

SOUTH AFRICA / JUDGMENT

Glencore Operations South Africa (Pty) Ltd and Others v National Energy Regulator of South Africa and Others (2023-074616)

[2023] ZAGPJHC 1305 (10 November 2023)

[2023] ZAGPJHC 1305**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Senyatsi

CASE / FILE NUMBER

2023-074616

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**IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG LOCAL
DIVISION, JOHANNESBURG**

CASE NO:

2023-074616
NOT REPORTABLE
NOT OF INTEREST TO
OTHER JUDGES
NOT REVISED
10.11.23

In the matter between:

GLENCORE
OPERATIONS SOUTH AFRICA (PTY) LTD
FIRST
APPLICANT
CONSOLIDATED
METALLURGICAL
INDUSTRIES
(PTY) LTD
SECOND
APPLICANT
MERAPE
FERROCHROME & MINING
(PTY)
LTD
THIRD
APPLICANT

MERAFAE
RESOURCES LIMITED
FOURTH
APPLICANT
NATIONAL
UNION OF METAL WORKERS
OF
SOUTH AFRICA
AMICUS
CURIAE
And
NATIONAL
ENERGY REGULATOR
OF
SOUTH AFRICA
FIRST
RESPONDENT
RUSTENBURG
LOCAL MUNICIPALITY
SECOND
RESPONDENT
ESKOM
HOLDINGS SOC LIMITED
THIRD
RESPONDENT
MINISTER
OF FINANCE
FOURTH
RESPONDENT
MINISTER
OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS
FIFTH
RESPONDENT
MINISTER
OF TRADE AND INDUSTRY
SIXTH
RESPONDENT

JUDGMENT

SENYATSI, J

Introduction

- [1] The first to the fourth applicants are participants in an unincorporated Pooling and Sharing Venture known as the Glencore Merafe Pooling and Sharing Venture (“the PSV”). The first respondent is National Energy Regulator of South Africa (“NERSA”). The second respondent is the Rustenburg Local Municipality (“the RLM”). The third respondent is Eskom SOC

Limited (“Eskom”) who is the generator, distributor and supplier of electricity in South Africa and with the exception of new entrants in the green energy sector, has a monopoly in electricity generation.

- [2] The National Union of Metal Workers of South Africa (“NUMSA”) applied to join the proceedings as a friend of the court and was so admitted as its application was not opposed. Its interest in the matter lies in the fact that should NERSA approve the 6.1% surcharge as demanded by the RLM, this will have an adverse impact on NUMSA’s members who may lose employment because of the potential closure of the Rustenburg Smelter. They support the PSV’s application for the long-term negotiated pricing agreement (“NPA”) which would include the Rustenburg Smelter.
- [3] The PSV challenges the refusal by NERSA to process a long-term NPA made by Eskom to NERSA on behalf of the PSV in compliance with the Interim Framework for Long-Term Negotiated Pricing Agreements (“the Framework”).
- [4] The PSV seeks relief directing NERSA to deal with, consider and assess the application purportedly comprising of various documentation as submitted by Eskom without excluding the Rustenburg Smelter from the NPA. Alternatively, that Eskom is directed to re-submit the purported application on the basis that Eskom makes it clear that despite the RLM being the municipal licensee, the RLM infrastructure is not utilised to supply electricity to the Rustenburg Smelter; Eskom is not acting as an agent of RLM and that RLM bears no cost in respect of the supply of electricity to the Rustenburg Smelter. Further and alternatively, that Eskom is directed to re-submit the purported NPA application, on the basis that Eskom, as opposed to RLM, is reflected as the supplier of electricity to the PSV’s Rustenburg Smelter.
- [5] The PSV also seeks relief declaring that the RLM may not impose or seek to impose a surcharge on the price of electricity used by the Rustenburg Smelter and setting aside the resolutions adopted by the RLM’s municipal council on 30 November 2022 and 10 May 2023.
- [6] Alternatively, the PSV also seeks a declarator that section 4 of the RLM’s Electricity Supply By-Law, published in the North West Extraordinary Provincial Gazette No. 5992, dated 19 February 2004 is unlawful and set aside.
- [7] The RLM seeks to have the main application by the PSV dismissed and has issued a counter-application seeking relief that any NPA application by the PSV in terms of the Framework in respect of the Rustenburg Smelter is to be addressed to RLM in terms of clause 12.2 of the Framework.

Background

- [8] The NPA application was submitted to NERSA in terms of the submissions first made to it by Eskom pursuant to the six-year negotiated pricing agreements (“the NPA”) for each of the PSV ferrochrome smelters, including the Rustenburg Smelter, owned by Glencore Operations South Africa (Pty) Ltd, the first applicant in this matter. The assessment, so

contends the applicants, should also be made in terms of the letter of support delivered by the RLM on 23 June 2023, but dated 22 June 2023 and the representations of the PSV dated 30 June 2023 in relation to the submissions to NERSA.

- [9] Six respondents were cited in this application insofar as they may have an interest in the application, but no relief is sought against most of them. NERSA and the RLM are the only respondents opposing the relief sought.
- [10] The PSV, in collaboration with the RLM and Eskom made submissions to NERSA. Involved in the PSV were five ferrochrome smelters spread across South Africa in terms of which the long-term NPA was to be considered by NERSA as the energy regulator in the Republic. The PSV sought to jointly, through Eskom and the RLM in respect of the Rustenburg Smelter, apply to NERSA to consider the new pricing related to their smelters, which if approved would run over a six-year cycle. The PSV sought and obtained the support to the joint submission of its NPA through Eskom. The support for the NPA related to the Rustenburg Smelter was conditional on NERSA imposing a 6.1% surcharge related to the invoiced amount for electricity consumption.
- [11] After considering the submissions lodged on the NPA application by the PSV through Eskom, NERSA was initially of the view that it was not entitled to approve the 6.1% surcharge related to the Rustenburg Smelter because the RLM was not supplying the electricity to the smelter, and that it had no jurisdiction to be an arbiter on the surcharge not related to the supply of electricity. After consultation with Eskom and the RLM, NERSA changed its stance and decided to exclude the Rustenburg Smelter from the long-term NPA on the ground that the Rustenburg Smelter and the RLM had not agreed on the surcharge. It further stated that because the RLM was the only licensee of electricity supply and that Eskom did not have a licence to supply electricity to the Rustenburg Smelter, it was justified in excluding the Rustenburg Smelter from the NPA pending the agreement with the RLM on the surcharge.
- [12] The Rustenburg Smelter was built in 1990. The RLM and the previous owners of the smelter concluded an agreement the gist of which was that the smelter would be charged the same rate of electricity as the RLM was charged by Eskom but other services like water, sewerage and rates and taxes would be at the RLM prevailing rates. The incentive was intended to stimulate more job creation by sustainable smelter operations within the jurisdiction of the RLM. The charges for the electricity have been invoiced in accordance with the agreement since then.
- [13] The electricity to the smelter was initially supplied by the RLM through two substations, namely "Smelter" and "Industries". The substations were intended to power six furnaces. Over the period, there were challenges related to the sustainable supply and eventually, the Smelter Substation 33KVA was taken over by Eskom and the Rustenburg Smelter. The latter invested heavily on the substation itself by upgrading it whilst Eskom supplied the distribution equipment such as heavy voltage pylons and related equipment. The Industries substation was proving to be unreliable and this led to the closure of furnace six with the

obvious job losses related to the closure. The parties agreed that Industries would be kept available to be used on an as and when required basis. Eskom continued to invoice the RLM and the smelter was charged in accordance with the long standing agreement.

- [14] The RLM was not satisfied that it was not charging more than the Eskom rates, after which negotiations were instituted. The negotiations started as far back as 2014 regarding the surcharge to be added on the Eskom rate. The parties could not reach consensus because at that time, the RLM was no longer supplying any electricity to the smelter. The RLM wanted to ensure that before it became a Metro, the surcharge was in place and as a result, was considering a 10% surcharge. This was resisted by the Rustenburg Smelter on the basis that the surcharge was not justified as no electricity was being provided to it by the RLM. The RLM contended during the negotiations that it needed to recoup the losses allegedly suffered in last ten years due to the agreement to charge the Eskom rate. This led to a stalemate and NERSA was requested in 2019 to mediate and resolve the impasse in terms of section 30 of the Electricity Regulation Act.[1] NERSA failed to resolve the issue and the exclusion by NERSA of the PSV's Rustenburg Smelter from the joint long-term NPA due to the unresolved surcharge dispute is what led to this litigation in the sense that NERSA was of the view that the PSV joint application, through Eskom, should exclude the Rustenburg Smelter from the long-term NPA pending the resolution of the surcharge with the RLM.
- [15] The RLM contended that the PSV went behind its back by submitting the application for long-term NPA through Eskom to its exclusion on the Rustenburg Smelter. It contended that the letter of support given to the PSV on the Rustenburg Smelter was a conditional support that the 6.1% surcharge on the amount invoiced by Eskom was imposed on the price to be determined. The surcharge, so argued the RLM, was lawful as it was the supplier of electricity to the Rustenburg Smelter through its Industries substation. Furthermore, the RLM argued that it mattered not whether the power that was supplied through the Industries substation was used or not. Its basis was that because the power was at the Rustenburg Smelter's disposal to be used as and when required, it was entitled to the surcharge and that the legacy agreement regarding the price of energy at cost to the Rustenburg Smelter caused the RLM losses in the last decade that needed to be recouped through the surcharge.
- [16] Eskom did not oppose the application by the PSV, which provides all the infrastructure and is a de facto supplier of electricity to the Rustenburg Smelter. It is however, common cause that the electricity consumed by the PSV at the Rustenburg Smelter is charged to it by the RLM on a pass-through basis, that is, without adding any markup due to the historical contracts between the PSV's predecessor and the RLM.

- [17] Presently both Eskom and the RLM supply electricity to the PSV at the Rustenburg Smelter in the sense that Eskom provides the de facto supply and the RLM raises the charges. The RLM believes that as the licensee for the supply of electricity, it should be entitled to impose a surcharge at 6.1% to the amount of invoice from Eskom. The PSV argues that this would cause the Rustenburg Smelter to be economically unviable with the potential result of the closure of operations.
- [18] As already stated, the PSV pertains to five ferrochrome smelting complexes, namely –
- a. the Boshhoek Smelter, located in the North-West Province;
 - b. the Wonderkop Smelter, located in the North-West Province;
 - c. the Lion Smelter, located in the Limpopo Province;
 - d. the Lydenburg Smelter, located in the Mpumalanga Province; and
 - e. the Rustenburg Smelter.
- [19] From the list above, three of the PSV smelters are in the North-West Province and all three are located in the RLM jurisdictional area. The other two smelters, namely Boshhoek and Wonderkop obtain and have always obtained their electricity directly from Eskom and this is not contentious between the parties.
- [20] I have already stated that it is not denied that the five furnaces of the PSV at the Rustenburg Smelter obtain electricity from the Smelter substation and no infrastructure of the RLM is used in respect thereof.

Contentions

- [21] At the hearing of the matter, Mr Maleka SC, on behalf of the RLM, submitted that it was RLM which was the licensed supplier of electricity to the smelter and therefore it was entitled to have the 6.1.% surcharge imposed. He contended that the RLM did not require to be the one supplying the electricity but that its entitlement to the 6.1.% surcharge was justified because the RLM was the only licensee to supply electricity to the smelter.
- [22] Ms Baloyi SC representing NERSA, contended that NERSA's stance that the RLM was not a supplier of electricity to the Rustenburg Smelter was based on the affidavit by the applicants following this litigation and that it was incorrect because the RLM was the licensee supplier of electricity. She argued that NERSA was correct in changing its stance after consulting with Eskom and the RLM. Consequently, so she contended, NERSA was correct in excluding the Rustenburg Smelter from the NPA pending the resolution of the settlement of the 6.1% surcharge.

The issue for

determination

[23] The first issue for determination in casu is whether NERSA, as the regulator of energy pricing in the Republic was entitled to change its stance to exclude the application before it for the long-term NPA brought on behalf of all the smelters of the PSV to the exclusion of the Rustenburg Smelter. The second issue is whether the application submitted through Eskom by the PSV was to the exclusion of the RLM despite the latter's alleged conditional support of the application by Eskom jointly with the PSV.

[24] Administrative action which materially and adversely affects rights or legitimate expectations of any person must be procedurally fair. A fair administrative procedure depends on the circumstances of each case. In order to give effect to a right, an administrator to procedurally fair administrative action must give the person affected by the decision adequate notice of the nature and purpose of the proposed administrative action; reasonable opportunity to make representations; a clear statement of the administrative action; adequate notice of any right of review or internal appeal.[2]

[25] Our courts have held that the precise ambit of administrative action has always been hard to define, "[t]he cumbersome definition of that term in PAJA

serves not so much to attribute meaning to the term as to limit its meaning by surrounding it with a palisade of qualifications".[3] Whether particular conduct constitutes administrative action depends primarily on the nature of the power that is being exercised rather than the identity of the person who does so.[4] In this case, I am satisfied that both NERSA and the RLM exercised an administrative decision and that PAJA applies.

[26] I now move on to consider the purpose of the long-term NPA. The NPA as introduced by the Framework seeks to achieve globally competitive electricity pricing to make ferrochrome smelters viable in the Republic. This is a deliberate attempt by Government to create an enabling environment for smelters to thrive and retain jobs that are scarce. Government realised the need to ensure that jobs are not lost as a result of the closure of local smelters due to the rampant increase of the cost of electricity which has increased by 722% over a decade. The incentive was important because absent it, smelters would face closure given the continuous increase in electricity charges as a significant input cost to the ferrochrome smelter operations and the ferrochrome would be exported as a raw material with the obvious job losses in the value chain. South Africa has one of the biggest ferrochrome ore reserves and 50% of it is found in the North West province. Consequently, for the benefit of the NPA an incentive to the smelters in the Republic was introduced in 2008 by the Department of Minerals and Energy through the Interim Framework for Long-Term Negotiated Pricing Agreement issued in terms of the Electricity Pricing Policy ("EPP") of the South African Electricity Supply Industry ("the Framework").The incentive streamlines the cost of electricity was concluded, to ensure sustained smelter operations.

[27] As its preamble, the Framework states –

“Pricing regulation is the responsibility of NERSA in terms of applicable legislation and energy policy, mainly the Electricity Pricing Policy (EPP) of the Department of Energy Department (now Department of Mineral Resources and Energy (DMRE)).

The EPP empowers NERSA to deviate from previously approved licensee tariffs by way of negotiated pricing agreements (NPAs). The EPP further stipulates that the DMRE must develop a transparent NPA application and approval process (i.e. a framework) which will set out the criteria against which NERSA evaluates, approves and monitors NPAs.

The framework for interim long-term NPAs will address NPAs with a duration six (6) years with the option to extend, and will be applicable while the final framework for long-term NPAs is finalised.”

The Framework has not yet been finalised and therefore the interim one still applies.

- [28] NERSA is empowered to regulate gas, petroleum and electricity.[5] Every decision of NERSA must be in writing and consistent with the Constitution.[6] Any person may institute proceedings in the High Court for the judicial review of administrative action by the Energy Regulator in accordance with the PAJA and any person affected by a decision of the Energy Regulator sitting as a tribunal may appeal such decision in the High Court. The procedure applicable to an appeal from a decision of a magistrate’s court in a civil matter applies, with the changes required by the context, to an appeal contemplated in paragraph (a) of ERA.[7]
- [29] NERSA regulates the supply of electricity in South Africa. Its objects include the achievement of efficient, effective, sustainable, and orderly operation of the electricity supply infrastructure in South Africa through ERA.[8] It facilitates a fair balance between the interests of customers, end-users, licensees, investors in the electricity supply and the public. In terms of ERA, NERSA must consider applications and issue licences for the operation of generation, transmission, or distribution facilities; and may mediate disputes between generators, transmitters, distributors, customers, or end-users and undertake investigations and inquiries into the activities of any licensee.[9]
- [30] Where a municipality claims payment from a resident or ratepayer for services, it is only entitled to payment for services that it has rendered and customer or ratepayer is only obliged to pay the municipality for services that have been rendered. There is no obligation on the resident, customer or ratepayer to pay the municipality for services that have not been rendered.[10]
- [31] The Constitution provides that that local government has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution.[11] Local government has executive authority and the right to administer amongst others, water, sewerage and electricity reticulation.[12] Local government may make and administer by-laws for the effective administration of matters which it has the right to administer,

including electricity reticulation.[13]

[32] The Electricity Regulation Act permits local government to exercise power in respect of supply of electricity and must, amongst others –

- a. provide basic reticulation services free of charge, or at a minimum cost, to certain classes of end-users.
 - b. ensure sustainable reticulation services through effective and efficient management;
 - c. must report to National Treasury and NERSA; and
 - d. keep separate financial statements, including your balance sheet of its reticulation business.
- [14]

[33] In *Joseph v City of Johannesburg*[15] the Constitutional Court held that –

“The provision of basic municipal services is a cardinal function, if not the most important function, of every municipal government. The central mandate of local government is to develop a service delivery capacity in order to meet the basic needs of all inhabitants of South Africa, irrespective of whether or not they have a contractual relationship with the relevant public service provider.”[16]

It is not controversial that the dictum by the court generally applies where it is uncontested that the local government does indeed provide the electricity to the customer.

Considerations and

reasons

[34] There is no doubt that the electricity to the Smelter Substation of the PSV is not supplied by the RLM. The Rustenburg Smelter, which currently operates five furnaces has been supplied electricity out of this substation by Eskom for a long time. Eskom has not purported that it is the agent of the RLM and of course the RLM has no difficulty with the arrangement and has in fact never, as a licensee, challenged Eskom. The arrangement was necessary due to the lack of capacity on the part of RLM to provide sustainable and reliable electricity to the substation. It has not been denied that the equipment used in the Smelter Substation belongs to Eskom and the PSV. It would be inappropriate under the circumstances to permit the 6.1% surcharge of the charges from Eskom through the RLM generated by the Smelter Substation.

[35] Industries Substation of the PSV appears to be more of a grey area. This was a 33KVA capacity substation and the equipment belongs to the RLM. The 33KVA was rated down to 11KVA by the PSV. This was to enable the substation to supply power to the auxiliaries and office blocks of the PSV. The substation does not power any of the furnaces. On the contrary, furnace six used to be powered from it and due to the substation being unreliable, the furnace had to be permanently decommissioned. I have no evidence of the job losses that followed the closure, but it can be reasonably inferred that the closure caused job losses.

The RLM's persistence on the 6.1% surcharge seems to be based on this substation. The RLM concedes that although no electricity has been used through the substation since 2019, it is entitled to charge the surcharge because it is a licensed supplier of electricity. The RLM contends that since the electricity is made available to be used as and when required, it is entitled to the 6.1% surcharge. I have not had the benefit of evidence on the amount of power that was consumed through the Industries Substation. The RLM's contention that it is entitled to charge 6.1% is chiefly based on this substation. This contention goes against what was previously agreed to when the smelter was built and finds no justification if regard is had to the fact that no evidence on consumption has been proffered.

- [36] The PSV produces approximately half of South Africa's ferrochrome output and this means that it is a significant consumer of electricity. As the electricity which the PSV's smelters use currently is charged at Eskom Megaflex tariff ("the Eskom rate"), it is becoming increasingly unsustainable for the South African ferrochrome smelters. It is for this reason, in my considered view, that the Rustenburg Smelter should not be excluded from the joint NPA application.
- [37] The dispute between the PSV and the RLM has been brewing for far too long. NERSA was seized with the opportunity to resolve the impasse between the PSV and the RLM on the disputed 6.1 % when a mediation was requested. It is not clear why NERSA failed to intervene. In my view, its failure to intervene and investigate the impasse did not assist the parties in the surcharge challenge. Had NERSA applied itself properly to the matter, it would have mediated and resolved the matter. I say so because in terms of Electricity Regulation Act, it is entitled to act as a mediator if so requested and can, in appropriate circumstances, appoint a suitable person to act as a mediator.[17]
- [38] It is unacceptable that only when seized with Eskom's application incorporating five smelters from the PSV, NERSA decided to exclude the Rustenburg Smelter. This is so especially when regard is had to the fact that NERSA had sent a letter confirming that the RLM was not supplying electricity to the Rustenburg Smelter only to change its stance after meeting both the RLM and Eskom. It is also unacceptable for the RLM, having supported the joint application for the NPA through Eskom and having done so in writing, to change its position and contend that the PSV excluded it from the joint application. This assertion has no factual basis if regard is had to the letter of support from the RLM in relation to the NPA. In my view, it is irrelevant whether the 6.1% surcharge had been agreed to or not. This was also an opportunity for NERSA to intervene and resolve the impasse if regard is had that no electricity is supplied to the Rustenburg Smelter. It is the law that municipalities are not permitted to charge for services they have not rendered to the rate payers. If NERSA were to investigate and test whether as a fact, the RLM supplied power to the Rustenburg Smelter, chances are it will not agree to have an additional surcharge imposed on the smelter. If it finds that there may well be a case for a nominal surcharge based on the RLM's contention that the electricity at the Industries Substation is available on an as required basis, the possibility exists that the rate of 6.1% may be found to be excessive, but whichever way one

looks at it, NERSA as a regulator can intervene to resolve the matter.

- [39] From the papers and annexures, it is clear that the RLM insists on the 6.1% because it feels it has lost out on revenue due to the

historical arrangement with the Rustenburg Smelter. The basis of this contention ignores the fact that three other smelters within its jurisdiction are supplied with electricity directly by Eskom. The RLM makes no issue with this fact.

- [40] It is also evident in my view that the insistence on the surcharge is motivated not by the fact that the RLM is expending any money for the provision of electricity, but by the fact that the RLM may become a Metro in future. This is evident from the letter of support by RLM. Consequently, for the RLM to resolve and agree to give a conditional support of the joint NPA for the imposition of a 6.1% surcharge was inappropriate when regard is had to the fact that the RLM and the PSV had not reached an agreement on the surcharge. Insisting on the surcharge on the basis that the RLM is the licensee of electricity even though it does not supply the Rustenburg Smelter and passing a resolution to give effect thereto, knowing that no agreement had been reached, is grossly abusive of its power as an organ of State. As I understand it, contracts are not negotiated through the proverbial barrelhead. To pass a council resolution to give effect to what has not been agreed to, given that the dispute whether or not the electricity is supplied to the PSV's Rustenburg Smelter, is simply untenable.

- [41] The contention by NERSA that it will not be able to process the long-term NPA application because the PSV and the RLM have agreed on the 6.1% surcharge, is therefore not justified. This approach does not help resolve the dispute and the protracted delay in processing the joint NPA application by NERSA on the ground the application for NPA by the PSV should be made through the RLM, is really debating about substance over form which will not assist the PSV to, jointly with all its smelters, finalise the NPA.

- [42] The concerns raised by NUMSA are justified. Not only has one of the six furnaces been closed at Rustenburg Smelter, but the Lydenburg Smelter is under care and maintenance with drastic consequences for its members with the job losses suffered. Both NERSA and the RLM should act as responsible citizens to ensure that the negotiations on the long-term NPA in its current form are finalised. It is also unreasonable at this late stage for Eskom to change its stance and suggest that as the RLM is the only licensed electricity supplier, the PSV joint application should be made through the RLM insofar as it relates to the Rustenburg Smelter. This clearly defeats the purpose for the speedy conclusion to the long-term NPA application before NERSA.

- [43] The contention by NERSA therefore to exclude the Rustenburg Smelter as part of the five smelters included in the Eskom application, is without merit. If there are losses suffered by the RLM which need to be recouped, certainly, the RLM can consider its options. It follows in my view that the applicants have made out a case.

Order

[44] Accordingly, the following order is made –

1. The first respondent is directed to deal with, consider and assess, in terms of the Interim Framework for Long-Term Negotiated Pricing

Agreements issues in terms of the Electricity Pricing Policy (EPP) of the South African Electricity Supply Industry (2008) (“the

Framework”), the Glencore-Merafe Pooling & Sharing Venture’s ferrochrome smelter, situated in Rustenburg (“the

Rustenburg Smelter”), as part of the application by the third respondent together with the second respondent submitted in terms of:

- a. the submissions made to the first respondent by the third respondent in relation to the six-year negotiated pricing agreements for each of the Glencore-Merafe Pooling & Sharing Venture five ferrochrome smelters, including the Rustenburg Smelter;
- b. the letter delivered by the second respondent on 26 June 2023 (but dated 22 June 2023) in relation to the aforesaid submissions; and
- c. the Glencore-Merafe Pooling & Sharing Venture’s representations dated 30 June 2023 and in particular whether the second respondent is entitled to charge any surcharge or not and, if so, at what rate.

(“The NPA application”)

2. The first respondent is to supplement the consultation paper in respect of the NPA application published by it on 14 July 2023, or publish a new consultation paper in respect of the Rustenburg Smelter, within 7 court days of the grant of this order, and set out in such consultation paper dates which will allow sufficient time for the first respondent to allow public consultation and conclude its assessment of the NPA application and publish its decision in respect of the NPA application by 15 December 2023.
3. It is declared that the second respondent may not impose or seek the imposition of a surcharge on the price of electricity used by the Rustenburg Smelter.
4. Resolution 4 taken by the second respondent’s council on 30 November 2022 in respect of the Rustenburg Smelter in terms of Item 258 is set aside.
5. Resolution 8 of the second respondent’s council taken on 10 May 2023 in respect of the Rustenburg Smelter in terms of Item 112 is set aside.
6. The first and second respondents are ordered to pay the costs of this application, including the costs of two counsel, jointly and

severally, the one paying the order to be absolved.

SENYATSI M L

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Delivered: This judgment and order was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the order is deemed to be the 10 November 2023.

Appearances:

For the Applicant:

Adv A Botha

Adv M Clark

Adv N Nyembe

Instructed by:

Werksman Attorneys

For the 1st Respondent:

Adv S Baloyi SC

Adv X Khoza

Malatji & Co.

For the 2nd Respondent:

Adv V Maleka SC

Adv T Scott

AB Scarrott Attorneys

For Amicus Curiae:

Adv WP Bekker

Adv K Kemp

Viljoen and Swart Attorneys

Date of Hearing: 23 October 2023

Date of Judgment: 10 November 2023

[1] 4 of 2006.

- [2] Section 3 of Promotion of Administrative Justice Act 3 of 2000 (“PAJA”).
- [3] Grey’s Marine Hout Bay (Pty) Ltd & others v Minister of Public Works & others [2005] ZASCA 43; 2005
- (6) SA 313 (SCA) at para 21.
- [4] President of the Republic of South Africa v South African Rugby Football Union [1999] ZACC 11; 2001 (1) SA 1; 1999 (10) BCLR 1059 (CC) at para 148.
- [5] Section 4(1) of the National Energy Regulator Act 40 of 2004. (“ERA”).
- [6] Section 10 of ERA.
- [7] Section 10 (2), (3) and (4) of ERA.
- [8] Section 4 of ERA.
- [9] Clause 4.8 of the Framework.
- [10] Rademan v Moqhaka Local Municipality [2013] ZACC 11; 2013 (4) SA 225; 2013 (7) BCLR 791 (CC) at para 42.
- [11] Section 151 (3) of the Constitution.
- [12] Section 156(1) of the Constitution.
- [13] Section 156(2) of the Constitution.
- [14] Electricity Regulation Act, above n 1 at section 27.
- [15]
- [2009] ZACC 30; 2010
- (4) SA 55; 2010 (3) BCLR 212 (CC).
- [16] Joseph above n 16 at para 34.
- [17] Electricity Regulation Act above n 1 at section 30(1) (a) and (2).

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CASE PAGE <https://chat.esheria.ai/case-law/south-africa/glencore-operations-south-africa-pty-ltd-and-others-v-national-unknown-topic-agpjhc-2023--6a3ea51d3b1caa9129813847>

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