

# Principles for Statutory Interpretation relating to efficiency and prudence in the energy sector

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# Paper Outline

- The conference paper makes a four-step case for developing and using a set of regulator-friendly principles of statutory interpretation, deriving those principles from a recent trend in court cases.
- Step One: In order to achieve the benefits of rights and good governance promised in new and recent Southern African constitutional orders, it is crucial to focus on practices of implementation, competition promotion, and regulation. Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* (1990).
- Step Two: In interpreting statutes providing regulatory regimes for particular sectors, courts should (a) recognize their role as co-regulators with energy regulators (b) recognize their position within an interdependent region.

# Paper Outline (continued)

- Step Three: A number of recent judicial decisions – Borbet v NERSA (2017); Transnet v Total (2016); NCP Chlorchem v NER (2016); PG Group v NERSA (2016) -- provide a basis for such principles ...
- ... though some other decisions are not as helpful – Electronic Media Network Ltd (2017); Earthlife Africa Johannesburg v Minister of Energy (query).
- Step Four: A provisional and limited list of the principles might be
- “In some cases, there has to be a degree of judicial deference to a specialised administrative body” (Borbet v NERSA)
- In favour of coordination and consistency (PG Group, Borbet v NERSA)
- Understand system effects of regulatory controls (PG Group)
- Against irrationality and injustice (Chlorchem)

# *NERSA v Borbet* (Supreme Court of Appeal (SA), June 2017) Facts

- The matter concerned a decision by the NERSA to increase the electricity tariffs in South Africa for 1.4% over and above an 8% increase it had already approved.
- Some major consumers of electricity challenged the decision in the Gauteng High Court (Pretoria). They were successful, with the High Court judge setting aside the decision taken by NERSA, on the basis that it had failed to follow its own statutorily based Multi-Year Pricing Determination Methodology (MYPDM), more specifically, the provisions dealing with adjustments to already approved tariffs (para 2).
- On appeal to the SCA (SA's #2 court), Judge Navsa reversed the decision of the High Court and found the additional tariff increase lawful.

## *NERSA v Borbet* (Supreme Court of Appeal (SA), June 2017) Decision and (Immediate) Effects

- South Africa's bulk energy supplier, ESKOM, welcomed the SCA's decision.
- For Eskom, the decision also meant that Nersa, in applying its discretion, could now consider the remaining RCA applications submitted by Eskom for financial years ending 2016 and 2017.
- These applications had been pending since the adverse judgment of the High Court that was handed down in August 2016.
- Further, for Eskom, the judgment creates "regulatory certainty" in how the tariff is determined, "a key concern of rating agencies and investors alike."

# NERSA v Borbet: Efficiency and Prudence

- “The Multi-Year Price Determination (MYPD) Methodology is developed for the regulation of Eskom’s required revenues. It forms the basis on which the National Energy Regulator of South Africa (NERSA or “the Energy Regulator”) will evaluate the price adjustment applications received from Eskom.” Para 18
- One of the objectives of the MYPD methodology is “to provide efficiency incentives without leading to unintended consequences of regulation on performance”.
- The Energy Regulation Act s 15 (Tariff Principles) provides ““(1) A licence condition ... relating to the setting or approval of prices, charges and tariffs and the regulation of revenues –
  - (a) must enable an efficient licensee to recover the full cost of its licensed activities, including a reasonable margin or return;
  - (b) must provide for or prescribe incentives for continued improvement of the technical and economic efficiency with which services are to be provided; ...”

# NERSA v Borbet (Supreme Court of Appeal (SA), June 2017) Judicial Reasoning

- Para 117: “I do not intend to deal with each individual pass-through that was allowed by NERSA, referred to in greater detail in paras 44 to 53, save to note that this was not a case of a rogue Regulator but one that was cautious and motivated in each of the constituent parts of its overall decision.”
  - Detailed decision-making process by Regulator allows for low-intensity approval by Court
- “The economic impact of the adjustment was considered by NERSA and the amounts allowed were within the bounds set by the MYPDM3. As far as efficiency is concerned, NERSA was astute to ensure Eskom did not obtain a benefit from its own inefficiency.”
  - Court ensures Regulator keeps to its own policy (MYPDM3)
  - Court ensures Regulator keeps to the factors (“efficiency” & prudence) in R’s empowering statute

# NERSA v Borbet (Supreme Court of Appeal (SA), June 2017) Judicial Reasoning (continued)

- “One has to bear in mind the balance to be achieved between Eskom’s sustainability and the impact on the consumer and the South African economy.”
  - Court recognizes its responsibility to balance among the firm, the individual, and the nation
- “This is a case in which there has to be a degree of judicial deference to a specialised administrative body engaged in an administrative action.”
  - Court recognizes Regulator as “specialized” – having regulatory expertise (economic, financial, legal?)
  - Court may go so far here as to give the Regulator some degree of authority to interpret the statute