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## Competition Law ALERT

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jurisdiction over electricity supply  
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Cape Gate (Pty) (Ltd) (Cape Gate) lodged a complaint with the Competition Commission of South Africa (Commission) against the Emfuleni Local Municipality (ELM), the National Energy Regulator of South Africa (NERSA) and the Gauteng Provincial Government.



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## "Yes, I can tell you what to do": Competition Tribunal confirms jurisdiction over electricity supply excessive pricing complaints

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Cape Gate alleged, *inter alia*, that ELM had charged it exorbitant prices for the supply of electricity in violation of the excessive pricing provisions in the Competition Act 89 of 1998, as amended (Competition Act).

The Commission decided not to prosecute the matter, leading Cape Gate to self-refer the excessive pricing complaint to the Competition Tribunal (Tribunal).

### ELM's submissions

ELM essentially opposed the application on the basis that the Tribunal lacks jurisdiction. ELM alleged that Cape Gate had a duty to exhaust other remedies available to it, and until such a time as Cape Gate had referred the matter to NERSA for investigation and exhausted the Electricity Regulation Act 4 of 2006's (ERA) internal remedies, its application was prematurely before the Tribunal.

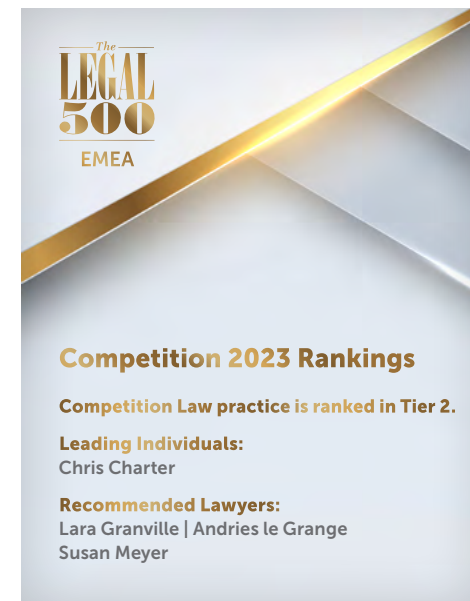
### Cape Gate's submissions

Cape Gate denied that the ERA applies to excessive pricing, which concerns overcharging by a dominant firm. It contended that the relevant ERA provisions relied upon by ELM only concerned price/tariff discrimination and/or a licensee's failure to abide by its licensing conditions.

Lastly, Cape Gate submitted that even should NERSA have jurisdiction to entertain a complaint of excessive pricing, it and the competition authorities would then enjoy concurrent jurisdiction.

### The Tribunal's decision

The Tribunal held that it did not have to determine whether the ERA gives NERSA the power to deal with complaints of excessive (as opposed to discriminatory) pricing, since even if NERSA does have that power, there is concurrent jurisdiction. The Tribunal highlighted that there is nothing in the ERA or the



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memorandum of agreement (MoA) between NERSA and the Commission that obliges a complainant to first exhaust remedies under the ERA before lodging a complaint with the competition authorities in terms of the Competition Act. Further, the remedies provided under the ERA are not internal remedies.

ELM also contended that the High Court had inherent jurisdiction, that is not ousted by the Competition Authorities, to adjudicate excessive pricing complaints in terms of the Competition Act. The Tribunal, however, confirmed that the High Court has no jurisdiction to deal with such complaints. The Tribunal held that where a civil court is faced with an issue concerning conduct that is prohibited in terms of the Competition Act, that court is not permitted to consider that issue on its merits and must refer the issue to the Tribunal.

The Tribunal cited *Siyakhuphuka Investment Holdings v Transnet (158/CAC/Nov17)* [2018] ZACAC 4 (3 July 2018) in which the

Competition Appeal Court applied the Supreme Court of Appeal's decision in *Competition Commission of South Africa v Telkom (623/2009)* [2009] ZASCA 155; [2010] 2 All SA 433 (SCA) and stated the following in relation to the Tribunal's powers in a self-referral:

*"... [t]he mere referral of a complaint triggers the exercise of the Tribunal's adjudicative powers and the Tribunal is obliged to conduct a hearing into the matter with the object of determining whether a prohibited practice has indeed occurred. If a prohibited practice is established, then the Tribunal may impose a remedy it deems appropriate, choosing from a number of remedies listed in the Competition Act."*

On this basis, the Tribunal held that it "plainly" has jurisdiction over the conduct complained of by Cape Gate.

Lastly, ELM contended that there was no concurrent jurisdiction in the present matter because the concurrency only commenced in 2021 on conclusion of the MoA between NERSA and the Commission. The Tribunal disagreed with this on the basis that the concurrency arises from the Competition Act and not from the non-binding MoA. The Tribunal also relied on its judgment in *Venter v Law Society of the Cape of Good Hope Case No: 24/CR/Mar12 (014688)*, to opine that even in matters of concurrent jurisdiction, the Tribunal retains authority, unless expressly ousted.

### Conclusion

In conclusion, the Tribunal held that it, "beyond doubt", has jurisdiction over a complaint dealing with excessive pricing in respect of the supply of electricity and the assertion that Cape Gate was first required to pursue an internal remedy through a complaint to NERSA was without basis.

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