLDS

INSTRUCTED BY : TIMOTHY AND TIMOTHY ATTORNEYS

DATE JUDGEMENT DELIVERED: 04 DECEMBER 2025