

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

Case No.: 2023/003615

On the roll: Monday 11 September – Friday 15 September 2023

Coram: Davis, Collis, and Nyathi JJ

In the matter between:

DEMOCRATIC ALLIANCE

Applicant

and

**NATIONAL ENERGY REGULATOR
OF SOUTH AFRICA**

First Respondent

AND NINETEEN OTHERS

Second to Twentieth Respondents

**DEMOCRATIC ALLIANCE'S HEADS OF ARGUMENT:
THE TARIFF HIKE¹**

I INTRODUCTION

1. These heads of argument address the DA's challenge to two decisions by the National Energy Regulator of South Africa (**NERSA**).
2. The basis of this challenge is simple. NERSA decided to increase Eskom's average tariff (the amount Eskom charges customers for electricity) by

¹ For the convenience of the Court, the DA is submitting two sets of heads of argument. These heads deal with the tariff decision. Separate heads of argument will concern the energy crisis and load shedding.

over 30% in the next two years. NERSA did so without considering cross-subsidies to protect poor households' access to electricity. NERSA's failure to consider cross-subsidies, to protect the poorest electricity consumers, renders its decisions inconsistent with the Constitution.

3. It is not in issue that—
 - 3.1. Eskom should be able to recover funds that cover its reasonable costs;
 - 3.2. NERSA can and should consider cross-subsidies; and
 - 3.3. if NERSA's two decisions are inconsistent with the Constitution, then a declaration invalidating the decisions should be suspended while NERSA redetermines its decisions.
4. Eskom, furthermore, agrees with the DA that there are grounds for reviewing NERSA's decisions.²
5. Notwithstanding the agreement on these issues, Eskom and NERSA dispute two aspects of the DA's case:
 - 5.1. *Timing.* Eskom and NERSA's argument is as follows. When NERSA decides how much electricity costs for consumers, NERSA makes its decision in two, discrete stages. It first determines Eskom's allowable revenue—how much Eskom can and should recover in a financial year given the reasonable costs of supplying electricity. Second, NERSA

² Eskom's Tariff Affidavit at para 45 onwards; DA Caselines at 08-34.

decides on tariff amounts—who pays for Eskom’s allowable revenue. Eskom and NERSA submit that NERSA should not consider cross-subsidies when deciding Eskom’s revenue. Instead, cross-subsidies are *only* relevant to deciding tariffs.

5.2. *The facts.* Eskom and NERSA accept that NERSA did not consider cross-subsidies when it took its revenue decision. Eskom and NERSA argue that when NERSA determined Eskom’s tariffs, NERSA properly considered cross-subsidies.

6. Both legs of this opposition cannot be sustained.

6.1. *Timing.* Eskom and NERSA attempt to draw a neat dichotomy between Eskom’s revenue and electricity tariffs. However, as a matter of law, policy, and practice, Eskom’s allowable revenue is linked to tariffs. The reason is obvious. All things being equal, if Eskom can recover more money, the cost of electricity for consumers will go up. So, when NERSA decides to raise Eskom’s revenue, as part of what is called NERSA’s “MYPD decision”, it cannot *ignore* or *fail to consider* cross-subsidies.

6.2. *The facts.* When NERSA determined Eskom’s tariffs, NERSA increased a pre-existing subsidised tariff by 10%—without any evidence on the impact of that increase. NERSA failed to consider whether a pre-existing subsidised tariff, with or without an increase, adequately protected poor households from Eskom’s revenue increase. NERSA, in these circumstances, did not properly consider cross-subsidies for the purposes of its revenue *or* tariff decision.

7. The submissions are structured as follows:
 - 7.1. **PART II:** NERSA has a duty to consider cross-subsidies.
 - 7.2. **PART III:** NERSA's failure to consider cross-subsidies.
 - 7.3. **PART IV:** Remedy.

II THE DUTY TO CONSIDER CROSS-SUBSIDIES

8. In this part, we demonstrate a straightforward legal proposition: cross-subsidies are relevant to NERSA's so-called "MYPD" decision.
9. If cross-subsidies are relevant to the MYPD decision, then NERSA had a duty to consider cross-subsidies when taking its MYPD decision. Decision-makers *must* consider factors relevant to their decision before taking that decision. Otherwise, their decision is irrational under the principle of legality and contrary to the Promotion of Administrative Justice Act 3 of 2000.³
10. We demonstrate the relevance of cross-subsidies to NERSA's MYPD decision in three steps.
 - 10.1. First, we provide an overview of NERSA's decision-making process.
 - 10.2. Second, we show why cross-subsidies are relevant to NERSA's MYPD decision as a matter of law, policy, and practice.

³ *National Energy Regulator of South Africa v PG Group (Pty) Limited* [2019] ZACC 28; 2019 (10) BCLR 1185 (CC); 2020 (1) SA 450 (CC) at para 63; section 6(2)(e)(iii) of PAJA.

10.3. Third, we conclude with addressing why sometimes NERSA *must* permit cross-subsidies.

(A) AN OVERVIEW

11. Who decides how much electricity costs?
12. In a free market, factors like supply, demand, technological innovation, and competition would determine the price of electricity. In South Africa, only the state, through Eskom and municipalities, can generate, transmit, and sell electricity to the public. So, the state decides how much electricity should cost.
13. The state decides the price of electricity through a regulator—NERSA. NERSA has a process for determining how much people should pay for electricity.⁴

(i) The MYPD decision

14. The process begins with an application by Eskom. Eskom holds a licence to generate, transmit, and sell electricity.⁵ In terms of its licence, Eskom applies for permission from NERSA to recover a certain amount of money from electricity sales (**revenue**). Eskom *asks* the state whether Eskom can make money from electricity sales.
15. Eskom, in its application for revenue, sets out how much electricity costs for Eskom to generate, distribute, and sell. Eskom motivates its application by showing how these costs are reasonable and must be incurred to provide

⁴ Section 4 of the Electricity Regulation Act 4 of 2006 (**ERA**) empowers NERSA to regulate electricity prices and tariffs.

⁵ Eskom holds this licence in terms of section 14 of the ERA.

electricity efficiently. Based on these reasonable costs, and factors like projected sales, Eskom asks NERSA to allow Eskom to recover money.⁶

16. For example, Eskom might say that electricity costs R1.5 billion to generate in a year, given how much electricity South Africans will demand in that year. So, Eskom asks NERSA for R1.6 billion, to recover its reasonable costs and make a profit.
17. Eskom's application is for multiple financial years. Eskom's application predicts its costs, across its various divisions, for supplying electricity for several years, usually three. It is a significant application, spanning hundreds of pages and consolidating large amounts of data. Hence, NERSA describes its decision on Eskom's application as a "Multi-Year Price Determination", or **MYPD**.
18. NERSA invites the public to comment on Eskom's MYPD application.⁷ In an application where Eskom seeks an *increase* in its revenue (compared to previous years), the public may have plenty to say. Members of the public may be concerned about the affordability of electricity prices if NERSA decides to allow Eskom to recover more revenue. The public may not be convinced that Eskom's supposed costs are reasonably incurred.
19. After receiving public comments, NERSA takes its MYPD decision. NERSA decides how much revenue Eskom should be able to recover in the next financial years. NERSA does so accordingly to a methodology, called the **Multi-Year Price Determination Methodology** or **MYPDM**. The

⁶ See NERSA's Reasons for its MYPD Decision of 12 January 2023 DA Caselines at 02-172.

⁷ NERSA's Reasons at para 2.10; DA Caselines 02-174.

methodology's aim is to give Eskom an opportunity to recover its prudent costs and achieve a reasonable return.⁸

20. NERSA, as it usually does, might give Eskom less than Eskom asked. For example, NERSA may find that some of Eskom's costs are imprudently incurred.
21. So, NERSA might award Eskom R1 billion (instead of the R1.6 billion requested by Eskom). If, in the previous year, NERSA allowed Eskom to recover R800 million, then NERSA's MYPD decision of R1 billion results in a *revenue increase of 25%*.
22. When NERSA takes its MYPD decision, NERSA translates Eskom's allowable revenue into an *average tariff*.⁹ Eskom's *revenue* is how much Eskom can recover overall. Eskom's *tariffs* are the prices for electricity paid by consumers. Tariffs are measured in cents per kilowatt hour.
23. NERSA calculates, based on projected sales, how much, on average, consumers will pay for electricity given Eskom's allowable revenue. So, if NERSA decided on a revenue of R1 billion, it may be that the *average tariff* is 100c/kWh.

⁸ NERSA's Reasons at para 1.1; DA Caselines 02-171.

⁹ NERSA's Decision at para 3; DA Caselines at 02-163. NERSA's Answering Affidavit at para 91.1; DA Caselines 07-65.

24. In a year where Eskom's revenue goes up, assuming sales stay constant, the average tariff will go up too.¹⁰ If Eskom can recover more, and can only recover from consumers, then consumers are going to pay more.¹¹
25. So, in a previous year, the average tariff may have been 80c/kWh while Eskom's allowable revenue was R800 million. Now that Eskom's allowable revenue increases to R1 billion, the average tariff (for argument's sake) might be 100c/kWh—an increase of 25%.¹²
26. NERSA expresses its MYPD decision in terms of increases to the average tariff. For instance, the MYPD decision impugned by the DA is a decision to increase the average tariff by 18.65% in FY23/24 (compared to the average tariff in FY22/23) and to increase the average tariff in FY24/25 by a further 12.74%.¹³ Overall, in the next two years, the average tariff will increase by roughly 30%.
27. The average tariff is the endpoint of the MYPD decision. NERSA takes this average tariff and uses it in the next stage of its process.

(ii) The ERTSA decision

28. After NERSA takes its MYPD decision, NERSA considers the **Eskom Retail Tariff and Structural Adjustment (ERTSA)**. NERSA takes its ERTSA

¹⁰ DA's Supplementary Affidavit at para 276; DA Caselines 06-170.

¹¹ This is unless Eskom's projected sales increase from more consumers joining the market.

¹² The percentage increases in revenue may not equal the percentage increase in average tariffs. But average tariffs will increase if allowable revenue increases.

¹³ NERSA's Reasons at para 3; DA Caselines 02-163.

decision according to the ERTSA Methodology.¹⁴ Unlike an MYPD decision, NERSA takes an ERTSA decision every year.

29. The ERTSA entails adjusting the electricity tariffs payable by Eskom's customers considering Eskom's allowable revenue and the average tariff.¹⁵
30. The "adjustment" is an increase or decrease in tariffs payable by Eskom's customers to ensure that Eskom can recover its allowable revenue. Where NERSA approves an increase in the average tariff at the MYPD stage, the ERTSA, on average, will be to increase Eskom's tariffs.
31. For example, during the MYPD stage NERSA decides to allow Eskom R1 billion in revenue, raising the average tariff by 25% (compared to the previous year). The previous year's tariffs may not suffice to recover Eskom's new, increased revenue of R1 billion. Those tariffs might only recover Eskom's previous revenue (of R800 million). So, to ensure that Eskom can recover its new revenue, NERSA needs to adjust the tariffs Eskom charges its customers.
32. The ERTSA occurs between Eskom's "customer groups". Eskom has two main customer groups: municipal and non-municipal customers.¹⁶ Eskom sells electricity to municipalities (who in turn sell electricity to their residents). Eskom also sells electricity directly to other, non-municipal customers, including homes and commercial properties in both rural and urban areas.

¹⁴ The Methodology (Annexure SA4) begins at DA Caselines 06-431.

¹⁵ NERSA's Answering Affidavit at para 94; DA Caselines 07-66.

¹⁶ NERSA's Answering Affidavit at para 93; DA Caselines 07-66.

33. NERSA adjusts Eskom's customers' tariffs in two ways. First, based on forecasted sales volume *per group* to ensure that Eskom can recover its revenue.¹⁷ NERSA will determine the adjustment to municipal and non-municipal customers' tariffs. So, municipalities might get an increase of 14%, while non-municipal customers get an increase of 16%, depending on various factors.
34. Second, NERSA also adjusts tariffs *within* Eskom's non-municipal customers.
35. Eskom has a tariff structure for its non-municipal customers. Eskom charges different tariffs for different kinds of non-municipal customers. For example, Eskom charges a tariff for kinds of high load urban customers, like the "Megaflex Tariff".¹⁸
36. Eskom's tariff structure currently includes a subsidised tariff—the Homelight 20A tariff. The tariff is a "life-line" tariff for poor consumers who use little electricity.¹⁹ The tariff is subsidised in that it charges consumers less than the cost of supplying electricity.
37. The 20A tariff is also *cross-subsidised* by an "affordability subsidy charge". NERSA introduced the cross-subsidy in 2013. Large consumers (like industrial and mining customers) pay extra to Eskom to cover the costs of the Homelight 20A tariff.²⁰

¹⁷ NERSA's Answering Affidavit at para 93; DA Caselines 07-66.

¹⁸ See further Eskom's Tariff Affidavit at para 15; DA Caselines 08-14.

¹⁹ Eskom's Tariff Affidavit at para 16.2.4; DA Caselines 08-15.

²⁰ Eskom's Tariff Affidavit at para 19.2; DA Caselines 08-20.

38. For instance, if electricity costs Eskom 100c/kWh, and the 20A tariff charges poor consumers 75c/kWh, then large consumers pay an extra 25c/kWh to cross-subsidise the 20A tariff. Cross-subsidies, in this sense, are “revenue neutral”.²¹ They ensure that a richer consumer pays for the reduced tariff; not Eskom.
39. During the ERTSA, NERSA adjusts the tariffs within Eskom’s non-municipal customer tariff structure. For example, NERSA might adjust Eskom’s “Megaflex Tariff” by 25%, to align with the increase to the average tariff determined at the MYPD stage.
40. NERSA might also adjust the 20A tariff and the affordability charge. This is what NERSA did in this case. NERSA adjusted the 20A tariff by 10% and the affordability charge by 29.53%, to cover the costs of the 20A tariff.²²
41. NERSA will *not* consult with the public when it takes its ERTSA decision. NERSA will *not* consider structural changes or new tariffs at the ERTSA stage.²³ We return to this below.
42. At the end of the ERTSA stage, NERSA has determined how much consumers within Eskom’s customer groups will pay Eskom for electricity. NERSA’s adjustments will implement the average tariff determined at the MYPD and ensure that Eskom recovers its allowable revenue.²⁴

²¹ Eskom’s Tariff Affidavit at para 95.4; DA Caselines 08-67.

²² NERSA’s ERTSA Decision at para 1; DA Caselines 015-1550.

²³ ERTSA Methodology at para 3.1; DA Caselines 06-434.

²⁴ There is a stage after ERTSA, where NERSA determines each municipality’s tariffs. Eskom and NERSA, in their Part B answers to the DA’s case, do not invoke the municipal tariff stage to defend

(B) CROSS-SUBSIDIES ARE RELEVANT AT THE MYPD STAGE

43. Eskom and NERSA agree that NERSA must consider cross-subsidies.²⁵ Their argument is that NERSA does not need to consider cross-subsidies when taking the MYPD decision, but only when taking the ERTSA decision.
44. Cross-subsidies are relevant to NERSA's MYPD decision.
45. Section 15(1)(e) of the Electricity Regulation Act 4 of 2006 (**ERA**) provides that a condition of a licence relating to "the setting or approval of prices, charges and tariffs and the regulation of revenues [. . .] may permit the cross-subsidy of tariffs to certain classes of customers" (emphasis added).
46. Since NERSA determines licence conditions,²⁶ section 15 empowers NERSA to permit cross-subsidies as a condition of a licence.
47. NERSA has this power, to permit cross-subsidies, when determining conditions relating to the "setting or approval of prices, charges and tariffs and the regulation of revenues".
48. So, when NERSA approves Eskom's average tariff and regulates Eskom's revenue, which NERSA does at the MYPD stage, NERSA has the discretion to permit a cross-subsidy.

NERSA's decisions. The DA demonstrated why the municipal tariff decision is irrelevant to this case. See the DA's Supplementary Affidavit at para 281 onwards; DA Caselines 06-172.

²⁵ Eskom's Tariff Affidavit at para 123.2; DA Caselines 08-84.

²⁶ Section 14 of the ERA.

49. If NERSA has the discretion to permit a cross-subsidy at the MYPD stage, then cross-subsidies are *relevant* to the MYPD stage.
50. By providing NERSA with a discretion to permit cross-subsidies when regulating revenue and approving tariffs, the legislation has made it clear that cross-subsidies are relevant to decisions relating to tariffs and the regulation of revenue.²⁷
51. If cross-subsidies were irrelevant to revenue regulation, then the ERA would not have said that NERSA may permit cross-subsidies when imposing conditions regulating Eskom's revenue.
52. The Minister of Mineral Resources supports the DA's interpretation of section 15 of the ERA.²⁸
53. NERSA suggests that because section 15(1)(e) says "may", NERSA can ignore cross-subsidies when taking its MYPD decision.²⁹
54. NERSA confuses the duty to consider cross-subsidies with a duty to impose cross-subsidies. The "may" in section 15 of the ERA does not mean that NERSA may ignore cross-subsidies. The "may" means that not every licence needs to include a cross-subsidy. But NERSA cannot ignore the possibility of

²⁷ As in, for example, *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* [2007] ZACC 13; 2007 (10) BCLR 1059 (CC); 2007 (6) SA 4 (CC) at para 86.

²⁸ Minister of Mineral Resources' Affidavit at para 2.7; DA Caselines 09-9.

²⁹ NERSA's Answering Affidavit at para 225.1; DA Caselines 07-112.

imposing a cross-subsidy on a licence when determining its allowable revenue and average tariff.

55. The DA's interpretation of section 15(1)(e), that cross-subsidies are relevant to the MYPD stage, accords with settled principles of statutory interpretation.³⁰

55.1. *The text.* Section 15(1)(e) is clear. Licence conditions relating to tariffs, prices, charges, and revenue may permit cross-subsidies. So, cross-subsidies are relevant to imposing licence conditions relating to tariffs, prices, charges, and revenue.

55.2. *The context.* Section 15 is titled "Tariff Principles". It is the only section in the ERA addressing the terms on which NERSA may set the recovery of tariffs and revenues by licence holders. It is the only section mentioning cross-subsidies. There is no other section providing for when cross-subsidies should be considered.

55.3. *The purpose.* The ERA's objects include facilitating universal access to electricity and balancing the interests of customers, licensees, and investors.³¹ By considering cross-subsidies when approving Eskom's allowable revenue and average tariff, NERSA promotes these objects. At the MYPD stage, NERSA determines Eskom's "de facto price path"

³⁰ The Constitutional Court recently affirmed these in *Independent Community Pharmacy Association v Clicks Group Ltd* [2023] ZACC 10; 2023 (6) BCLR 617 (CC) at para 238.

³¹ Section 2(d) and (g).

for subsequent financial years.³² That is why NERSA calls the MYPD a *price* determination.

55.4. By considering whether poor consumers can afford an average tariff increase, whether existing subsidies will protect their access to electricity, and whether cross-subsidies should be introduced to protect access to electricity, NERSA facilitates universal access to electricity and balances consumers' interests. Conversely, *ignoring* cross-subsidies threatens access to electricity and risks an imbalance against consumers' interests.

55.5. *The promotion of the spirit, purport, and object of the Bill of Rights.*³³ A consideration of cross-subsidies mitigates the risk of a reduction to vulnerable consumers' access to electricity. In turn, a consideration of cross-subsidies reduces the risk of interference with constitutional rights because of reduced access to electricity.³⁴ In that sense, considering cross-subsidies, whenever deciding on tariffs and revenue, protects and promotes constitutional rights.

56. A court cannot invoke delegated legislation or a functionary's practice to interpret legislation.³⁵ Nonetheless, in this case NERSA's ERTSA Methodology

³² NERSA's MYPD Reasons at para 1.2; DA Caselines 02-171.

³³ Section 39(2) of the Constitution obliges Courts to promote the spirit, purport and objects of the Bill of Rights when interpreting legislation.

³⁴ A reduction in access to electricity impacts on a suite of constitutional rights. *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd* [2022] ZACC 44; 2023 (5) BCLR 527 (CC); 2023 (4) SA 325 (CC) at para 260.

³⁵ *Sebola v Standard Bank of South Africa Ltd* [2012] ZACC 11; 2012 (5) SA 142 (CC); 2012 (8) BCLR 785 (CC) at para 62. See most recently the minority judgment of Majiedt J in *Independent Community Pharmacy Association v Clicks Group Ltd* [2023] ZACC 10; 2023 (6) BCLR 617 (CC) at para 83 onwards. The majority, per Rogers J, endorsed this approach at para 272.

and practice *accords* with the DA's interpretation of section 15. The ERTSA Methodology and NERSA's practice imply that cross-subsidies are relevant to the MYPD stage.

57. With respect to the ERTSA Methodology:

57.1. The ERTSA Methodology provides that NERSA "as part of the MYPD" may allow cross-subsidies.³⁶ The ERTSA Methodology envisages these "approved" cross-subsidies to be "implemented" as part of the ERTSA.³⁷

57.2. The ERTSA Methodology does not envisage any "structural changes" or the "implementation of new tariffs". The Methodology envisages NERSA approving tariffs and their structures in the MYPD stage.³⁸

57.3. The implication is that NERSA should consider the possibility of new cross-subsidies at the MYPD stage. The MYPD stage is when NERSA considers wide-ranging socio-economic impacts of price increases.

57.4. ERTSA, in contradistinction, is only an *adjustment* to existing tariffs. NERSA understands the ERTSA process as "the implementation of the decisions arising out of the MYPD5 decisions".³⁹ NERSA does not consider bigger, structural questions at the ERTSA stage, like whether new cross-subsidies should be introduced to protect the poor.

³⁶ ERTSA Methodology at para 7.1; DA Caselines 06-439.

³⁷ ERTSA Methodology at para 7.2; DA Caselines 06-439.

³⁸ ERTSA Methodology at para 3.2; DA Caselines 06-434.

³⁹ DA Caselines 09-1508.

- 57.5. Eskom suggests that the ERTSA Methodology's references to the "MYPD" mean the entire of NERSA's process. But this cannot be. The Methodology distinguishes between the MYPD decision (as the multi-year determination of Eskom's allowable revenue and average tariff) and the ERTSA (which is an adjustment implementing the average tariff determined at the MYPD stage).⁴⁰
58. As a matter of *practice*, NERSA's process is set up to consider cross-subsidies at the MYPD stage (even though NERSA fails to do so). For example:
- 58.1. Eskom's MYPD application contains an entire section titled "Indicative Standard Tariff Increase", which illustrates to NERSA how the increase in revenue will have a knock-on effect for tariffs. The section even spells out how the 20A cross-subsidy will be affected and addresses the protection of poor households.⁴¹
- 58.2. Public consultation at the MYPD stage largely concerns subsidies and the affordability of the average tariff. There is no consultation at the ERTSA stage.⁴²
- 58.3. NERSA considers the socio-economic impacts of a revenue increase (and an average tariff) when taking its MYPD decision.⁴³ If NERSA can

⁴⁰ For example, see ERTSA Methodology at paras 1.1, 1.2., and 3.2; DA Caselines 06-434.

⁴¹ DA Caselines 014-53.

⁴² Eskom's Tariff Affidavit at para 129.3; DA Caselines 08-87.

⁴³ DA Caselines 014-1165.

consider the impact its decision will have on the poor, then NERSA can consider cross-subsidies.

59. So, on an interpretation of the ERA, and considering the ERTSA Methodology and NERSA's practice, cross-subsidies are relevant at the MYPD stage.

(c) CONCLUSION ON NERSA'S DUTY

60. Cross-subsidies are relevant to the MYPD stage. The ERA says as much, by giving NERSA the discretion to permit cross-subsidies when imposing conditions relating to tariffs and revenues. The ERTSA Methodology says the same, expressly. NERSA and Eskom, in practice, appear prepared to have cross-subsidies considered at the MYPD stage.
61. So, NERSA must at least *consider* cross-subsidies when taking its MYPD decision.
62. The DA submits that in exceptional circumstances, NERSA *must* permit cross-subsidies.
63. The Constitutional Court has held that a discretion, "may", in legislation sometimes can be read as conferring a power coupled with a duty to use it.⁴⁴
64. A court will read "may" as "must" to achieve a constitutional result and to better afford constitutional protection to persons affected by the relevant decision.⁴⁵

⁴⁴ *Saidi v Minister of Home Affairs* [2018] ZACC 9; 2018 (7) BCLR 856 (CC); 2018 (4) SA 333 (CC) at para 17.

⁴⁵ *Saidi* at para 18; *Joseph v City of Johannesburg* [2009] ZACC 30; 2010 (3) BCLR 212 (CC); 2010 (4) SA 55 (CC) at para 73.

65. In *Saidi*, the Court read a refugee reception officer's discretion ("may") to extend an asylum seeker's permit as a duty. The Court adopted this interpretation to "better afford an asylum seeker constitutional protection" and to safeguard their constitutional rights to human dignity, access to healthcare and education, and freedom and security of the person.⁴⁶
66. In this case, NERSA's decision significantly interferes with existing access to electricity. On NERSA's version, half of South Africa faces a threat to their access to electricity because of its decision.⁴⁷ NERSA accepts that the most vulnerable consumers could be left without electricity.⁴⁸ NERSA acknowledges the obvious implications this has on their constitutional rights.⁴⁹ In these circumstances, NERSA cannot sit back. It *must* permit a cross-subsidy of some kind to protect vulnerable consumers' access to electricity.

II NERSA'S FAILURE TO CONSIDER CROSS-SUBSIDIES

67. NERSA admits that NERSA did not consider cross-subsidies in its MYPD decision.⁵⁰ If the DA is correct that cross-subsidies are relevant to the MYPD decision, then NERSA's admission suffices to review the decision.⁵¹ NERSA failed to consider a relevant consideration, rendering its decision irrational and contrary to PAJA.

⁴⁶ *Saidi* at para 18.

⁴⁷ DA Caselines 02-317.

⁴⁸ DA Caselines 02-317.

⁴⁹ DA Caselines 02-315.

⁵⁰ NERSA's Answering Affidavit at para 315; DA Caselines 07-135.

⁵¹ If the MYPD decision is reviewed, then the ERTSA decision must fall too. The ERTSA decision cannot exist without the MYPD decision.

68. NERSA and Eskom allege, however, that NERSA considered cross-subsidies in its ERTSA decision.
69. This allegation cannot be sustained. As we explained above, the ERSTA is an adjustment to *existing* tariffs. NERSA, on its own version and methodology, does not consider cross-subsidies at the ERSTA stage. NERSA simply adjusts pre-existing tariffs, which may include cross-subsidies, to ensure that Eskom can recover the average tariff approved at the MYPD stage.
70. Just because NERSA adjusts a pre-existing, subsidised tariff at the ERTSA stage does not mean that NERSA *considered* permitting a cross-subsidy. Adjusting a pre-existing subsidy to ensure Eskom can recover costs is one thing; considering permitting new cross-subsidies in response to a substantial increase in average tariff prices is another.
71. When NERSA decided to increase the 20A tariff by 10%, NERSA conducted no scientific or empirical analysis. NERSA never assessed whether the cross-subsidy would protect vulnerable people. NERSA never considered whether new or alternative subsidies should be introduced.⁵² In these circumstances, NERSA cannot be said to have “considered” cross-subsidies at the ERTSA stage.
72. There are two implications to this. If NERSA did not consider cross-subsidies at the ERTSA stage, then—

⁵² NERSA's ERTSA Reasons; DA Caselines 014-1564. NERSA's Answering Affidavit at para 185; DA Caselines 07-97.

72.1. The ERTSA decision cannot be used to justify a failure to consider cross-subsidies at the MYPD stage; and

72.2. Even if the DA is incorrect, and tariffs are only relevant at the ERTSA stage, then NERSA failed in its duty to consider tariffs at the ERTSA stage. The ERSTA decision can be reviewed for that reason.

III REMEDY

73. The DA's challenge concerns a failure by the national energy regulator to consider protecting South Africa's poorest electricity consumers. NERSA acknowledged that thousands (28 895) of people will lose their jobs, and that poor households will abandon electricity usage, because of its decision.⁵³

74. NERSA did nothing in response to this. It did not consider cross-subsidies to protect those vulnerable people before approving Eskom's new average tariff price. NERSA's decision is inconsistent with the Constitution. It cannot be that a regulator can ignore measures to protect vulnerable consumers in the face of evidence that those consumers will suffer.

75. NERSA's decision, for failure to consider cross-subsidies, is contrary to the principle of legality and PAJA. It is inconsistent with the Constitution. This Court, under section 172(1)(a) of the Constitution, *must* declare it as invalid.⁵⁴

⁵³ NERSA's MYPD Decision at paras 8.14.27 and 8.14.75; DA Caselines 02-318.

⁵⁴ *Economic Freedom Fighters v Speaker of the National Assembly* [2017] ZACC 47; 2018 (3) BCLR 259 (CC); 2018 (2) SA 571 (CC) at para 209.

76. The issue is then whether this Court should grant further just and equitable relief under section 172(1)(b) of the Constitution, including an order suspending its declaration of invalidity to allow NERSA to correct its defect.⁵⁵
77. Eskom, NERSA, the Minister of Finance, and the DA all (conditionally) agree that if this Court finds that NERSA's decisions are inconsistent with the Constitution, then the Court should suspend its declaration of invalidity. Eskom, NERSA, and the DA conditionally agree to remitting the decisions to NERSA.⁵⁶
78. Eskom proposes that the Court affords NERSA 15 months to redetermine its MYPD and ERSTA decisions. NERSA proposes that it requires six months.⁵⁷
79. The DA supports NERSA's proposal. Remittal will not require a full redetermination, but a consideration of cross-subsidies and (at best) slight adjustments to Eskom's application.⁵⁸
80. For these reasons, the DA seeks the relief sought in its draft order, which it will annex to its practice note.

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⁵⁵ Section 172(1)(b)(ii) of the Constitution.

⁵⁶ The Minister of Finance does not address remittal. DA's Replying Affidavit at paras 80, 127, and 147; DA Caselines 012-30.

⁵⁷ NERSA's Answering Affidavit at para 393; DA Caselines at 07-149.

⁵⁸ DA's Replying Affidavit at para 80.4; DA Caselines at 012-30.

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