

South African Local Government Association

# External Legal Advisory Services Bulletin

Third Edition - December 2023



## From the Editorial Team

### Dear municipal legal practitioners

Welcome to the December 2023 edition of our SALGA External Legal Advisory Services Legal Bulletin, which is packed full of useful information about legal cases that have had an impact on South Africa's local government sector.

Since its inception in April of 2022, the bulletin has gone from strength to strength, helping more local government practitioners, legal managers and legal professionals in the local sector understand the complex legal issues affecting municipalities and their communities.

Our audience has been extremely receptive to this publication and the insights it shares about past, present, and emerging legal issues in local government, and we are determined to continuously improve and stay relevant.

We must also draw your attention to our recently held Third Annual National Municipal Legal Practitioners Forum held in December 2023. The forum focused on the amendment to the Attorneys Act with specific reference to Section 3(4) that relates to the procurement of legal services within the State which will include Local government.

The Solicitor General from the Department of Justice and Constitutional Development (DoJ & CD) Mr F Pandelani set out the purpose of the amendments and the implementation process of the six policies that have been introduced by the Amendments.

Confirm that the forum was a great success as practitioners could firsthand from the Solicitor General (SG) be advised as to the purpose of the amendments and directly engage the SG on the practical implementation of the legislation and its impact on the sector. All attendees were requested to direct any further comments and questions for the office of the SG to SALGA for attendance by the Office of the SG.

The content contained in this bulletin comprises of highlights and summaries of recent and significant case law affecting SALGA's member municipalities:

- SALGA VS Eskom Holding SOC Ltd, NERSA & OTHERS
- SALGA VS Eskom Holdings & Others (The Declaratory order on the Reticulation of electricity in municipalities)
- South African Municipal Workers Union (SAMWU) vs CoGTA & SALGA (Labour Court)
- National Union of Metalworkers of South Africa v Trenstar (Pty) Ltd (CCT 105/22) [2023] ZACC 11 (18 April 2023)
- Solidarity obo Oosthuizen v South African Police Service and Others

- Samancor Chrome Ltd (Western Chrome Mines) v Willemse and Others (JR312/2020) [2023] ZALCJHB 150 (29 May 2023)
- Marasi v Petroleum Oil and Gas Corporation of South Africa (C219/2020) [2023] ZALCCT 34 (27 June 2023)

We hope you enjoy reading this bulletin and we look forward to your feedback so we can continuously improve this along the way. Share your input at: [communication@salga.org.za](mailto:communication@salga.org.za) alternatively send inputs directly to **Mr George Thomas: SALGA Senior Manager External Legal Advisory Services** at: [gthomas@salga.org.za](mailto:gthomas@salga.org.za).

Best wishes to you and your families for a restful holiday and a happy new year from all of us at SALGA's Legal Unit.

*Editorial Team*

**Editorial Team**

## Table of Content

SALGA VS Eskom Holding SOC Ltd ,NERSA & OTHERS .....	05
SALGA VS Eskom Holdings & Others ( The Decaleretory order on the Reticulation of electricity in municipalities) .....	07
National Union of Metalworkers of South Africa v Trenstar (Pty) Ltd (CCT 105/22) [2023] ZACC 11 (18 April 2023).....	10
Solidarity obo Oosthuizen v South African Police Service and Others.....	10
Samancor Chrome Ltd (Western Chrome Mines) v Willemse and Others (JR312/2020) [2023] ZALCJHB 150 (29 May 2023) .....	11
Marasi v Petroleum Oil and Gas Corporation of South Africa (C219/2020) [2023] ZALCCT 34 (27 June 2023) .....	11

## **SALGA VS Eskom Holding SOC Ltd , NERSA & OTHERS**

**Review of the National Energy Regulator of South Africa's (NERSA) decision to approve a 36% increase with regards to electricity tariffs.**

*Review of an administration decision*

**Matter:** South-African Local Government Association / National Energy Regulator of South- Africa & Others

**Case Number:** 022464/2023

**Court:** High Court of the Republic of South Africa, Gauteng Division, Pretoria

**Judges:** Nyathi J, Collins, J, Davis J.

**Judgement date:** 1 December 2023

**Key Words:** Local Government – Review Application – Provision of electricity – ESKOM tariff hike – 15(1)(a) of the Electricity Regulations Act - Leave to Appeal.

### **Subject Matter Classification:**

Administrative decision – review of decision by Regulator to approve a request for an electricity tariff increase – failure of NERSA to consider the “*efficiency and prudence principle*”.

### **Mini Case Summary:**

On 12 January 2023, NERSA took a decision to allow ESKOM to increase its electricity tariffs by 18.65% for the 2023/2024 financial year and by a further 12.75% for the 2024/2025 financial year.

Based on NERSA's decision, SALGA instituted an application seeking to review NERSA's decision. The empowering provision relevant to the NERSA decision is section 15(1)(a), read with section 14 of the Electricity Regulation Act, No 4 of 2006. The empowering statute requires NERSA to determine a tariff for an efficient licensee to recover costs and a reasonable mark-up. SALGA contended that relevant considerations affecting the efficiency, prudence and costs of ESKOM were not taken into account and that the considerations underpinning the review application were either relevant to determining the costs base of ESKOM or its revenue forecasts.

SALGA's grounds of review were that NERSA failed to conduct a prudence and/or efficiency assessment that takes into account corruption, fraud, and wasteful expenditure at Eskom prior to making the impugned decision and that NERSA's decision was irrational in that it failed to, amongst

others, consider the impact of the decision on those who purchase electricity from municipalities. The application was opposed by NERSA and ESKOM whilst the Minister of Finance although not opposing the merits of SALGA's application, elected instead to propose a just and equitable remedy.

The Democratic Alliance instituted a separate review application (under case number: 003615/2023) which was ultimately consolidated for hearing purposes with the application launched by SALGA. The matter was heard before the Full Bench (consisting of the Honourable Judges Davis, Collins and Nyathi) from 11 to 15 September 2023.

In terms of Section 15(1)(a) of the Electricity Regulations Act, NERSA is required to establish, based on ESKOM's submission, a cost-of-service amount. Furthermore, NERSA is obliged to assess a licensee's, such as Eskom, efficiency and financial prudence prior to approving any such increase. Thus, any aspect which negatively affects a licensee's operation efficiency or its financial prudence is a necessary and relevant consideration to be taken into account by NERSA before allowing such tariff increase.

The tariffs to be charged by ESKOM are determined by NERSA in terms of a methodology known as the Multi-Year Price Determination (MYPDM).

SALGA argued that NERSA failed to conduct a prudence and/or efficiency assessment that takes into account corruption, fraud and wasteful expenditure at ESKOM, prior to making the impugned decision. Adjunct to that, SALGA contended that NERSA failed to conduct a full prudence review and audit [ investigation] into the corruption, fraud and state capture at the national power utility, as contemplated by NERSA as far back as 2019. Accordingly, NERSA failed to consider relevant considerations and its decision was consequently irrational. In addition, SALGA argued that NERSA failed to consider amongst others, the impact of the decision on those who purchase electricity from municipalities, the contention that ESKOM is overstuffed, whether diesel purchased by ESKOM is subject to a wholesale discount and the impact of loadshedding on ESKOM's sales forecast.

NERSA and ESKOM argued that corruption, fraud and wasteful expenditure are not relevant at the revenue/tariff determination stage (the stage at which the impugned decision was taken) because that stage involves a forward looking or forecasting process concerned with only projected costs. NERSA and ESKOM further contended that the Regulatory Clearing Account (RCA) stage is where corruption and wasteful expenditure are to be taken into account.

The Minister of Finance submitted that should the Honourable Court find irregularities with NERSA's decision, the court should not set the decision aside but rather order that in its next round of decisions NERSA should take into account any factors that it failed to properly consider in making the impugned decisions

On 01 December 2023, the Full Bench delivered a judgment in terms of which it dismissed SALGA and the Democratic Alliance's review application.

On 27 December 2023, SALGA instituted an Application for Leave to Appeal to the Supreme Court of Appeal, the whole of the judgement and the order made and granted by the Full Bench. The Application for Leave to Appeal was set down for hearing before the Full Bench, on 7 March 2024, with NERSA, ESKOM and the Minister of Finance having opposed SALGA's Application for Leave to Appeal on the basis that there existed no merits in SALGA contentions and thus that there were prospects in another court coming to a different conclusion.

Judgement in the Application for Leave to Appeal was reserved.

---

### ***SALGA VS Eskom Holdings & Others ( The Declaratory order on the Reticulation of electricity in municipalities)***

#### **Municipalities have the exclusive authority to reticulate electricity within their jurisdictions**

**Matter:** South-African Local Government Association / Eskom and 13 Others

**Case Number:** 46214/2021

**Court:** High Court of the Republic of South Africa, Gauteng Division, Pretoria

**Judges:** Motha AJ

**Judgement date:** 02 December 2022

**Key Words:** Local Government – Declarator – Distribution and supply of electricity – section 76 of the Local Government Systems Act – Joinder Application

#### **Subject Matter Classification:**

Declarator – municipalities have the exclusive executive authority to reticulate electricity within their jurisdictions and the provision and supply of electricity by Eskom in municipal jurisdictions requires a service delivery agreement in terms of section 76 of the Local Government Systems act 32 of 2000



## Mini Case Summary:

The 1996 Constitution introduced the concept of a wall-to-wall local government system, which provided that municipalities be established for the whole of the territory of South Africa. The wall-to-wall government system meant that there could no longer be a distinction between municipal and non-municipal areas, with the result that former non-municipal areas that Eskom had been distributing electricity to, now fell within one of the established municipalities boundaries.

This resulted in a situation where both Eskom and some municipalities were distributing electricity within the same jurisdictions.

SALGA has since 2014 been in discussions with Eskom for the formulation of a Service Delivery Agreement (SDA) template which would give municipalities, on account of their executive authority, the power to enter into an SDA with Eskom wherein it would be entitled to reticulate electricity within their respective jurisdictions, even those jurisdictions under the control of Eskom. Such SDA was envisioned under Section 76(b)(iii) of the Municipal Systems Act in terms of which a municipality may provide a municipal service in its area or a part of its area entering into an SDA with an organ of state.

In 2021, SALGA issued an application in the Pretoria High Court seeking a declarator that:

- *Municipalities have exclusive executive authority to reticulate electricity within their jurisdictions;*
- *The distribution and supply of electricity by Eskom in municipal jurisdictions amounts to reticulation of electricity and the provision of a municipal service which requires a Service Delivery Agreement to be entered into between Eskom and the respective municipalities, in terms of Section 76 of the Local Government Systems Act 32 of 2000;*
- *On account of their executive authority to reticulate electricity, and their right to govern the affairs of their communities, municipalities have the power to request Eskom to enter into Service Delivery Agreements within the municipalities in order for the former to reticulate electricity within Eskom's jurisdiction.*

Eskom, the Minister of Public Enterprises, Sasol, Damplaas Kragbron (Pty) Ltd and AECI (the Respondents) have since opposed the matter, with NERSA electing to abide by the court's final ruling.

Following such opposition, SALGA's legal representatives became inundated with requests from Eskom's direct clients, indicating their intentions to be joined to these proceedings. These requests were initially declined due to the fact that these organisations had no direct and substantial interest in the proceedings.

SALGA then approached the office of the Deputy Judge President of the Pretoria High Court requesting his intervention, given the surmounting interests and unnecessary applications its



legal representatives had been receiving. Following a meeting with the Deputy Judge President it was agreed that only 2 such applications would be considered and heard, that being The Minerals Council of South Africa and the Energy Intensive Users Group (joinder applications), during which time, the Respondents to the main application were directed to file their respective answering affidavits.

The joinder applications were heard in October 2022 and by December 2022, the Pretoria High Court handed down an order dismissing the joinder applications and awarding costs in favour of SALGA, thereby confirming the stance that such entities have no legal standing in this matter between SALGA and Eskom.

Unsatisfied by the initial ruling as handed down by the Pretoria High Court, the Minerals Council of South Africa and Energy Intensive Users Group then filed an application for Leave to Appeal the judgment of December 2022, on the basis that the court had erred in its judgment that they and other direct clients of Eskom have no legal standing in this matter. At time in which the Application for Leave to Appeal was filed, SALGA's legal representatives then received a further joinder application from Bertie Van Zyl (Pty) Ltd also requesting that the court allow it to intervene in these proceedings due to the fact that it is a consumer of electricity.

On 28 March 2023, the application for leave to appeal was heard in the Pretoria High Court. The Court having again dismissed such applications for lack of direct and substantial interest in the main application involving SALGA and Eskom, with legal costs granted in favour of SALGA once again.

In April 2023, the Minerals Council of South Africa and Energy Intensive Users Group petitioned the Supreme Court of Appeal for leave to appeal the Pretoria High Court's decision, citing that the Pretoria High Court erred in its two (2) findings and requesting leave to argue that such court orders be overturned.

In August and September 2023, the Supreme Court of Appeal handed down judgment setting aside the two (2) court orders of the Pretoria High Court and directing that a Full Bench of the Pretoria High Court hear the respective Applications for Leave to Appeal.

Both the Minerals Council of South Africa and Energy Intensive Users Group have filed their Appeal Applications to the Full Bench of the Pretoria High Court, and the matter is now awaiting the constitution of a Full Bench panel to be appointed by the Deputy Judge President of the Pretoria High Court given that the date for the hearing of the appeal has now been set for 28 May 2025.

In a separate application, Bertie Van Zyl (Pty) Ltd is persisting with its application to be joined to the main application, despite the fact that the Minerals Council of South Africa and Energy Intensive Users Group joinder applications are awaiting a hearing before the Full Bench of the same division.

They referred their request for a hearing to the Office of the Deputy Judge President who directed that their hearing be heard as a separate application to that of the Minerals Council of South Africa and Energy Intensive Users Group with the date for hearing set for 13 May 2024.

Given these current applications as brought by the Minerals Council of South Africa, Energy Intensive Users Group and Bertie Van Zyl (Pty) Ltd, the main application between SALGA and the Respondents continues to remain suspended pending the outcome of the respective joinder application hearings.

---

### **National Union of Metalworkers of South Africa v Trenstar (Pty) Ltd (CCT 105/22) [2023] ZACC 11 (18 April 2023)**

The use of replacement labour during a lock-out “in response to a strike” under section 76(1) (b) of the LRA, is confined to the duration of the strike. A “strike” is a state of affairs occurring with a particular purpose - it either exists or it does not. A “strike” ends when there is no longer a concerted withdrawal of labour. If employees suspend a strike, there is no longer a strike as defined.

**CITATION: [2023] 7 BLLR 609 (CC)**

---

### **Solidarity obo Oosthuizen v South African Police Service and Others**

The Court ordered the SAP to pay an employee who was sexually harassed, R300 000 compensation and to apologise in writing to her within one week of the court order for the indignity she suffered. For the employer to escape being vicariously liable, it must show (i) that it took reasonable precaution to prevent and promptly correct the inimical behaviour, and (ii) that the employee unreasonably failed to take advantage of the employer’s preventive or corrective opportunities. To achieve that, the employer would be expected to transcend the confines of superficial compliance and deal with historical ethos and systems that may have created a toxic environment which is susceptible to racial harassment.

**CITATION: [2023] 3 BLLR 258 (LC)**

**Samancor Chrome Ltd (Western Chrome Mines) v Willemse and Others (JR3 12/2020) [2023] ZALCJHB 150 (29 May 2023)**

Where an employer's alcohol policy makes testing positive a disciplinary offence, the onus is on the employer to establish that there is alcohol in the employee's blood stream. A breathalyzer test is capable of producing false positive results in certain circumstances (eg when the person tested had not eaten for more than eight hours, or eaten any substance with a yeast content) and the more reliable test is that of a blood sample tested in laboratory conditions.

Unreported. [\*Judgment attached\*](#)

---

**Marasi v Petroleum Oil and Gas Corporation of South Africa (C219/2020) [2023] ZALCCT 34 (27 June 2023)**

This case explores the overlap between culture and discrimination, with the employee prescribed cannabis as part of a traditional healer training programme.

Unreported. [\*Judgment attached\*](#)

**Telephone:** 012 369 8000 | **Fax:** 012 369 8001

**Physical Address:**

Menlyn Corporate Park, Block B  
175 Corobay Avenue, Cnr Garsfontein and Corobay,  
Waterkloof Glen ext II, PRETORIA 0001

**Postal Address:** PO Box 2094 PRETORIA 0001



**Facebook:**  
South African  
Local Government  
Association (SALGA)



**Twitter:**  
@SALGA\_Gov



**YouTube:**  
SALGA TV



**Instagram:**  
salga.org.za

[www.salga.org.za](http://www.salga.org.za)

