



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: CRP162Jan22/DSC131OCT22

In the matter between:

CAPE GATE (PTY) LIMITED

Applicant

And

EMFULENI LOCAL MUNICIPALITY

Respondent

Panel:	Mr A Wessels (Presiding Member) Adv G Budlender (Tribunal Member) Prof I Valodia (Tribunal Member)
Heard on:	2 October 2023
Date of last submission:	18 October 2023
Order Issued on:	02 May 2024
Reasons Issued on:	02 May 2024

REASONS FOR DECISION AND ORDER

Introduction

[1] This application arises from a complaint self-referred by Cape Gate (Pty) Limited (“Cape Gate”) against Emfuleni Local Municipality (“ELM”), which is pending before the Competition Tribunal (“Tribunal”). Cape Gate alleges that ELM contravened section 8(a)/8(1)(a) of the Competition Act¹ (“the Act”).² On 2

¹ 89 of 1998, as amended.

² The Applicant refers in its notice of motion and founding affidavit to both section 8(a) and section 8(1)(a) of the Act, in relation to the complaint of excessive pricing. As a result of the amendment of the Act, it no longer contains a section 8(a). It seems that the reference to section 8(a) is probably because it was

October 2023, the Tribunal heard an application by Cape Gate for orders compelling further and better discovery by ELM, which opposed the application.

[2] We have decided to grant the application. These are the reasons for our decision.

Background

[3] On 29 October 2021, Cape Gate, a large steel producer located in the Emfuleni district, in the southwestern part of the Gauteng province, self-referred a complaint against ELM. ELM is a municipality responsible for distributing electricity to residents and businesses in the Emfuleni district. Cape Gate alleges that during the period 2016/2017 to date, ELM charged it excessively for the supply of electricity, in contravention of section 8(a)/8(1)(a) of the Act. In its answering affidavit, ELM denied the allegations against it.

[4] Following the close of pleadings, on 7 July 2022 the Tribunal convened a pre-hearing. ELM was directed to file a discovery affidavit and provide copies of its discovered documents by 29 August 2022.

[5] ELM responded by filing a discovery affidavit in which it stated, under oath, that it had in its power and possession only the pleadings exchanged in the main application. Not satisfied with ELM's discovery, Cape Gate sought further and better discovery. ELM responded by producing certain documents and objecting to the production of others on the grounds *inter alia* that such documents amount to third party information and/or are confidential.

[6] On 17 October 2022, Cape Gate filed the present application in which it sought orders compelling ELM to make further and better discovery. The details of the documents sought by Cape Gate are outlined in "**Annexure A**" to these Reasons.

[7] In an answering affidavit filed on 11 November 2022, ELM tendered the production of all of the documents sought by Cape Gate, except items 7, 8, 13 and 14 in **Annexure A**. By August 2023, ELM had however failed to produce the majority of

referred to in the complaint, which was launched before the Act was amended. Nothing turns on this in this discovery application.

documents it had tendered. At a pre-hearing on 29 August 2023, the Tribunal directed ELM to file a supplementary affidavit setting out the status of the outstanding documents.

[8] By the time of the hearing, the documents sought by Cape Gate could be distilled into two categories.³

8.1. First: documents which ELM had objected to producing, namely Items 7, 8, 13 and 14 to **Annexure A** (“documents in dispute”).

8.2. Second: documents which ELM had tendered, but which ELM failed to produce either at all or fully, being Items 2, 3, 4, 5, 9, 10, 11, 12, 15, 16, 17, 18, 19, 20, 21, 22 and 23 in **Annexure A** (“tendered documents”).

[9] Cape Gate submitted that ELM ought to be compelled to produce the documents in dispute as they are relevant to its theory of harm and that ELM has, in paragraphs 16, 17, 18 and 23 of its answer to the main application, made reference to these documents. ELM argued that the documents in question are irrelevant, confidential and constitute third-party information.

[10] As to the tendered documents, ELM submitted in its supplementary affidavit that they had either been destroyed in a fire that broke out in its offices, or lost during a relocation of its office.

[11] Cape Gate disputes the defences raised by ELM. We are required to determine whether the documents in dispute are relevant to Cape Gate’s ability to advance its theory of harm, and whether sufficient explanation has been provided by ELM for its inability to produce the tendered documents.

Legal Framework

[12] The Rules for the Conduct of Proceedings in the Tribunal (“Rules”) do not explicitly address the process for compelling discovery. However, Rule 55(1)(b) confers a discretion on the Tribunal to “*have regard*” to High Court rules if “*a question arises*

³ By the hearing of this application, ELM had made full discovery of Items 1 and 6 of **Annexure A**.

as to the practice or procedure to be followed in cases not provided for” by the Rules.

[13] Relying on Rule 55(1), Cape Gate called upon us to exercise our discretion by compelling ELM to make discovery in line with the principles of rule 35 of the Uniform rules of the High Court. The procedure adopted by the Tribunal in applications to compel discovery encompasses the principles laid out in High Court rule 35, but the Tribunal has cautioned against uncritically borrowing from those rules, noting that this may lead to impracticality owing to the *sui generis* and informal nature of the proceedings of the Tribunal. The Tribunal has emphasised that the guiding principle in these matters is fairness, and that the High Court rules in relation to discovery serve to assist the Tribunal in its assessment of fairness to the parties when discovery requests are made.⁴

[14] The overarching principle in determining whether documents ought to be discovered is relevance. In *Goosen*,⁵ the Court held that a document is relevant if it contains information which *may* – not which *must* – either directly or indirectly enable the party requiring the affidavit either to advance its own case, or to damage the case of its adversary.

[15] We also have regard to the wide discretion of the Tribunal in the conduct of its proceedings, given that while the Tribunal’s proceedings are adversarial in form, the Tribunal has inquisitorial powers, which in appropriate cases it must exercise in carrying out its truth-seeking functions.

[16] We consider Cape Gate’s application against this background.

Assessment

Documents in dispute

Relevance to Cape Gate’s theory of harm: Items 7 and 8

⁴ See *Goodyear South Africa (Pty) Ltd and The Competition Commission CR053Aug10/DSC073Aug12 / BMW South Africa (Pty) Ltd and Fourier Holdings (Pty) Ltd t/a Bryanston Motorcycles 97/CR/Sep08 [2011] ZACT; Group Five Ltd and Competition Commission CR229Mar15/DSC124Sep15; and Allens Meshco & others 63/CR/Sep09.*

⁵ *Goosen v Muller (1224/2015) [2017] ZAFSHC 212 (3 November 2017) at para 38.*

- [17] In Items 7 and 8, Cape Gate sought discovery of documentation or internal records which provide an overview of electricity tariffs charged by ELM to its other large industrial customers including, but not limited to, [REDACTED] [REDACTED] as well as correspondence between ELM and other large industrial customers in relation to electricity tariffs.⁶
- [18] Cape Gate submitted that the tariffs/prices charged by the alleged dominant firm, ELM, to other customers are relevant to the inquiry into whether an excessive price has been charged to it. The documents sought will provide insight into ELM's relationships with its other large industrial customers relative to Cape Gate as well as ELM's pricing conduct toward such customers.
- [19] ELM disputed the relevance of these documents to the determination of an excessive price. It contended that to the extent that Cape Gate intends to use the documents in order to compare the tariffs/prices charged to other industrial customers to the tariffs/prices charged to it, its request would be suitable for a price discrimination theory of harm and not excessive pricing.
- [20] In our view, evidence of the prices charged by ELM to other industrial customers is relevant to determining whether a price is excessive since it may enable Cape Gate to advance its excessive pricing case. The language of the Act is clear in section 8(3) that an excessive price must be determined in relation to whether the price is higher than a competitive price, and whether such difference is unreasonable taking into account all relevant factors which *inter alia* may include the respondent's prices for the goods and services (i) to customers in other geographical markets; and (ii) for similar products in other markets. Theoretically, from an economics perspective, the tariffs/prices that ELM charges to its other industrial customers may be a proxy or a benchmark for a competitive price. While there may be an overlap in the type of economic evidence considered in an

⁶ After the hearing, Cape Gate submitted (with leave of the Tribunal) a draft order, in which it made provision for ELM's tariff information in relation to other parties, such as [REDACTED] [REDACTED] ELM was provided an opportunity to respond to Cape Gate's draft order, but did not specifically address the contents of the draft order, choosing instead to submit its own draft order calling for the dismissal of the application.

excessive pricing case and a price discrimination case, nothing in Cape Gate's request for discovery suggests a deviation from its excessive pricing case.

Documents referred to in ELM's answer

[21] Cape Gate submitted that ELM has referred to the documents in dispute in paragraphs 16, 17, 18 and 23 of its answer to the main application, and that by virtue of the alleged references, it is entitled to the production thereof. As indicated, the documents sought by Cape Gate under Items 7 and 8 relate to the electricity tariffs charged by ELM to other industrial customers. The requests in Items 13 and 14 relate to the "ex-Eskom customer old contract" with each of the parties referred to in paragraph 16.1 of ELM's answer, as well as the 1987 agreement referred to in paragraph 18 of ELM's answer.

[22] In paragraphs 16,17,18, and 23 of ELM's answer to the main application, it states:

"16. The said meeting was necessitated by the Respondent's concerns that the Municipal Council had suffered serious financial losses due to the following reasons:

16.1. The Ex-Eskom customer old contract only catered for about 7 businesses. However, as it stands now, about 21 businesses are benefiting unjustly in a contract that does not cover the operational costs associated with the running and supplying electricity to all customers of Emfuleni;

16.2. That the tariff assessment had revealed that business customers have been paying an average tariff of Eskom for many years, since 1978. This meant that the Respondent had been under recovering on electricity supply services;

16.3. That the increase of 20.63 % tariff had been consulted with NERSA and evidence was provided to both NERSA and the LPU customers, including the Applicant, which supported the requested tariff increases.

17. *After Eskom had introduced the time of use tariff, which is MegaFlex and Miniflex the migration to this tariff was not automatic. The Respondent's customers and/or end-users including the Applicant, were enjoined to apply to migrate their tariffs. The Respondent also introduced this tariff to its customers. The Respondent's customers and/or end-users were enjoined to do their own study based on their production pattern and apply to the Respondent to place them on a tariff that would be more favourable to their operation.*

18. *At the time [REDACTED] which was one of the customers of the Respondent which formed part of the 1987 agreement, opted to [REDACTED] [REDACTED] The Applicant just like other customers were engaged and, they [REDACTED] [sic]. The Applicant was represented by [REDACTED] [REDACTED]*

23. *The said agreement was nullified after the IDPN/Budget process and no longer exist in law and in fact, and thus ceased to find application in the relationship between the Applicant and the Respondent. All the customers of the Respondent including the Applicant were informed through this process. Meeting was held with all affected businesses including the Applicant and information was sent to NERSA in relation to the new tariffs.”*

[23] According to ELM, nothing in those paragraphs can be construed as referring to the documents sought by Cape Gate. ELM argued that in terms of High Court rule 35(12), a mere reference by deduction or inference is insufficient to require the production of documents.⁷ Further, it stated that it has no intention of relying on the documents which Cape Gate seeks, in defending itself against the allegations in the complaint. It contends that to the extent that it is found to have referred to the documents sought, Cape Gate is not entitled to the production thereof as the documents are irrelevant to the adjudication of the main application.⁸

⁷ ELM Heads of Argument p 18, at para 41.

⁸ ELM Heads of Argument p 16, at para 37.

[24] In *Allens Meshco*,⁹ the Tribunal established two relevant principles in applications to compel discovery (albeit in a context where the application to compel has been brought prior to the filing of answering affidavits). Firstly, where a document is to be relied on to support an allegation in a pleading, then regardless of whether or not it is expressly quoted, the document should be provided. Secondly, an inference that a document exists is insufficient to create an obligation to produce it.

[25] In *Mkhwebane*,¹⁰ the Supreme Court of Appeal recently summarised the position regarding documents referred to in affidavits as follows: “... *documents in respect of which there is a direct or indirect reference in an affidavit or its annexures that are relevant, and which are not privileged, and are in the possession of that party, must be produced. Relevance is assessed in relation to rule 35(12), not on the basis of issues that have crystallised, as they would have, had pleadings closed or all the affidavits been filed, but rather on the basis of aspects or issues that might arise in relation to what has thus far been stated in the pleadings or affidavits and possible grounds of opposition or defences that might be raised and, on the basis that they will better enable the party seeking production to assess his or her position and that they might assist in asserting such a defence or defences.*”

[26] In our view, ELM directly and indirectly made reference to the documents in dispute in its answer. In its supplementary affidavit, ELM belatedly stated that Items 13 and 14 were no longer its possession and were either destroyed in the 2018 fire or lost during the relocation. But a reading of paragraphs 16, 17, 18 and 23 of the answering affidavit suggests that the deponent would have consulted and had regard to the tariff information, correspondence and contracts referred to therein, in preparation of the answer.

[27] ELM's arguments that the documents are irrelevant to the adjudication of the main application cannot stand. The relevance of these documents must be assessed

⁹ *Allens Meshco & Others v Competition Commission*, case number: CR229Mar15/DSC124Sep15 at paras 8 and 9.

¹⁰ *Democratic Alliance and Others v Mkhwebane and Another* [2021] ZASCA 18; [2021] 2 All SA 337 (SCA); 2021 (3) SA 403 (SCA) at para 41.

on the basis of the issues that may arise in relation to what has been stated in the affidavits. The requested documents are relevant to those issues.

[28] ELM raised further defences to the request for the documents. It argued that the documents contain confidential information belonging to third parties that are not party to the main proceedings. We agree with Cape Gate that ELM's argument ignores the provisions of section 45 of the Act, which provide a mechanism for the Tribunal to preserve confidentiality, for example by limiting the right to access information that is claimed to be confidential. In *Caxton*,¹¹ the Supreme Court of Appeal found that confidentiality is not a defence to producing documents sought in discovery. The practice of permitting the production of confidential documents, subject to appropriate limits, is firmly established in our law¹² and furthermore is an established practice in the Tribunal.

[29] For the first time in its Heads of Argument, ELM sought to rely on the doctrines of estoppel and *res judicata* in support of its argument that Cape Gate's case against it is that of excessive pricing and not price discrimination and that the information sought by Cape Gate would only be relevant to a price discrimination case. These contentions are without merit. Cape Gate does not seek to make a case of price discrimination.

[30] We conclude that the documents in dispute are relevant to Cape Gate's theory of harm in relation to alleged excessive pricing, and that reference has been made to them in ELM's answer to the main application. Accordingly, ELM must produce them.

Tendered Documents

[31] In its supplementary affidavit, ELM stated that despite diligent search, it is unable to locate the tendered documents and that the documents may have been destroyed in a fire that broke out in its offices in May 2018 or lost during the relocation of its offices.

¹¹ *Caxton and CTP Publishers and Printers Limited v Novus Holdings Limited (219/2021) [2022] ZASCA 24; [2022] 2 All SA 299 (SCA) (9 March 2022) ("Caxton")*.

¹² *Caxton supra*, at para 81.

- [32] It is trite that a discovery affidavit will generally be regarded as conclusive against the party seeking relief, in respect of both the possession of documents and the relevance of their contents.¹³ However, as noted in *Continental Ore Construction*,¹⁴ a court will go behind a discovery affidavit if it is satisfied that there is a probability that the party making the affidavit had the relevant document in its power or possession. The facts of this case are regrettably such that little reliance can be placed on the affidavits placed before the Tribunal on behalf of ELM.
- [33] The belated assertion that documents may have been lost in the fire or mislaid in the relocation is a conclusion which lacks any foundation in the form of evidence of primary facts. A conclusory assertion that the documents could not be found after diligent search does not constitute evidence. ELM has produced no direct evidence of what efforts have been made to find the documents, who made those efforts, and when they were made.
- [34] ELM has on five occasions provided contradictory statements on the status of the tendered documents. First: It stated in its discovery affidavit that other than the pleadings filed of record, it had no additional documents in its possession.¹⁵ Second: It stated, in response to Cape Gate's request for further and better discovery,¹⁶ that it only had in its possession annual financial statements sought by Cape Gate under Item 1.¹⁷ Third: In its answer to the present application, it tendered production of the documents, raising no dispute as to their relevance to the main application.¹⁸ Fourth: In a letter dated 25 July 2023, it purported to produce certain documents sought by Cape Gate.¹⁹ Fifth: In its supplementary affidavit, it stated that after diligent search it is unable to locate the documents and that they may have been destroyed or lost as a result of the 2018 fire. And ELM

¹³ Tshepiso Selby Mofokeng and The Standard Bank of South Africa, case number: 12998/2020.

¹⁴ *Continental Ore Construction and Highveld Steel 1971 (4) SA 589*.

¹⁵ ELM Discovery Affidavit, bundle p 64.

¹⁶ ELM Discovery Affidavit, bundle p 71.

¹⁷ Discovery is complete in respect of this item.

¹⁸ Answering Affidavit, bundle p 82 at para 14.

¹⁹ Bundle p 127.

for the first time, in the supplementary affidavit, raised the defence that the documents are irrelevant to the adjudication of the main application.²⁰

[35] In our view, the circumstances are such that no reliance can be placed on the generalised assertion that the documents cannot be found.

[36] In our view, this is a classic case for going behind a discovery affidavit:

36.1. Contradictory versions (most of them under oath) have been provided regarding the tendered documents.

36.2. The alleged fire broke out in May 2018. Most of the documents sought by Cape Gate fall within the complaint period (2016/2017 to date). ELM has provided no explanation for its failure to produce the requested documents which would have come into existence after the fire. It has not suggested that they never came into existence.

36.3. Despite its allegations about the fire and relocation, ELM has in a number of instances made discovery of documents which came into existence prior to May 2018. It produced annual financial statements dating back to the 2014/2015 financial year (Item 1) and made partial discovery of its management accounts for the periods 2012 and 2013. There is no adequate explanation for why subsequent management accounts have not been produced.

36.4. No explanation is provided as to the actual steps taken by ELM to search for the documents, or why there are no electronic copies of these documents.

[37] In the circumstances, we find that ELM has not shown that the tendered documents are not in its possession or control. Accordingly, we exercise our discretion in favour of going behind ELM's supplementary affidavit, and order production of the tendered documents.

²⁰ ELM Supplementary Discovery Affidavit, bundle p 119.

Conclusion

[38] In light of the above, we make the order that follows.

ORDER

Having considered the application by Cape Gate to compel further and better discovery from ELM, the Tribunal makes the following Order:

1. The application is granted.
2. ELM must, within 10 (ten) business days of this order, produce and provide copies of the following documents to Cape Gate-

Documents in Dispute:

- 2.1. **Item 7:** Any documentation or internal records that provide an overview or indication of electricity tariffs charged to ELM's other industrial customers, including but not limited to [REDACTED] [REDACTED] for the period 2016 to the date of this order (being for the financial year starting July 2016 to date). It is specifically recorded that ELM must produce documentation or internal records that provide an overview of the electricity tariffs it charged to [REDACTED] [REDACTED] if it supplied electricity to them during this period.

- 2.2. **Item 8:** Any correspondence (including but not limited to emails, letters, invoices) between ELM and the industrial customers referred to in paragraph 2.1 above in relation to electricity tariffs and issues relating to the supply of electricity (such as communications of disruptions or discontinuance), for the period 2016 to the date of this order (being for the financial year starting July 2016 to date).
- 2.3. **Item 13:** The “Ex-Eskom customer old contract/s” with each of the parties referred to in paragraph 16.1 of ELM’s answering affidavit.
- 2.4. **Item 14:** The 1987 agreement to which [REDACTED] was a party, referred to in paragraph 18 of ELM’s answering affidavit.

Tendered Documents:

- 2.5. **Item 2:** ELM’s management accounts for the following periods –
- 2.5.1. 2012: January, February, March, April, May, June, July, August, September, November;
- 2.5.2. 2013: January, February, May, June, July, August, September, October, November, December;
- 2.5.3. 2014: January, February, March, September, October, November;
- 2.5.4. 2015: January, February, March, April, May, June, July, August,

September;

2.5.5. 2016: July, September; and

2.5.6. 2017: March;

2.6. **Item 3**: All documentation that ELM has provided to the National Energy Regulator of South Africa (“NERSA”) for the period 2016 to 2022 (being for the financial year ending June 2017 up to, and including, the financial year ending June 2022) in relation to:

2.6.1. All applications for a tariff increase submitted by ELM to NERSA;

2.6.2. All requests by NERSA to ELM to submit to NERSA ELM’s cost-of-supply studies; and

2.6.3. All cost-of-supply studies submitted by ELM in response to NERSA’s requests for same.

2.7. **Item 4**: All correspondence (including but not limited to emails, letters etc) between NERSA and ELM for the financial years 2016/17 until 2021/22.

2.8. **Item 5**: All ELM’s board meeting minutes and/or internal documents and

presentations that discuss or refer to Cape Gate's tariff structure for the period 2016 to the date of this order (being for the financial year starting July 2016 to date).

2.9. **Item 9**: All correspondence between ELM and Eskom in relation to electricity payments, issues of supply and/or electricity tariffs for the period 2016 to the date of this order (being for the financial year starting July 2016 to date).

2.10. **Item 10**: Any internal assessments or third-party studies conducted or commissioned by ELM into its electricity supply costs and/or how these may be reduced for the period 2016 to the date of this order (being for the financial year starting July 2016 to date).

2.11. **Item 11**: The notice by ELM to Cape Gate of ELM's nullification of the agreement pursuant to the IPDN/Budget process that Cape Gate was allegedly informed of, as referred to in *paragraph 23* of ELM's answering affidavit.

2.12. **Item 12**: The "old Ex-Eskom Contract with the Respondent" referred to in paragraph 15 of ELM's answering affidavit.

2.13. **Item 15**: All Cost of Supply Studies submitted by ELM to NERSA as contemplated by NERSA's Cost of Supply Framework dated 19 September 2020.

- 2.14. **Item 16**: ELM's network and development plans as contemplated by clause 6.1 "Network and Capacity Planning" in terms of NERSA's Rules for Licensable Distribution Areas of Supply dated 19 January 2021, which set out ELM's network and capacity planning, development and investments relevant to future licensable areas of supply.
- 2.15. **Item 17**: ELM's Integrated Development Plan, as contemplated by clause 6.1.2.1 of NERSA's Rules for Licensable Distribution Areas of Supply dated 19 January 2021.
- 2.16. **Item 18**: ELM's system performance statistics, as contemplated by clause 6.1.2.2 of NERSA's Rules for Licensable Distribution Areas of Supply dated 19 January 2021.
- 2.17. **Item 19**: ELM's ten-year load forecast at its incoming point of supply or point of delivery, as contemplated by clause 6.1.2.3 of NERSA's Rules for Licensable Distribution Areas of Supply dated 19 January 2021.
- 2.18. **Item 20**: ELM's network development plans with a minimum window period of five years, as contemplated by clause 6.1.2.4 of NERSA's Rules for Licensable Distribution Areas of Supply dated 19 January 2021.
- 2.19. **Item 21**: ELM's electrification plans submitted annually to the Department of Mineral, Resources and Energy, since the financial year

ending 2016/2017 until 2020/2021.

2.20. **Item 22:** ELM's application to NERSA for the licensing of an area of supply, as contemplated by sections 4, 8, 16 and 17 of the Electricity Regulation Act and in accordance with the NERSA-approved Electricity Distribution Licensing Procedure and/or flow chart 1.

2.21. **Item 23:** ELM's Electricity Distribution Forms submitted annually to NERSA for the period 2016 to the date of this order (being for the financial year starting July 2016 to date), which is to include all D1 to D8 Forms, being:

2.21.1. ELM's D1 Form containing ELM's relevant financial information, including ELM's balance sheet and income statement;

2.21.2. ELM's D2 Form, containing the required market information;

2.21.3. ELM's D3 Form, containing the required human resources information;

2.21.4. ELM's D4 Form, containing the required technical information;

2.21.5. ELM's D5 Form, containing the required connection information;

2.21.6. ELM's D6 Form, containing the required tariff information; and

2.21.7. ELM's D8 Form, containing the required information regarding its quality of service.

3. In relation to the documents/information referred to in paragraphs 2.1 (Item 7) and 2.2 (Item 8) above, to the extent that these documents/information may contain information which is confidential to the third party concerned, and in relation to any other document/information referred to above that may contain confidential third party information, the following procedure will apply:

3.1. ELM will, within 10 days of the date of this order, identify each and every such document in a schedule, which schedule shall include (1) the name or title of the document; (2) the name of the third party who owns the confidential information and its contact details; and (3) the date of the document; and (4) the nature of the third party confidential information;

3.2. Cape Gate's attorneys will address correspondence to each of the third parties referred to, requesting that access to the document/s be given to Cape Gate's legal representatives, economists, consultants or other expert witnesses (if applicable), subject to the provision of appropriate signed confidentiality undertakings in their favour;

3.3. in the event that the third party concerned refuses access to the document on the basis in 3.2, Cape Gate may apply to the Tribunal in

terms of section 45 of the Act.

4. The costs are reserved for determination at the conclusion of the hearing of the complaint.

Signed by: Geoff Budlender
Signed at: 2024-05-02 15:15:29 +02:00
Reason: Witnessing Geoff Budlender

Geoff Budlender

02 May 2024

Date

**Advocate Geoff Budlender SC
Mr Andreas Wessels and Prof. Imraan Valodia concurring**

Tribunal Case Managers:

Matshidiso Tseki and Theodora Michaletos

For the Applicant:

Adv Anthony Gotz SC assisted by Adv Lucelle
Buchler instructed by Fairbridges Wertheim Becker
Attorneys

For the Respondent:

Adv Palesa Sekati instructed by Seleka Attorneys

ANNEXURE A

ITEM	REFERENCE IN APPLICANT'S REQUEST FOR FURTHER AND BETTER DISCOVERY	DESCRIPTION OF DOCUMENT
1.	Ad item 1	The Respondent's annual financial statements for the financial years ending June 2014 and June 2015.
2.	Ad item 2	The Respondent's management accounts for each month for the period for the period 2013 to 2022 (being for the financial year 2013/14 to, and including, the financial year 2021/22). For the purposes of this request, the respondent's management accounts include documents (in the form of excel spreadsheets or otherwise) that reflect the respondent's profitability; and which include total electricity supply costs incurred by the respondent, broken down by category (i.e., bulk electricity purchases, salaries, repairs and maintenance), and total revenue earned by the respondent from the sale of electricity.
3.	Ad item 3	All documentation that the respondent has provided to the National Energy Regulator of South Africa

		<p>("NERSA") for the period 2016 to 2022 (being for the financial year ending June 2017 to, and including, the financial year ending June 2022) in relation to tariff increase applications; including but not limited to:</p> <ul style="list-style-type: none"> - All applications for a tariff increase submitted by the respondent to NERSA; - All requests by NERSA to the respondent to submit to NERSA the respondent's cost-of-supply studies; - All cost-of-supply studies submitted by the respondent in response to NERSA's requests for same.
4.	Ad item 4	All correspondence (including but not limited to emails, letters, etc.) between NERSA the respondent for the financial years 2016/17 until 2021/22.
5.	Ad item 5	All the respondent's board meeting minutes and/or internal documents and presentations that discuss or refer to the applicant's tariff structure.
6.	Ad item 6	All correspondence (including but not limited to emails, letters, etc.) between the respondent and the applicant in relation to electricity tariffs and issues relating to the supply of electricity (such as communications of disruptions or discontinuance).
7.	Ad item 7	Any documentation or internal records that provide an overview or indication of electricity tariffs charged to other industrial customers of the respondent (including but not limited to [REDACTED])
8.	Ad item 8	Any correspondence (including but not limited to emails, letters, etc.) between the respondent and

		other large industrial customers (such as [REDACTED] in relation to electricity tariffs and issues relating to the supply of electricity (such as communications of disruptions or discontinuance).
9.	Ad item 9	All correspondence between the respondent and Eskom in relation to electricity payments, issues of supply and/or electricity tariffs.
10.	Ad item 10	Any internal assessments or third-party studies conducted or commissioned by the respondent into its electricity supply costs and/or how these may be reduced.
11.	Ad item 11	Notice by the respondent to the applicant of the respondent's nullification of the agreement pursuant to the IPDN/Budget process that the applicant was allegedly informed of, as referred to in paragraph 23 of the respondent's answering affidavit.
12.	Ad item 12	The "old Ex-Eskom Contract with the Respondent" referred to in paragraph 15 of the respondent's answering affidavit.
13.	Ad item 13	The "Ex-Eskom customer old contract" with each of the parties referred to in paragraph 16.1 of the respondent's answering affidavit.
14.	Ad item 14	The 1987 agreement to which [REDACTED] was a party, referred to in paragraph 18 of the respondent's answering affidavit.
15.	Ad item 15	All Cost of Supply Studies submitted by the respondent to NERSA as contemplated by NERSA's Cost of Supply Framework dated 19 September

		2020.
16.	Ad item 16	The respondent's network and development plans as contemplated by clause 6.1 "Network and Capacity Planning" in terms of NERSA's Rules for Licensable Distribution Areas of Supply dated 19 January 2021, which set out the respondent's network and capacity planning, development and investments relevant to future licensable areas of supply.
17.	Ad item 17	The respondent's Integrated Development Plan, as contemplated by clause 6.1.2.1 of NERSA's Rules for Licensable Distribution Areas of Supply dated 19 January 2021.
18.	Ad item 18	The respondent's system performance statistics, as contemplated by clause 6.1.2.2 of NERSA's Rules for Licensable Distribution Areas of Supply dated 19 January 2021.
19.	Ad item 19	The respondent's ten-year load forecast at its incoming point of supply or point of delivery, as contemplated by clause 6.1.2.3 of NERSA's Rules for Licensable Distribution Areas of Supply dated 19 January 2021.
20.	Ad item 20	The respondent's network development plans with a minimum window period of five years, as contemplated by clause 6.1.2.4 of NERSA's Rules for Licensable Distribution Areas of Supply dated 19 January 2021.
21.	Ad item 21	The respondent's electrification plans submitted annually to the Department of Mineral, Resources and Energy, since the financial year ending

		2016/2017 until 2020/2021.
22.	Ad item 22	The respondent's application to NERSA for the licensing of an area of supply, as contemplated by sections 4, 8, 16 and 17 of the Electricity Regulation Act and in accordance with the NERSA-approved Electricity Distribution Licensing Procedure and/or flow chart 1.
23.	Ad item 23	<p>The respondent's Electricity Distribution Forms submitted annually to NERSA for the period 2016 to the date of this order (being for the financial year starting July 2016 to date), which is to include all D1 to D8 Forms, being:</p> <ul style="list-style-type: none"> - The respondent's D1 Form containing the respondent's relevant financial information, including the respondent's balance sheet and income statement. - The respondent's D2 Form, containing the required market information. - The respondent's D3 Form, containing the required human resources information. - The respondent's D4 Form, containing the required technical information. - The respondent's D5 Form, containing the required connection information. - The respondent's D6 Form, containing the required tariff information. - The respondent's D8 Form, containing the required information regarding its quality of service.