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IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NR: 51765/2017

In the matter between:

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA
PRIVATE BAG/PRIVAATSAK X67
PRETORIA 0001
2019 -04- 30
Z. Z. MANANA
REGISTRAR'S CLERK
GRIFFIER VAN DIE HOË HOF VAN SUID-AFRIKA, GAUTENG AFDELING, PRETORIA

THE CITY OF CAPE TOWN — APPLICANT

and

THE NATIONAL ENERGY REGULATOR OF SOUTH AFRICA — FIRST RESPONDENT

THE MINISTER OF ENERGY — SECOND RESPONDENT

FILING NOTICE

DOCUMENTS:
1. FIRST RESPONDENT'S PRACTICE NOTE
2. FIRST RESPONDENT'S HEADS OF ARGUMENT

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PRETORIA

AND TO:
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RC 30 April 2019 14:00

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AND TO: **THE MINISTER OF ENERGY**
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2019-04-30
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PRETORIA 0001 (10)
STAATSPROKUREUR

14h:25

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 51765/17

In the matter between:

THE CITY OF CAPE TOWN

Applicant

And

THE NATIONAL ENERGY REGULATOR OF SOUTH AFRICA First Respondent

THE MINISTER OF ENERGY Second Respondent

FIRST RESPONDENT'S PRACTICE NOTE

NAMES OF THE PARTIES AND CASE NUMBER

1. The parties' names and the case number are set out above.

THE PARTIES' REPRESENTATIVES

2. For the applicant:

Wim Trengove SC

082 337 0852

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	Nick de Jager 082 339 8664 nickdejager@capebar.co.za Cingashe Tabata 083 677 9411 tabata@thulamelachambers.co.za
For the first respondent:	Ngwako Hamilton Maenetje SC 083 459 6358 maenetje@duma.nokwe.co.za Isabel Goodman 083 303 4491 isabel.goodman@gmail.com Riaz Itzkin 082 801 2302 riaz@riazitzkin.co.za
For the second respondent:	Unknown

NATURE OF THE APPLICATION AND MAIN CONTENTIONS

3. The applicant ("the City") seeks declaratory or other alternative relief in relation to section 34 of the Electricity Regulation Act 4 of 2006 ("the Act").

4. The City contends that it is not a prerequisite that a determination be made by the second respondent ("the Minister") in terms of section 34 of the Act, for the grant by the first respondent ("NERSA") of a licence for new electricity generation under the Act. It contends, in the alternative, that such a prerequisite is unconstitutional.

5. NERSA contends that its power to grant new generation licences is constrained by section 34(3) of the Act. It contends that it cannot issue a new generation licence unless and until the Minister makes a determination that new generation capacity is required. It contends, moreover, that there is nothing unconstitutional about this prerequisite.

ISSUES TO BE DETERMINED

6. Whether a prior ministerial determination in terms of section 34 of the Act is required for NERSA to grant a new generation licence.

7. If so, whether section 34 is unconstitutional and invalid because it impermissibly trenches upon the constitutional powers and functions of local government.

8. If the court holds that such a determination is required and that section 34 is valid, whether the Minister should be ordered to determine the City's pending application for a section 34 determination.

RELIEF SOUGHT

9. NERSA seeks the dismissal of this application with costs as against it, including the costs of two counsel.

ESTIMATED DURATION

10. 1 day.

WHETHER THE MATTER IS URGENT

11. The matter is not urgent.

NEED TO READ THE PAPERS

12. It is necessary to read the papers in their entirety.

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 51765/17

In the matter between:

THE CITY OF CAPE TOWN

Applicant

And

THE NATIONAL ENERGY REGULATOR OF SOUTH AFRICA First Respondent

THE MINISTER OF ENERGY Second Respondent

FIRST RESPONDENT'S HEADS OF ARGUMENT

INTRODUCTION

1. This case asks whether there is – and can lawfully be – any jurisdictional prerequisite to the grant, by the first respondent ("NERSA"), of a licence for new electricity generation under the Electricity Regulation Act 4 of 2006 ("the Act").

    1.1. The applicant, the City, says that there is none. It submits that an applicant can make application for a new generation licence at any time, and NERSA is obliged to consider and determine it. The IPP is then entitled to generate new electricity capacity and sell it to its customer of choice, including the City.

    1.2. The City also submits that there can lawfully be no such prerequisite. According to it, a provision that precludes NERSA from accepting and deciding applications for new generation licences until the Minister has decided that new generation capacity is needed, is unconstitutional because it trenches upon municipal powers and functions.

    1.3. By contrast, NERSA submits that its power to grant new generation licences is constrained by section 34(3) of the Act. It cannot issue a new generation licence unless and until the Minister makes a determination that new generation capacity is required. It submits, moreover, that there is nothing unlawful or unconstitutional about this prerequisite. It is necessary to enable it and national government to plan for and oversee South Africa's electricity needs in a manner which serves the interests of power consumers nationally, and which safeguards the national power grid. To allow the City to operate in a silo – which is effectively what the City wants out of this application – would undermine the ability for national planning and oversight, the interests of power consumers across the country, and the

national power grid. The City's insular approach ignores the national imperatives and practicalities at play.

2. The case turns, to a large extent, on the proper interpretation of section 34 of the Act.[1] That, in turn, requires the court to consider the language, purpose and context of that provision,[2] and to prefer a sensible interpretation to one that is absurd or leads to unbusinesslike results.[3]

3. We submit the proper starting point is to understand how the national grid is operated and electricity is supplied across the country. That provides the context in which section 34 was enacted, and makes its purpose clear.

THE NATIONAL POWER GRID

4. Since the 1970s, electricity has been transmitted and distributed across the country by a single, integrated transmission network colloquially called "the grid".[4]

5. The grid is central to South Africa's electricity supply. It ensures power supply is reliable and stable, reducing the risks of power outages.[5] Its use also allows Eskom to take advantage of economies of scale and to enable cross-subsidisation. It is, for example, far more expensive to run and maintain power lines to remote areas. But these higher costs are not passed on to remote end-users because

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1 The City also seeks an order, in the alternative, compelling the Minister to consider and determine its request that she issue a section 34 determination. NERSA abides that relief.

2 *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC) para 28.

3 *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) pare 18; *Trinity Asset Management v Grindstone Investments 132* 2018 (1) SA 94 (CC) para 52.

4 NERSA AA p 69 para 41.

5 NERSA AA p 69 para 41.

they are averaged out and borne by all consumers who rely on the grid.[6] The grid thus promotes universal access to electricity.

6. The grid operates as follows. Power is generated at power stations, either by Eskom or by independent power producers ("IPPs"), and is then transmitted,[7] via the grid, into load centres.[8] From the load centre, electricity passes into a distribution centre, where its voltage is reduced to 132 kV or less, and it is then distributed, via the grid, to consumers (including municipalities).[9] Municipalities are involved in the sale and distribution of electricity to end consumers via the reticulation grid.[10] They bear constitutional responsibility for the provision of reticulation services[11] - that is, for providing access to consumers to purchase electricity.

7. The grid is owned and operated by Eskom.[12] IPPs do not have their own transmission and distribution lines, and consequently use the grid to supply electricity to their customers.[13]

8. That has implications for the price of electricity:

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6 NERSA AA p 77 para 57.

7 Transmission is defined in section 1 of the Act as "*the conveyance of electricity through a transmission power system excluding trading*". In practice, it comprises the movement of electricity over transmission lines at a voltage of more than 132 kilovolts: NERSA AA p 71 para 44.

8 NERSA AA p 71 para 44.

9 Distribution is defined in section 1 of the Act as "*the conveyance of electricity through a distribution power system excluding trading*". In practice, it comprises the movement of electricity at a voltage of less than 132 kV: NERSA AA p 71 para 44.2.

10 Reticulation is defined in section 1 of the Act as "*trading or distribution of electricity and includes services associated therewith*". Trading, in turn, means "*the buying and selling of electricity as a commercial activity*". See also FA p 18 para 33; pp 38-39 para 5.

11 In terms of Schedule 4B of the Constitution and section 27 of the Act. See also FA p 37 para 4.1; p 39 para 5.5.

12 NERSA AA p 71 para 45.

13 NERSA AA p 72 para 46.

8.1. IPPs pay a levy – referred to as a wheeling charge – for the use of the grid and its associated services.[14] Wheeling charges and other costs associated with accessing the grid are ultimately passed on to the consumer and affect the price of electricity provided by IPPs.[15]

8.2. At present the average cost of procuring renewable energy from IPPs across the grid is significantly higher than the rate at which Eskom supplies electricity to the City.[16] To ensure that a reasonable price is paid by electricity consumers across the grid, the relatively higher costs associated with renewable energy are balanced out against the relatively lower production costs of coal-fired power.[17] A mix of generation sources is thus crucial to maintain affordable electricity prices nationally.

9. The use of the grid by IPPs also has implications for the stability of the grid:

9.1. There is a maximum load that any transmission or distribution line can safely carry. If too much power is loaded onto the grid, the system is programmed to trip, leading to power outages.[18] Both overloading the grid and trips on the grid can damage it, with resultant power losses and repair costs.[19] Eskom must therefore carefully manage the amount of electricity loaded onto the grid at any given time.

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14 NERSA AA p 72 paara 46.3.

15 NERSA AA p 72 para 46.3.

16 NERSA AA p 75 para 53.

17 NERSA AA p 76 para 55.

18 NERSA AA p 73 para 49.

19 NERSA AA p 73 para 48.

9.2. To avoid overloading the grid, Eskom aims to maintain a system frequency of 50Hz at any given time. It achieves this by constantly balancing the amount of power generated with the load carried over the grid.[20]

9.3. Traditionally, Eskom's National Control would prepare a daily load forecast, and would identify which power generators would be responsible for generating electricity and uploading it to the grid to meet such demand. Generators would then be notified of the proposed schedule, as well as which plants were required to power up or shut down, a day in advance.[21] Eskom's planning would ensure that the cheapest generation would dispatch first, and that more expensive generation would come on-line only when demand necessitated it.[22]

9.4. However, this approach has changed with the advent of renewable energy generators. Renewable energy generators are dependent upon relatively unpredictable sources – the sun or wind. To avoid wastage, they must be allowed to generate and transmit electricity when that resource is available. Renewable energy generators are therefore allowed to "self-dispatch" – that is, to access the grid and transmit electricity whenever it is generated, without first being scheduled by National Control. When this occurs, other (sometimes cheaper) generators must switch off or cut back their supply, to make way for their electricity load on the grid.[23]

9.5. But that, in turn, affects the viability of other generators. A generator that is precluded from supplying to the grid will either be threatened with cutting

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20 NERSA AA p 73 para 50.

21 NERSA AA p 74 paras 51.1-51.3.

22 NERSA AA p 75 para 53.

23 NERSA AA p 75 para 53

back its operations, or will insist on a guaranteed uptake agreement with Eskom. The former affects employment and electricity supply; the latter affects the cost of power.[24]

9.6. Moreover, self-dispatching generators make it more difficult for Eskom to manage electricity supply and to balance the load on the grid without causing undue wastage. Coal-fired power stations, for example, take approximately 18 hours to bring on-line.[25] They cannot supply or cut load on short notice.

10. The increased use of the grid by IPPs also has implications for the security of electricity supply:

10.1. Because the source of power for renewable energy is inherently intermittent, there must be back-up energy sources for any renewable energy supply.[26]

10.2. But back-up generation has costs of its own and creates further capacity considerations that must be managed.[27]

11. These considerations of price, security of the grid and security of supply mean that the amount of power generated across the country, and the sources from which such power is generated, must be carefully monitored and controlled at a national level. New generation capacity cannot be added on an *ad hoc* basis, or at the whim of an IPP or a single municipality.

12. The legislative scheme makes provision for that.

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24 NERSA AA p 75 para 53

25 NERSA AA p 74 para 51.3.

26 NERSA AA p 76 para 56.

27 NERSA AA p 76 para 56.

THE LEGISLATIVE SCHEME

13. The legislative scheme tasks the national government – through the Minister – with planning and oversight of electricity supply.

14. The National Energy Act 34 of 2008 assigns a range of electricity planning functions to the Minister. Among other things, he must:

14.1. publish annually the energy demand and supply for the previous year, as well as the future demand/supply forecast;[28]

14.2. adopt measures to provide for universal access to appropriate forms of energy for all people of South Africa, at affordable prices;[29]

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[28] Section 3(5) states:

> *"(5) The Minister must annually publish an analysis—*
>
> *(a) reviewing energy demand and supply for previous year;*
>
> *(b) forecasting energy supply and demand for no less than 20 years; and*
>
> *(c) of plausible energy scenarios of how the future energy demand and supply landscape could look like under different demand and supply assumptions.*"

[29] Section 5 states:

> "*Energy access by households.—(1) The Minister must adopt measures that provide for the universal access to appropriate forms of energy or energy services for all the people of the Republic at affordable prices.*
>
> *(2) The measures contemplated in subsection (1) must take into account—*
>
> *(a) the safety, health and environmental suitability of such energy;*
>
> *(b) the availability of energy resources;*
>
> *(c) the optimisation of existing energy infrastructure;*
>
> *(d) the need for new infrastructure;*
>
> *(e) the provision of information and training regarding energy and its optimal utilisation;*
>
> *(f) the sustainability of the energy provision;*
>
> *(g) affordability;*
>
> *(h) cost-effectiveness;*
>
> *(i) the State's commitment to provide free basic electricity to poor households; and*

14.3. develop and publish an Integrated Energy Plan with a planning horizon of at least 20 years, which deals with issues relating to *"the supply, transformation, transport, storage of and demand of energy"* taking account of, amongst other things, security of supply, economically available energy resources, the environment, international commitments and the contribution of energy supply to socio-economic development.

14.4. The Integrated Energy Plan must take into account all viable energy supply options, and guide the selection of the appropriate technology to meet energy demand.[30] It thus provides a blueprint for, among others, the new generation capacity that will be brought on-line.

(j) appropriate governance procedures for government sponsored programmes as prescribed by the Public Finance Management Act."

[30] Section 6 states:

6. Integrated energy planning.—(1) The Minister must develop and, on an annual basis, review and publish the Integrated Energy Plan in the Gazette.

(2) The Integrated Energy Plan must deal with issues relating to the supply, transformation, transport, storage of and demand for energy in a way that accounts for—

(a) security of supply;

(b) economically available energy resources;

(c) affordability;

(d) universal accessibility and free basic electricity;

(e) social equity;

(f) employment;

(g) the environment;

(h) international commitments;

(i) consumer protection; and

(j) contribution of energy supply to socio-economic development.

(3) The Integrated Energy Plan must—

(a) take account of plans relating to transport, electricity, petroleum, water, trade, macro-economy energy infrastructure development, housing, air quality management, greenhouse gas mitigation within the energy sector and integrated development plans of local and provincial authorities;

15. The Energy Act thus deals with electricity planning, and empowers the Minister to decide the electricity policy for the country. Providing "*the national regulatory framework for the electricity supply industry*" is thus a functional area of national government.[31]

16. Within that context, the Act governs "*the termination of electricity*" and electricity supply.[32]

17. Its objects include to *"achieve the efficient, effective, sustainable and orderly development and operation of electricity supply infrastructure in South Africa,"* to "*promote the use of diverse energy sources and energy efficiency*" and "*facilitate a fair balance between the interests of customers and end users, licencees, investors in the electricity supply industry and the public*".[33]

18. Chapter 3 of the Act deals with electricity licences:

> *(b) inform and be informed by plans from all supply, production and demand sectors whose plans impact on or are impacted by the Integrated Energy Plan; and*
>
> *(c) be based on the results of the energy analysis envisaged in sections 3 (4) (a) and 3 (5).*
>
> *. . .*
>
> *(6) The Integrated Energy Plan must—*
>
> *(a) serve as a guide for energy infrastructure investments;*
>
> *(b) take into account all viable energy supply options: and*
>
> *(c) guide the selection of the appropriate technology to meet energy demand."*

31 As Froneman J found in his concurring decision in *Rademan v Moqhaka Local Municipality and Others* 2013 (4) SA 225 (CC); 2013 (7) BCLR 791 (CC) para 51.

32 Ibid.

33 Section 2 of the Act.

18.1. Section 7(1) provides that no one may operate any generation, transmission or distribution facility unless it has been issued a licence to do so by NERSA.[34]

18.2. Section 10 says that application must be made in the prescribed form, and stipulates the information that it must contain. That includes details of the facility to be constructed and operated;[35] a description of the type of customer to be served and the tariff and price policies to be applied;[36] and "*evidence of compliance"* with the applicable integrated resources plan or reasons why the Minister should approve a deviation from that plan.[37]

18.3. Sections 11 and 12 provide for applications to be published, and for objections to be lodged and dealt with.

18.4. Section 13 requires NERSA to consider and determine any application that has been lodged within a stipulated time. It affords NERSA a discretion to refuse a licence,[38] or to grant it on such terms as deems appropriate.[39]

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[34] Section 7(1) states:

> *"7. Activities requiring licensing.—(1) No person may, without a licence issued by the Regulator in accordance with this Act—*
>
> *(a) operate any generation, transmission or distribution facility;*
>
> *(b) import or export any electricity; or*
>
> *(c) be involved in trading."*

Section 7(2) exempts anyone from holding a licence if they conduct an activity specified in Schedule II.

[35] Section 10(2)(c).

[36] Section 10(2)(d).

[37] Section 10(2)(g). The *"integrated resource plan"* is defined, in section 1 of the Act, as *"a resource plan established by the national sphere of government to give effect to national policy"*. We agree with the City's contention (in para 70.2 of its heads of argument) that it appears to be a reference to the Integrated Energy Plan made under the Energy Act.

[38] Section 13(4) states:

> *"The Regulator is not obliged to issue a licence and may issue only one licence per applicant for each of the activities contemplated in subsection (3)."*

19. Once granted, a generation licence is valid for at least 15 years, and can be renewed by the applicant as of right.[40] It can only be suspended or removed in limited circumstances – namely, on application or with the permission of the licensee or an affected party, as a consequence of non-compliance with a licence term or where it is necessary for the purposes of the Act.[41] A generation licence therefore affords the licensee long-term rights and duties.

20. Chapter 3 does not limit when licence applications can generally be lodged. It suggests that application can be made on an *ad hoc* basis. As outlined above, once an application is lodged, it must be expeditiously processed and determined by NERSA.

21. Were that regime alone to apply to generation licences, national government would have no control over how or when new generation capacity was brought on-line,

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39 Section 14 stipulates a broad range of issues in respect of which NERSA may impose licence conditions.

40 Section 20 pertinently provides:

> "*20. Renewal of licence.—(1) Any generation or transmission licence issued in terms of this Act is valid for a period of 15 years or such longer period as the Regulator may determine.*
>
> *. . .*
>
> *(3) A licensee may apply for the renewal of his or her licence.*
>
> *(4) An application for renewal must be granted, but the Regulator may set different licence conditions.*"

41 Section 16(1) states:

> *"The Regulator may vary, suspend or remove any licence condition, or may include additional conditions—*
>
> *(a) on application by the licensee;*
>
> *(b) with the permission of the licensee;*
>
> *(c) upon non-compliance by a licensee with a licence condition;*
>
> *(d) if it is necessary for the purposes of this Act; or*
>
> *(e) on application by any affected party."*

In terms of section 17(1), a licensee may only apply for the revocation of its licence where the licensed facility or activity is no longer required or is not economically viable, or where a new licence is issued to another person who is willing and able to assume the licensee's rights and obligations.

and NERSA would be unable to comparatively assess the price, viability and source of proposed new generation. It would simply have to accept and assess applications individually, as they came in. To avoid that, section 34 creates an exception to the general licensing regime insofar as it applies to generation licences.

Section 34 of the Act

22. Section 34 has been attached, in full, to the City's submissions. We do not reproduce it here.

23. Section 34(1) empowers (but does not oblige) the Minister, in consultation with NERSA, to determine:

- when new generation capacity is needed;
- the types of energy sources from which electricity must be generated, and the percentages of electricity that must be generated from such sources;
- to whom electricity produced by a new generator may be sold; and/or
- the appropriate tendering process and participation by the private sector in that new capacity generation.

24. Section 34(3)(a) makes clear that NERSA cannot issue a generation licence in the absence of a determination to procure new generation capacity from the Minister. It states that "*The Regulator, in issuing a generation licence . . . <u>is bound</u> by any determination by the Minister in terms of subsection (1)"* (emphasis added). Section 34(3) therefore curtails NERSA's licensing discretion such that it can only grant generation licenses pursuant to, and on such terms dictated by, the

Minister's determination. A section 34(1) determination is thus a prerequisite to the grant of any new generation licence.

25. This is consistent with the approach recently espoused by the High Court which held that *"[t]he Regulator, in issuing the licences, is guided by whether the application for a license is in compliance with the IRP 2010 and, in doing so, is bound by the Determinations"*.[42]

26. The City contends that such interpretation is not supported by the discretionary language of the provision, or its purpose. Section 34, according to it, merely empowers the Minister to initiate a process to procure new generation capacity when it is required. It does not curtail NERSA's general licensing powers at all.

27. We submit that interpretation cannot prevail, for the following reasons.

28. First, it is not supported by the language of the provision.

    28.1. The City correctly points out that section 34(1) is framed in permissive terms. It allows the Minister a broad discretion to decide whether new generation capacity is required, as well as how and from what supply it should be sourced. That is congruent with the planning and oversight role that the Energy Act confers on the Minister. It is for him to determine, together with NERSA, when new energy supply is needed. In appropriate circumstances, the Minister may also take a more interventionist approach, and stipulate how and from whom new energy can be procured.

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[42] See the as-yet unreported judgment in *Coal Transporters Forum v Eskom Holdings Limited and Others* (42887/2017) [2019] ZAGPPHC 76 (26 March 2019) para 13.

28.2. Section 34(2) confers broad powers on the Minister to ensure that he can give effect to his determination. He is obliged to exercise those powers reasonably, rationally and lawfully.

28.3. Section 34(3) is couched in mandatory terms. It precludes NERSA from issuing any generation licence outside the terms of the Minister's determination. The City's interpretation overlooks this provision, and does not suggest what role it is intended to play. We submit it is clearly a limitation on NERSA's general licensing powers.[43]

29. Second, NERSA's interpretation is more consistent with the purpose and context underpinning the Act, and with the requirements of the Constitution:

29.1. For the reasons we have addressed, as a matter of law and of practicality, electricity capacity and the sources of electricity supply have to be carefully planned and rolled out.[44] It is only by controlling the introduction of new electricity supply that the Minister and NERSA can manage the energy source mix, the price of electricity, the integrity of the grid and security of supply.

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[43] The *Coal Transporters Forum* case cited above confirms that determinations issued in terms of section 34 bind NERSA in the issuing of licenses.

[44] The importance of national planning, safeguarding the interests of power consumers across the country, and protecting the national power grid, was specifically recognised at para 9 of the *Coal Transporters Forum* case cited above, where it was held that *"[f]ollowing extensive public participation, representations and comments by interested parties and independent international consultants and consultations with government departments (in which process, it is undisputed, neither CTF nor any of its members participated), the final version of the IRP 2010-2030 (the IRP 2010) was promulgated in the Government Gazette on 6 May 2011. It is undisputed that when deciding on the required mix of energy sources, the DoE sought to achieve a balance between the expectations of different stakeholders. It considered key constraints and risks, including: reducing carbon emissions; new technology uncertainties such as costs, operability and lead time to build; water usage; localisation and job creation; regional development and integration; and security of supply, The IRP 2010 was informed by the PPD trajectory and included a cap on carbon emissions. Ultimately, the IRP 2010 determined that, in order to secure the continued and uninterrupted supply of energy, the following mix of new generation technologies was required between 2010 and 2030: a nuclear fleet of 9.6 GW; 6.3 GW of coal; 17.8 GW of renewables; and 8.9 GW of other generation sources. The IRP 2010 was ultimately adopted by Cabinet, and presently represents the government's policy"*.

29.2. NERSA's interpretation of section 34 permits the Minister and NERSA to decide when to accept and consider applications for new generation capacity, and what mix of supply sources to permit. That, in turn, allows them to:

- maintain their oversight role;

- safeguard the viability of the grid, and customers from opting out of it and undermining the cross-subsidisation of services that it enables;

- assess the applications received comparatively (since they will be lodged within a stipulated time period) and decide which applications are most appropriately granted, in accordance with the requirements of section 217 of the Constitution (which requires electricity to be procured through a fair, transparent and cost-effective process); and

- determine the sources from which new electricity is supplied and comply with South Africa's obligations under the Paris Agreement on Climate Change.[45]

29.3. The implication of the City's argument, by contrast, is that IPPs could simply lodge applications when they decide it appropriate to do so, and NERSA would then have to assess each application individually and in isolation. The award of new generation licences would be determined, to a large extent, by the timing of an application. NERSA could not refuse a competent application where new supply was needed, only in the hope that

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45 NERSA AA p 67 para 34.

a cheaper, or more convenient proposal would be made in due course. Neither it nor national government could control the price or mix of generation capacity, and could not give effect to its electricity planning or ensure compliance with South Africa' treaty obligations. That cannot have been the intention of the legislature in adopting the provision.

30. Third, we submit that there is nothing absurd or unbusinesslike in interpreting section 34 as imposing a prerequisite to NERSA's exercise of its generation licensing powers.

30.1. Contrary to the City's claims, that interpretation does not mean that NERSA is "*completely side-lined"* when new generation capacity is to be established.[46] The Minister must procure its concurrence before he can issue a determination in terms of section 34(1).[47] NERSA thus participates in issuing the determination. And in any event, NERSA remains responsible for considering applications, determining whether to grant them and deciding what conditions to attach to such licence. It is not stripped of its regulatory role. In truth, the City's interpretation seeks to strip the Minister of his oversight role and to side-line him.

30.2. Tellingly, the High Court has confirmed that section 34 "*operates as the legislative framework by which any decision that new electricity generation capacity is required*"[48] and that a determination issued under its terms gives "*binding effect to aspects of the electricity generation policy outlined in the*

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46 See City's heads of argument p 26 para 67.

47 A requirement that the Minister act "*in consultation with"* NERSA requires concurrence between them: *Premier, Western Cape v President of the Republic of South Africa* 1999 (3) SA 657 (CC) fn 94; *President of the RSA v SARFU* 1999 (4) SA 147 (CC) para 63.

48 See *Earthlife Africa, Johannesburg and another v Minister of Energy and others* [2017] 3 All SA 187 (WCC) para 24

[Integrated Resource Plan]".[49] In doing so, it has implicitly endorsed the interpretation contended for by NERSA. That, we submit, is because it is a sensible interpretation derived from the plain wording of section 34, coupled with an understanding of its purpose.

31. We therefore submit that, properly interpreted, a determination by the Minister to call for new capacity in terms of section 34(1) is a perquisite to the grant of a generation licence under the Act. An IPP cannot create new capacity for the generation of electricity unless it is licenced to do so in terms of a generation licence. It means that a section 34 determination is also a prerequisite to an IPP creating new capacity, producing electricity by the capacity so created and selling it to the City.

32. The City is consequently not entitled to the declaratory relief that it seeks.[50] It does not correctly capture the legal position.

THE CONSTITUTIONALITY OF SECTION 34

33. The City submits that if section 34 entitles the Minister to determine when and from whom it can procure electricity, then that provision is unconstitutional. That, it says, is because:

    33.1. Municipalities have the constitutional power and duty to supply basic services, to protect the environment and to procure goods and services in a fair, equitable, transparent, competitive and cost-effective way;

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49 *Earthlife Africa Johannesburg v Minister of Environmental Affairs and others* [2017] 2 All SA 519 (GP) para 34.

50 NOM p 1 para 1.1.

33.2. The power to decide whether to buy its electricity from Eskom or an IPP is necessary and incidental to its constitutional powers and duties; and

33.3. It is unconstitutional for the national government to interfere with, or violate its autonomy in, the exercise of those functions.[51] National government may only limit that autonomy by legislation "*as provided for in the Constitution"*.[52] The Constitution does not permit a limitation of the kind imposed by section 34 (as NERSA interprets it).

34. The City's argument starts from the premise that it enjoys complete autonomy in the discharge of its powers and functions, and that national government can only limit that freedom where it is expressly constitutionally empowered to do so. But that, with respect, is to misconstrue the Constitution's careful allocation of powers and functions among the different spheres of government.

The allocation of powers and functions under the Constitution

35. Section 40 of the Constitution recognises that "*government is constituted as national, provincial and local spheres of government which are distinctive, inter-dependent and interrelated*". The different spheres are enjoined to:

35.1. respect the constitutional status, institutions, powers and functions of government in the other spheres;[53]

35.2. assume only those powers and functions conferred on them by the Constitution;[54]

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51 City's heads of argument, p 31 para 80.

52 City's heads of argument, pp 37-38 para 106-107.

53 Section 41(1)(e) of the Constitution.

35.3. exercise their powers and perform their functions in a manner that does not encroach on the functional or institutional integrity of government in another sphere;[55] and

35.4. co-operate with one another by, among others, co-ordinating their actions and legislation with one another.[56]

36. The Constitution's allocation of powers across different spheres of government gives effect to these principles.[57] It allocates different legislative competence to each sphere.[58]

37. The national legislative authority is given the power to "*pass legislation with regard to <u>any matter</u>, including a matter within a functional area listed in Schedule 4, but excluding, subject to subsection (2), a matter within a functional area listed in Schedule 5*".[59] It means that Parliament has plenary legislative power outside the functional areas that are exclusively reserved for provincial and municipal legislatures.[60]

38. The Constitution contains no express itemisation of the exclusive competences of the national legislature. As the Constitutional Court has previously recognised:

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54 Section 41(1)(f).

55 Section 41(1)(g).

56 Section 41(1)(h)(iv).

57 *Premier, Western Cape v President of the Republic of South Africa* 1999 (3) SA 657 (CC) para 50; *Executive Council of the Province of the Western Cape v Minister for Provincial Affairs and Constitutional Development and Another, Executive Council of KwaZulu-Natal v President of the Republic of South Africa and Others* 2000 (1) SA 661 (CC) para 27.

58 *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others (MEC of KwaZulu Natal for Local Government and Traditional Affairs and Others Intervening; SA Property Owners Association and Another as amici curiae)* 2010 (9) BCLR 859 (CC) para 43

59 Section 44(1)(a) of the Constitution.

60 *Premier, Limpopo Province v Speaker of the Limpopo Provincial Government and Others* 2011 (11) BCLR 1181 (CC) para 22

> "*These may be gleaned from individual provisions requiring or authorising "national legislation" regarding specific matters. They may also be derived by converse inference from the fact that specified concurrent and exclusive legislative competences are conferred upon the provinces, read together with the residual power of the national Parliament, in terms of section 44(1)(a)(ii), to pass legislation with regard to "any matter". This is subject only to the exclusive competences of Schedule 5 which are in turn subordinated to the "override" provision in section 44(2). An obvious instance of exclusive national legislative competence to which the Constitution makes no express allusion is foreign affairs.*"[61]

39. The national legislature's power must, however, be exercised "*in accordance with, and within the limits of, the Constitution"*.[62] Where the Constitution imposes such limits, they constrain the residual plenary power of Parliament.[63]

40. The Constitution protects the role of local government by placing certain constraints on Parliament's power to interfere with local government.[64] Thus:

    40.1. Municipalities have the fiscal and budgetary powers vested in them by Chapter 13 of the Constitution.

    40.2. Section 156(1) of the Constitution affords municipalities executive authority in respect of, and the right to administer, the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5 of the Constitution, as well as any other matter assigned to it by national or provincial legislation. Section 156(2) obliges them to make and administer by-laws in respect of these functional areas. National government must "*see to the effective performance by municipalities of their functions in respect of matters listed*

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61 *Ex parte President of the Republic of South Africa In re: Constitutionality of the Liquor Bill* 2000 (1) BCLR 1 (CC) para 47

62 Section 44(4).

63 *Executive Council, Western Cape* para 25.

64 *Executive Council, Western Cape* para 29.

in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156(1)".

40.3. The executive authority over, or the power to administer, matters listed in Part B of Schedules 4 and 5 is vested thus exclusively in municipalities. National and provincial government can regulate their exercise of that executive authority only by creating norms, standards and guidelines. They cannot usurp the municipality's executive powers or functions.[65]

40.4. Separately, a municipality 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*".[66] It means that the national legislature has the power to regulate, by legislation, the right of municipalities – conferred on them by the Constitution – to govern local affairs. We submit that the phrase "*as provided for in the Constitution"* qualifies the municipality's right to govern local affairs, not the matters that may be regulated by national and provincial legislation. The Constitutional Court has repeatedly recognised that the executive and legislative authority of municipalities to govern local government affairs of their communities (outside the functional areas listed in Part B of Schedules 4 and 5) are subject to national and provincial legislation.[67]

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65 *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 (6) SA 182 (CC) para 46; *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council and Others; Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v City of Cape Town and Others* 2014 (4) SA 437 (CC) paras 20-22.

66 Section 151(3) of the Constitution. Emphasis added.

67 See, for example, *Executive Council, Western Cape* para 12; *Rademan* para 15;

40.5. Indeed, the legislature's ability to pass legislation regulating the municipality's right to govern is constrained only by section 151(4), which states:

> "*The national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions.*"

41. The legislature thus has a narrow power to regulate the municipality's exercise of its executive authority in respect of areas of competence conferred on it, but a broad mandate to legislate in respect of any other discharge of its powers and functions. Legislation enacted in the discharge of the latter mandate will be unconstitutional only if it compromises or impedes the municipality's ability to discharge its powers and functions.

42. The City is thus wrong to contend that national legislation may not curtail the manner in which it discharges its rights and duties in governing local affairs. That is at odds with the scheme created by the Constitution.

The implications for this case

43. The City enjoys legislative and executive authority over "*electricity and gas reticulation"* (since it is a functional area listed in Part B of Schedule 4). Its autonomy is guaranteed here.

44. As outlined above, electricity reticulation is an aspect of electricity supply; it entails the trade and distribution of electricity to local government consumers. In a context different from the present, the High Court interpreted this constitutional competence to mean that a municipality is entitled to set up its own electricity reticulation

network. And that it is the only organ of State entitled to administer that network, since the administration of its own electricity reticulation network is a necessary element of municipal autonomy.[68] This is distinct from planning and regulating the framework for the electricity supply industry. The latter is a national functional competence.[69]

45. The national legislature may only regulate the City's exercise of its executive authority over electricity reticulation to ensure its effective performance. It can create standards to guide the City's exercise of its powers. It has done so in section 27 of the Act without interfering with the City's autonomy. The City does not object to that provision.

46. The City instead complains that it has a constitutional right to determine how and from whom to procure the electricity it supplies to its inhabitants, which flows from its right to govern the affairs of its community. It says that national legislation can only limit that right "*as provided for in the Constitution*".[70]

47. We submit that this complaint is unfounded, for the following reasons:

    47.1. The national government – and not the City – enjoys functional competence over planning and regulating electricity supply. It is thus entitled to determine when and from what sources it will procure new electricity supply, and whether to feed it into the grid. Section 34 gives effect to that entitlement. In the absence of legislation conferring it such rights, the City has no entitlement to determine how and from whom to procure its electricity

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68 *NCP Chlorchem (Pty) Ltd v National Energy Regulator and others* [2017] 1 All SA 950 (GJ) para 46.

69 *Rademan* para 51 (per Froneman J concurring).

70 City's heads of argument, pp 36-42 paras 99-117.

supply. It must exercise its powers and duties within the parameters laid down by national government under the Act.

47.2. But even if the City were entitled to decide how and from whom to procure electricity (which is denied), that entitlement would flow from its power and duty to govern its affairs in accordance with the Constitution. As we have set out above, the Constitution affords the legislature a broad power to pass any legislation regulating the manner in which a municipality governs its affairs outside the functional areas reserved to municipalities in Part B of Schedules 4 and 5. Such legislation is only precluded, under section 151(4), if it compromises the municipality's ability to exercise its powers or perform its functions. This means that the City enjoys no complete constitutional autonomy in this regard.

47.3. At worst, then, section 34 creates certain prerequisites to, and limits on, the City's discretion to determine when and from whom to procure new electricity generation. That regulation safeguards the national and public interest. It does not impede the City's ability to exercise its powers or perform its functions. On the contrary, it must be assumed that the Minister will exercise the section 34 power with due regard to the City's rights and duties. To the extent that he fails to do so, the City may be entitled to review and set aside the determination.[71] A determination that unduly trenches upon the Municipality's powers will not be allowed to stand.

48. It follows that section 34 does not impede the City's ability to exercise its power and duties, or trench upon the autonomy conferred on it by the Constitution.

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[71] The *Earthlife* cases cited above confirm that determinations issued in terms of section 34 are amenable to review.

49. We therefore submit that section 34 is not unconstitutional and invalid. The City is not entitled to the relief sought in prayer 1.2 of the notice of motion.[72]

THE CITY'S APPLICATION FOR A DETERMINATION

50. If the City's declaratory and constitutional relief is dismissed, it seeks an order compelling the Minister to determine its application for a determination within one month of the date of such order.[73] The application was not directed to NERSA and such relief is not sought against it. NERSA has consequently not joined issue on this matter.

51. It points out only that the issue of a determination in terms of section 34 must be done in consultation with NERSA and pursuant to a public participation process.[74] We submit that any order compelling the Minister to determine the City's application should afford sufficient time for those processes to take place.

CONCLUSION

52. We submit that the City is not entitled to the declaratory or constitutional relief that it seeks. Its application should therefore be dismissed with costs as against NERSA, including the costs of two counsel.

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72 NOM p 2 para 1.2.

73 NOM p 2 para 1.3.

74 NERSA AA p 103 para 158.

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30 April 2019