12/2/70

G.P.-S.33967—1968-69—1,000. J. 219.

In the Supreme Court of South Africa.
In die Hooggeregshof van Suid-Afrika.

(APPELLATE Provincial Division.)
(Provinsiale Afdeling.)

Appeal in Civil Case.
Appèl in Siviele Saak.

MUNICIPALITY OF PORT ELIZABETH *Appellant,*

versus

THE MUNICIPALITY OF UITENHAGE *Respondent*

Appellant's Attorney F.S. WEBBER & SON *Respondent's Attorney* ~~ESPIN~~ & HS IN
Prokureur vir Appellant *Prokureur vir Respondent*

Appellant's Advocate D. Reichman S.C. *Respondent's Advocate* T.M. Wallis S.C.
Advokaat vir Appellant L. Melamet *Advokaat vir Respondent* C.J. Hamie

Set down for hearing on 5-11-70
Op die rol geplaas vir verhoor op

2 3 6 16. 11

Coram: Ogilvie Thompson, Potgieter JJ.A. de Villiers, Corbett et Muller AJJ.A.

B.C.D. 9.45 am — 11.00 am
11.15 am — 1.00 pm
2.15 pm — 4.00 pm
4.15 pm — 5.~~45~~ pm

C.A.V.

The Court Orders:- per Muller AJA on 4/12/70

(1) The appeal, in so far as it was directed against the order declaring Regulation 8 of Provincial Notice No.68 of 1955 ultra vires, succeeds. In its other respects the appeal is dismissed.

(2) Appellant, the Municipality of Port Elizabeth, is to pay the costs of appeal, such costs to include the costs of two counsel.

(3) The cross-appeal is allowed with costs, such costs to incl the costs of two counsel.

(4) The order made by the Court a quo is set aside and is replaced by an order reading as follows: (a) It is declared:
(i) That the applicant is not obliged to pay the 5% tariff increase imposed by the respondent in respect of electricity supplied to the applicant.
(ii) That the applicant is entitled to recover from the respondent any monies already paid in respect of the said 5% tariff increase.
(b) Respondent is to pay the costs of the application.

BY THE COURT,

REGISTRAR.

Writ
Lasb

Date
Datu

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

THE MUNICIPALITY OF THE CITY
OF PORT ELIZABETH ..... Appellant

and

THE MUNICIPALITY OF UITENHAGE ..... Respondent

CORAM: OGILVIE THOMPSON, POTGIETER, JJ.A., et DE VILLIERS, CORBETT and MULLER, A.JJ.A.

Heard on: 5 November 1970. Judgment on: 4th December 1970.

J U D G M E N T

MULLER, A.J.A.:

This appeal is concerned with the validity of certain charges levied by the appellant, the Municipality of Port Elizabeth, in respect of electricity supplied by it to the respondent, the Municipality of Uitenhage. I shall refer to the parties as the Municipality of Port Elizabeth and the Municipality of Uitenhage respectively.

It appears that the Municipality of Uitenhage

does 2/

does not itself operate works for generating electricity either for its own use or for supplying private consumers in Uitenhage, but obtains a bulk supply of electricity for the said purposes from the Municipality of Port Elizabeth. This has been the position for many years, and the terms and conditions of supply, including the charges leviable, have over the years been laid down in successive agreements entered into between the parties from time to time, the last of which was concluded in writing during 1953, and which, subject to amendments agreed upon thereafter, is still in force. This agreement, as amended, is the subject of dispute in the present case; and, for a proper understanding of its terms, reference must be made to legislative provisions regulating the supply of electricity by the Municipality of Port Elizabeth to other consumers.

Until the year 1905 the Municipality of Port Elizabeth, though authorised to employ electricity for certain municipal purposes, was not entitled to sell and supply electricity to other consumers either within or outside the

municipal 3/

municipal area. By Act No. 11 of 1905 power was, however, conferred on the municipality to enter into agreements for the sale and supply of electricity to other consumers "in accordance with the tariff to be framed by the said Council with the approval of the Governor." (Preamble and Section 4 of the Act.)

The said Act was repealed by the Electric Power Ordinance, No. 6 of 1911, which thenceforth regulated, and still regulates, the supply and distribution of electricity for "public purposes" by any "undertaker" within the Cape Province. The expression "undertaker" is defined in Section 1 of the Ordinance as "any local authority, company, body, or person supplying, employing or distributing electricity for public purposes within the area of a local authority." And "public purposes" ~~is~~ ARE defined in the said section as meaning

"any public scheme or system providing for:-

(a) The application of electrical energy for lighting or other purposes to or in connection with any street, place, hall, building, or structure belonging to or subject to the control of a local authority.

(b) The supply of electric light or electrical energy for private purposes to consumers

generally 4/

consumers generally within the area controlled by any local authority.

(c) The application of electricity or electric current as a motive power for tramways, lifts, cranes and other like purposes within the area controlled by any local authority."

Section 5 of the Ordinance reads as follows:

"TARIFFS AND CONDITIONS OF SUPPLY TO BE APPROVED BY THE ADMINISTRATOR.

5. (1) All charges hereafter levied by any undertaker within the area of any local authority other than the Town Council of Cape Town for the supply of electric light or electrical energy for private consumers shall be in accordance with such tariffs and conditions of supply as may be approved of by the Administrator, and no charges levied under any tariff or conditions not so approved shall be recoverable.

(2) Such tariffs and conditions of supply shall be submitted for re-approval by the Administrator at intervals of not more than seven years.

(3) In respect of any building or premises owned or occupied by the Government within any area supplied by any such undertaker, the price and extent of the supply shall be subject to mutual agreement, but the rate shall not except with the consent of the Administrator exceed the lowest charge to any private consumer within such area, or to any local authority.

Provided that in considering any charges under sub-sections (1) and (2) hereof due regard shall be given by the Administrator to local conditions."

Section 6 provides that

"Subject to the provisions of this Ordinance, any local authority may

contract 5/

> contract with any other local authority for a supply of electrical energy, or for public purposes, (sic) provided that ....."

The proviso is not material to the present enquiry.

There are no provisions in the Ordinance, other than Section 5, regulating the charges leviable by an undertaker (which expression includes a local authority) for electricity supplied to other consumers; and it was contended in argument before us that section 5, being in terms limited in its application to charges for electricity supplied to private consumers, was not intended to apply to a situation such as the present where one local authority (the Municipality of Port Elizabeth) supplies electricity to another local authority (the Municipality of Uitenhage) and where the electricity so supplied is in part distributed to private consumers and in part applied to the needs of the local authority itself. I am inclined to agree with that contention but, for reasons which will become apparent

hereinafter 6/

hereinafter, there is, for purposes of the present dispute, no need to pronounce thereon.

The agreement at present in force between the parties was, as I have already mentioned, concluded in 1953. In addition to providing for the particular form of electrical energy to be supplied, the point of delivery thereof, the metering of the supply and other incidental matters, provision was made in the agreement for a fixed charge per unit of electricity supplied, which charge would be subject to a pro rata adjustment for any variation in the cost of coal supplied to the Municipality of Port Elizabeth. It was specifically provided that the agreement was subject to the consent of the Administrator and of the Electricity Control Board, and that the tariff and conditions of supply "shall be subject to the approval of the Administrator ..... in terms of Ordinance No. 6 of 1911 ....."

By letter dated 10 February 1953, the Municipality of Port Elizabeth was informed that the Administrator "has authorised your Council in terms of sections 5 and 6 of

Ordinance 7/

Ordinance No. 6 of 1911, to enter into an agreement with the Uitenhage Municipality as per draft submitted ....." One of the conditions of approval was that any amendments to the agreement "shall be subject to the Administrator's consent."

The reference in the said letter to Sections 5 and 6 of the Ordinance was, as it seems to me, clearly erroneous inasmuch as Section 5 has, as I have already stated, no bearing on the matter, and Section 6, while it authorises a local authority to contract for the supply to it of electricity by another local authority, makes no provision for approval of such a contract. But, be that as it may, the fact remains that the Administrator's approval was obtained as required by the agreement. The Electricity Control Board also notified the parties by letter of its approval of "the tariff of charges contained in the agreement." The Boards' approval was presumably obtained because of the provisions of Section 39 of the Electricity Act, No. 42 of 1922, then in force.

In 1962 the parties agreed upon certain variations

of 8/

of the 1953 agreement, one of which concerned the charges for electricity supplied, and in this regard clause 13 of the agreement was amended to read as follows:

> "Electricity shall be supplied by the Council in terms of this agreement to the consumer who shall pay for such electricity measured at Swartkops as provided in Clause 11 in accordance with the terms of the Port Elizabeth Urban Electricity Tariff published in Provincial Notice No. 68 of the 4th February 1955, as amended from time to time, such payments to be in terms of the scale applicable to high voltage bulk consumers and presently known as Scale "C" of the said tariff as in force from time to time, less a deduction of 0.75% of the amount due under such scale in respect of line losses within the Port Elizabeth Municipal area and, further, subject to the applicable discount on payments to be made under such scale as provided in the Port Elizabeth Urban Electricity Tariff referred to above."

Provision was then also made for additional charges in respect of capital expenditure on certain plant, apparatus and equipment and maintenance costs, etc., but these additional charges are not material to the present enquiry.

The amended agreement was submitted to the Administrator for approval and, by letter dated 28 February 1962, the parties were notified that the Administrator had approved thereof "in terms of Section 2 of Ordinance No. 17 of 1916." It seems clear that the reference in the letter

to 9/

to Section 2 of Ordinance No. 17 of 1916 was erroneous as the said section can have no application to the circumstances of the particular case. The section, in its terms, requires approval of agreements for the supply of electricity to private consumers outside the area of a local authority; which is not the case here for the reason, as I have already mentioned, that the Municipality of Uitenhage is not a private consumer, nor is the electricity in question supplied outside the area of a local authority as defined in Section 1 of Ordinance No. 6 of 1911. The fact remains, however, that the Administrator's approval of the agreement as amended was obtained. The amended agreement was also approved of by the Electicity Control Board - presumably in terms of Section 40 of the Electricity Act, No. 40 of 1958.

Provincial Notice No. 68 of 1955, referred to in Clause 13 of the amended agreement (quoted above), promulgated an electric tariff for consumers "within the Municipality" of Port Elizabeth. Although it was provided in Regulation 11 of the said Notice that the tariff therein

laid 10/

laid down was to be in force only until the end of the year 1955, its operation has been extended from time to time, and, subject to amendments promulgated over the years, the Notice is still in force.

It is stated in the Notice that the tariff promulgated thereby had been framed by the Municipality of Port Elizabeth and that the Administrator's approval thereof was "under the provisions of Ordinance No. 6 of 1911." Although no specific reference is made in the Notice to Section 5 of the Ordinance, it seems clear, from what I have already stated with regard to the provisions of the Ordinance concerning approval of electricity charges, that the Administrator's approval could only have been in terms of that section. In this regard I have already stated that, in my view, section 5 was not intended to apply to a case such as the present where one local authority supplies electricity to another. Moreover, the Notice in express terms makes the tariff promulgated thereunder applicable only to consumers

"within 11/

"within the Municipality" of Port Elizabeth. It follows that, whatever the position may be with regard to consumers in Port Elizabeth, the tariff laid down in the Notice could not apply to charges levied against the Municipality of Uitenhage, save by contractual arrangement between the parties - which indeed is the basis of its applicability in the present dispute.

The tariff promulgated under the Notice provides for different tariff scales to apply to various classes of consumers in Port Elizabeth. One of such scales, termed tariff scale "C", is applicable to, inter alios, high voltage bulk consumers, and it was this particular tariff, as amended and in force from time to time, that the parties, in their amended agreement, adopted as a basis for fixing contractually the charges to be levied against the Municipality of Uitenhage.

Tariff scale "C", as amended and at present in force, provides for a fixed charge per unit of electricity supplied subject to the condition that such charge "shall be increased or decreased by 0.004 cents per unit for each

completed 12/

completed 5 cents that the average price of coal delivered at the power stations rises above or falls below R4.60 per short ton." The Notice also contains the following general provisions with regard to tariff rates and payment of charges levied, namely:

"INCREASE IN TARIFF RATES

Regulation 8: In the event of an increase in the cost of fuel, running stores or of labour, or where deficits in the operation of the undertaking are likely to arise it shall be lawful for the Council to increase any or all the charges laid down in these tariff scales by an amount not exceeding 10 per cent thereof. The actual amount of the percentage increase shall be in the discretion of and determined by the Council from time to time."

"DISCOUNTS

Regulation 9: The foregoing Tariff Scales, with the exception of Scale "D" shall be subject to a discount of 5 per cent for prompt payment if payment is received at the City Treasurer's Office within 14 (fourteen) days of the date of the account provided the bill be produced at the time for inspection and that no previous balance for energy is outstanding under any Scale whatever."

It is common cause that the effect of clause 13 of the agreement, as amended by the parties, was to incorporate

the 13/

the provisions of Regulations 8 and 9 of the Notice in their contract.

It appears that as from 1 January 1965 the Municipality of Port Elizabeth, purporting to act in terms of Regulation 8 of the Notice, increased all the tariff charges laid down in the aforementioned tariff scales by 2½%. The effect thereof was that the Municipality of Uitenhage was, because of the terms of its agreement, also charged with this increase, which it paid without objection.

Towards the end of 1967 the Municipality of Uitenhage noted from newspaper reports that the Municipality of Port Elizabeth was contemplating a further increase of 5% in the electricity tariff. According to the reports the reason for such an increase, as explained by the Chairman of the Finance Committee of the Port Elizabeth Municipal Council, was that difficulty was foreseen in balancing the estimated revenue and expenditure of the Municipality for 1968. The estimated increase in expenditure was such that, if it had to be met in full by an increase in the general

rates 14/

rates, a very heavy burden would be placed on the ratepayers of Port Elizabeth. In order to hold the general rates at a reasonable level the Finance Committee had, therefore, recommended a further increase in the electricity tariff. This increase was expected to bring in an additional R350,000 per annum, which could be applied towards the general expenses of the Municipality, thereby avoiding a very substantial increase in the rates.

The Council of the Municipality of Uitenhage was perturbed about the suggested increase in the electricity tariff. As it saw the situation, having regard to what was stated in the newspaper reports, the proposal for an increase in the tariff was made, not because of any expected deficiency in the revenue of the Port Elizabeth electricity account, but with the object of balancing the Municipal budget in such a way as to bring relief to the ratepayers of Port Elizabeth. If the increase were to be made applicable also to the Municipality of Uitenhage the charges levied against it for electricity supplied would be increased by approximately

R40,000 .....15/

R40,000 per annum, and it would mean, so the Council of the Municipality of Uitenhage reasoned, that the Municipality of Uitenhage and the private consumers of electricity in Uitenhage would in effect be making a contribution of that sum of money for the relief of ratepayers in Port Elizabeth.

Letters were accordingly addressed by the Municipality of Uitenhage to the Municipality of Port Elizabeth setting forth its contentions and raising objection to the proposed increase being made applicable to it. The Council of the Municipality of Port Elizabeth adopted the proposal of its Finance Committee and increased the electricity tariff scales for all consumers supplied by the Municipality by 5% with effect from January 1968. In response to the representations of the Municipality of Uitenhage that the increase should not be applied to it, the Municipality of Port Elizabeth replied that the decision to make the increase had been taken under Regulation 8 of the aforementioned Provincial Notice and that, in terms of the agreement between the parties, the Municipality of Uitenhage was obliged to

pay 16/

pay the increased charges. Pursuant to that attitude charges based on the increased tariff were levied against the Municipality of Uitenhage as from January 1968 and accounts rendered accordingly.

The Municipality of Uitenhage, while disputing liability for the 5% increase, paid the accounts rendered in full, but subject to reservations with which I shall deal ~~with~~ in due course.

In October 1968 the Municipality of Uitenhage applied to the Eastern Cape Division on notice of motion for an order

> "(a) Declaring that Clause 8 of the Port Elizabeth Urban Electricity Tariff promulgated under provincial Notice No. 68 of 1955, is ultra vires and unenforceable;
>
> (b) ALTERNATIVELY, that even if the said Clause 8 is valid and enforceable, declaring that Respondent has exercised its powers thereunder for reasons not justifying a percentage increase of the said tariff, and that the 5% increase imposed by the Respondent on Applicant is invalid and unenforceable;
>
> (c) Declaring that Applicant is not obliged to pay the 5% increase imposed by Respondent, and that Applicant is entitled to recover from Respondent such 5% increase already paid by it under protest."

In 17/

In support of the application there was ~~lodged~~ FILED an affidavit by the Town Clerk of Uitenhage, Mr. Edge, in which the facts of the case are set out, and to which there are annexed the agreement entered into by the parties with subsequent amendments, the newspaper reports to which I have referred and the correspondence between the parties. There is also an affidavit by the Town Treasurer of Uitenhage, Mr. Boliter, who states that he examined the Abstract of the Treasurer's Accounts of the Municipality of Port Elizabeth for the year 1967 as well as the Estimates of Expenditure and Income of the Municipality for the year 1968. This examination, he says, was made with the object of

(i) establishing the purpose to which the monies derived from the increase of 5% in the electricity tariff had in fact been applied, and, more particularly, whether and to what extent the additional funds so obtained had been applied in the form of tax relief; and

(ii) ascertaining whether it could be argued that the 5% increase was in fact imposed to meet increased costs or anticipated increased costs in the electricity account of the Port Elizabeth Municipality.

With regard to the first part of the investigation Mr. Boliter found, according to his affidavit, that for the

year 18/

year 1967 an amount of R400,000 had been debited against the electricity account of the Port Elizabeth Municipality as a "Contribution in Aid of Rates", and that for the year 1968 this amount had been increased by R350,000 making a total debit in 1968 of R750,000 under the heading "Contribution to the General Rate Fund." According to him, the aforesaid sum of R350,000 was roughly equivalent to the additional income which could be expected as a result of the 5% increase in the electricity tariff, calculated by him to be R398,534. On these facts he was satisfied that the 5% increase was to enable the Municipality of Port Elizabeth to make an increased contribution in relief of rates.

With regard to the second part of the investigation Mr. Boliter states that an analysis of the estimates for the year 1968 shows that the following amounts were in fact debited to the electricity account for the year 1968:

R750,000, being the aforementioned "Contribution to the General Rate Fund";

R244,031, being a substantial part of the costs of the City Treasurer's Department for the year 1968;

R147,119 .....19/

R147,119, being street lighting charges for 1968.

There ~~was~~ WERE moreover, as he found, reserves in excess of R6,000,000 in the ~~electric light~~ ELECTRICITY account. His conclusion was that the 5% increase in the electricity tariff was not for the purpose of meeting actual or anticipated increases in costs in the running of the electricity undertaking.

Opposing affidavits were filed by the Town Clerk of Port Elizabeth, Mr. McPherson, and the City Treasurer, Mr. Jenvey. To the affidavit of Mr. McPherson there are attached the budget estimates of the Municipality of Port Elizabeth for the year 1968, prepared during 1967, and the budget speech on such estimates delivered by the Chairman of the Finance and General Purposes Committee on 20 November 1967. Mr. McPherson contends in general that the budget of a local authority must be looked at as a whole; that it is not proper to regard the affairs of each Municipal department or undertaking as if it were a separate and watertight compartment not affected by the finances of the other

departments 20/

departments, and that it is common practice in municipal finance that certain undertakings contribute a capital amount towards the finances of the municipality thereby making it possible to spread the burden of financing municipal activities more evenly and equitably amongst the ratepayers of a mumicipality and the users of municipal facilities. According to Mr. McPherson, it is accepted municipal practice for the electricity department to make a contribution towards rates. This practice has been followed by the Municipality of Port Elizabeth for many years, and a schedule annexed to his affidavit reflects contributions so made from 1925 to 1969. The amount of such contributions rose steadily over the years from R5,000 in 1925 to R400,000 in 1966 and 1967 and R750,000 in 1968. Mr. McPherson also makes the point that the Administrator, when he approved of the electricity tariff, including Regulation 8, promulgated by the aforementioned Provincial Notice, was well aware of the said practice.

For the rest, Mr. McPherson states in his affidavit that the increase of 5% in the electricity tariff

was 21/

was effected for the purposes set out in Regulation 8 of the tariff; and in this regard he draws attention to certain passages in the budget speech where reference is made to rising costs, rising salaries and wages and deficits in the electricity account, and to certain budget estimates for 1968 reflecting an increase in the running and maintenance costs of the electricity undertaking.

The opposing affidavit of Mr. Jenvey, the City Treasurer of Port Elizabeth, was devoted to answering the allegations MADE and contentions ADVANCED ~~made~~ by Mr. Boliter. In the first place Mr. Jenvey calculates the additional income expected for the year 1968 from the 5% tariff increase at R404,380, which is somewhat HIGHER ~~more~~ than the figure of R398,534 calculated by Mr. Boliter. Mr. Jenvey denies specifically "that the increase of 5% was to enable the Respondent (the Municipality of Port Elizabeth) to make an increased contribution in respect of rates," and he repeats elsewhere in his affidavit "that the 5% increase in the tariff was not made specifically with a view to the proceeds being

taken 22/

taken into the rate fund." In this regard he refers to the 1968 budget estimates which reflect an estimated expenditure increase of R636,254 for that year in the electricity undertaking, and makes the following statement:

> "For the year 1968 the Respondent Council was faced with increased expenditure on the electric light fund in excess of R600,000 whereas the 5% imposed on consumers amounted to approximately R400,000 and was insufficient to meet the increase in expenditure."

He shows, by reference to statistics, that over the years 1964 to 1968 there was an increase in the price of coal and in salaries and wages. Mr. Jenvey deals further with certain allegations made by Mr. Boliter and explains for what purposes the reserve funds in the electricity account are intended, and the reason for debiting a substantial portion of the costs of the City Treasurer's Department and the cost of street lighting to the electricity account.

I do not consider it necessary to deal in detail with all the matters traversed in Mr. Jenvey's affidavit nor with the replying affidavits of Mr. Edge and Mr. Boliter commenting thereon, as, in my view, the answer to the point

in 23/

in dispute can be elicited from the figures reflected in the budget estimates of the Port Elizabeth Municipality, and particularly from the following passage:

"ELECTRIC LIGHT FUND.

Revenue estimates, 1968.

	R
Expenditure.	8,418,622
Income.	8,282,974

Actual 1966 expenditure was R6,758,144 and income R7,043,321.

Capital estimates 1968. R3,741,940

The estimated revenue expenditure for the new year includes an additional R350,000 contribution to the general rate fund as proposed by the finance and general purposes committee, as well as reflecting as income the proposed increase in the surcharge from 2½% to 7½%. Apart from the increased contribution, the expenditure has increased by R636,254, or 8.5% over the 1967 estimate, the main variations being as follow:-

	Increase R	
Salaries, wages and allowances.	137,502	(16%)
Miscellaneous expenses.	84,687	(11%)
Coal.	152,125	(5%)
Loan charges.	272,790	(11%)
Repairs, and maintenance reduced by	-10,850	(-3%)
	R636,254	

(Increased) Income at R1,085,174 including the increased surcharge is 15% more than the 1967 estimate.

The deficit for the year is R135,648, to be met from the Tariff Equalisation Fund, the corresponding figure for 1967 was R234,568."

I 24/

I have added in brackets the word "increased" before the word "income" in the second last sentence of the above passage because the figure of R1,085,174 clearly represents estimated increased income for 1968 as compared with the income for 1967.

Taking the figures in the above passage as they stand, and ignoring for present purposes certain adverse comment in the affidavits of Mr. Edge and Mr. Boliter on particular aspects of the budget, the following conclusions appear to be inescapable, namely:

1. That if the electricity tariff had not been increased by 5% then the estimated increased income for 1968 would have been reduced by approximately R400,000, being the additional income expected to be derived from the tariff increase. Mr. Boliter, as I have stated, calculates the additional income ~~income~~ for 1968 from the tariff increase at R398,534, while Mr. Jenvey puts it at R404,380. Even if, for purposes of argument, the latter figure is accepted, then the estimated increased income for 1968, excluding the

additional 25/

additional income expected from the tariff increase, would have been R1,085,174 less R404,380 = R680,794, which sum would have been ~~adequately~~ amply sufficient to meet the increased expenditure for 1968 estimated at R636,254.

2. That, while the budget in respect of the Electric Light Fund for the year 1968 shows an estimated deficit of R135,648, this results from the inclusion on the expenditure side of a sum of R750,000 earmarked as a "contribution to the general rate fund." This appears clearly from the above quoted passage in which reference is made to a sum of R350,000 as being an "additional contribution to the general rate fund" included in the estimated expenditure for 1968. The contribution in 1967 was R400,000 and the additional sum of R350,000 ~~varied~~ increased the contribution to R750,000 for 1968. It follows that if the contribution to the rate fund had not been increased by the substantial figure of R350,000 the position would have been entirely different. There would then have been no need to obtain additional revenue to the extent of approximately R400,000 by way of

a 26/

a 5% increase in the electricity tariff.

The above conclusions are fortified by various explanatory statements in the budget speech from which I need only quote the following:

> "What is proposed is ..... an increase in the surcharge of 2½% on electric light accounts to 7½% and transfer of an additional R350,000 in aid of rates."

In the circumstances I cannot understand how Mr. Jenvey, the City Treasurer of Port Elizabeth, can PROFFER ~~propper~~ a denial to the charge that the increase of 5% in the electricity tariff was to enable an increased contribution to be made in aid of rates. It is true that reference is made in the budget speech generally to rising costs and rising salaries and wages, and indeed the budget, as I have indicated, shows an estimated increase of R636,254 in the running and maintenance expenses of the electricity undertaking for 1968, but on the figures in the budget, and particularly the estimated increased income of R1,085,174, (of which, incidentally, Mr. Jenvey makes no specific mention in his affidavit) it is clear that, if the decision to effect

an 27/

an increase in the electricity tariff had been ~~actuated~~ ACTUATED by considerations relative to increased costs and expenses, the actual increase would have been very much less than 5%.

For the reasons aforestated it is my conclusion that the increase of 5% in the electricity tariff was brought about mainly, if not entirely, for the purpose of increasing by R350,000, the contribution made by the Electric Light Fund to the general revenue of the Port Elizabeth Municipality. And it is against that factual position that the legal contentions of the parties should be considered.

The Court a quo, after hearing argument, ruled that Regulation 8 was ultra vires and made an order to that effect as well as a consequential order declaring that the Municipality of Uitenhage was not obliged to pay the 5% increase in the electricity tariff. For reasons which I shall mention later, the Court refused to declare the Municipality of Uitenhage entitled to recover the monies which it had already paid in respect of the additional 5% charged under the increased tariff.

An 28/

An appeal was noted by the Municipality of Port Elizabeth against the order and judgment of the Court, and the Municipality of Uitenhage, in turn, noted a cross-appeal against the Court's refusal to declare it entitled to a refund.

On appeal this Court, noting that the Administrator was not a party to the proceedings, at the outset raised the question whether, in view of the fact that the validity of a Provincial Notice was in issue, the Administrator should not have been joined, and in that connection drew attention to the decision and order made in Amalgamated Engineering Union vs. Minister of Labour 1949 (3) S.A. 637 (A.D.). Counsel for the Municipality of PORT ELIZABETH informed the Court that, in anticipation of the point being raised on appeal, the Administrator had already been approached with the object of ascertaining whether he was prepared to consent to being bound by the judgment of this Court notwithstanding the fact that he had not been cited as a party, but that the Administrator's decision was still awaited. Argument

on 29/

on the appeal proceeded and in the course thereof we were informed that the Administrator had telephonically conveyed his consent to be so bound; and that has since been confirmed by a letter dated 5 November 1970 addressed to the Registrar of this Court. The judgment of this Court in the matter will, therefore, be binding also on the Administrator.

Coming to deal with the legal issues in the case, it will be convenient at the outset to consider the reasons advanced by the learned Judges a quo (Cloete and Eksteen, JJ.) for their conclusion that Regulation 8 of the electricity tariff, promulgated under the aforementioned Notice, is ultra vires. Their reasoning was along the following lines:

(a) Section 5 of Ordinance No. 6 of 1911 provides that charges levied by an undertaker for electricity supplied to private consumers within the area of a local authority shall be in accordance with such tariffs and conditions of supply as may be approved of by the Administrator.

(b) The object of the legislature was, primarily, to protect the inhabitants, i.e. the private consumers of electricity within an urban area, against unreasonably high charges for electricity by ensuring that electricity charges are reasonable in relation to the cost of supply.

(c) 30/

(c) The word "tariff" used in Section 5 connotes a list or scale of charges; and the intention to be gathered from sub-sections 5 (1) and (2) is that such tariff should not only be approved of by the Administrator, but that, once approved, was to be unalterable save with the consent of the Administrator.

(d) The purpose of Regulation 8 of the Provincial Notice was to permit the Municipality in its discretion to increase the tariff, within certain limits, without the approval of the Administrator. In effect, therefore, so the learned Judges reasoned, it constituted pro tanto an unauthorised delegation by the Administrator of the discretionary powers conferred on him by the Ordinance.

I must say at once that I do not share the view that Regulation 8, in effect, constitutes a delegation of powers. It is inherent in the provisions of Section 5 of the Ordinance that a municipality has authority not only to frame a tariff but also to alter it from time to time - subject of course to the Administrator's approval. The purpose and effect of Regulation 8, which forms part of the approved tariff as promulgated under the Notice, was not to permit the municipality, by an act of delegation, to exercise powers of approval vested in the Administrator, but rather to serve as approval in advance by the Administrator of future increases within certain limits. The real enquiry is

whether 31/

whether Section 5 of the Ordinance permits of the inclusion in an approved tariff of a provision such as contained in Regulation 8.

It appears from the judgment that the learned Judges a quo, in arriving at the conclusion that Regulation 8 was invalid, were to a large extent influenced by the measure of discretion which, upon their interpretation of the Regulation, was intended to be vested in the municipality. As they interpreted Regulation 8, it was intended to permit the Council of the municipality, upon the happening of either of the events referred to therein, namely,

> an increase in the cost of fuel, running stores or ~~of~~ labour,
>
> or
>
> where deficits in the operation of the undertaking are likely to arise,

to increase the charges laid down in the tariff scales by any percentage subject only to observance of the 10% limit. The measure of the increase need, therefore, as the learned Judges saw the position, bear no relation to the extent of the increase in running costs or to the amount of the

expected 32/

expected deficit in the operation of the undertaking.

The above interpretation was also that contended for by Mr. Reichman, counsel for the Municipality of Port Elizabeth on appeal. Indeed his contention was that, provided either of the conditions precedent are satisfied - namely an increase in running costs or the likelihood of deficits in the operation of the undertaking - the Municipality of Port Elizabeth has, within the contemplation of Regulation 8, an unfettered discretion not only as to the measure of the tariff increase (provided, of course, that the 10% limit be not exceeded) but also as to the purpose for which the increase is effected (on the understanding that it be a bona fide municipal purpose). And, therefore, so Mr. Reichman submitted, upon either of the conditions precedent being satisfied, there could, in so far as Regulation 8 was concerned, be nothing wrong in the municipality deciding to increase the tariff, even beyond what was necessary to meet rising costs or an expected deficiency, with the object of obtaining increased revenue

for 33/

for general municipal purposes - which indeed is what happened in the present case.

I cannot agree with the proposition that the Administrator intended Regulation 8 to have such a wide effect. Accepting, as I think one must, that the reason why the legislature required electricity tariffs framed by local authorities and other undertakers to be approved of by the Administrator, was to ensure that charges levied against private consumers would be reasonable in relation to the costs involved in producing the electricity, it is extremely unlikely that the Administrator could have intended that Regulation 8 should confer an unfettered discretion on the municipality both as regards the measure of any increase as well as regards the purpose thereof, provided only (a) that one of the conditions precedent be satisfied and (b) that the limit of 10% be not exceeded.

One must, I think, have due regard to the context in which Regulation 8 was framed. The Provincial Notice, in giving effect to Section 5 of the Ordinance, presupposes

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a contractual relationship between the local authority and each of the private consumers supplied by it, and the provisions of Regulation 8, like the prescribed tariff scales, are applicable in each case on a contractual basis. In that context Regulation 8 serves as a means of regulating contractually, as between the supplier and the consumers, permissible tariff increases to meet contingencies in the operation of the undertaking. That that was the purpose of Regulation 8 clearly emerges, I think, from the nature of the conditions precedent which, in terms of the Regulation, are to be satisfied before a tariff increase can be effected. Those conditions are limited to considerations bearing solely on the object of operating the undertaking on a sound financial basis.

Having regard to the context and to the fact that the conditions precedent are limited in the respects aforementioned, the Regulation could not have been intended in itself to serve as a measure enabling the municipality to use the electricity undertaking as a source of revenue for

other 35/

other municipal purposes.

Interpreting Regulation 8 with due regard to the considerations which I have mentioned, and leaving aside for the moment the last sentence thereof, it seems to me that its underlying purpose was to permit the municipality to effect increases in the tariff, within the limit prescribed, so as to meet contingencies which MIGHT from time to time arise in the operation of the undertaking. No doubt the reasons, or one of the reasons, for so providing was to avoid delays which could be experienced if the Administrator had to be approached for the approval of tariff increases each time that a minor increase was necessitated by reason of such contingencies.

Looking at the matter in that light, it must, I think, follow as a matter of reason that the increases envisaged by the Regulation were intended to be commensurate with the actual or expected rises in the running costs of the undertaking.

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The question immediately poses itself why and for what purpose was there added to the Regulation the last sentence which provides that "The actual amount of the percentage increase shall be in the discretion of and determined by the Council from time to time." I think the answer comes readily to hand. In the first place it should be noted that ~~that~~ THE sentence is only concerned with the amount of the increase and not with the purpose thereof. This sentence does, therefore, not disturb the intention gathered from the rest of the Regulation preceding it, namely, that the purpose of an increase under the Regulation was to be limited to the considerations which I have mentioned.

In the second place one must visualise what the position would have been without a provision vesting a discretion in the Council of the municipality to determine a percentage increase which would be binding on the consumers. And in that connection the fact will be appreciated that increases under Regulation 8 would not be applicable to charges for electricity already supplied but to future supplies,

and 37/

and in calculating what the amount of the increase should be the Council would, so to speak, be budgeting for the future, an exercise in which income and expenditure cannot be balanced with precision. If then there had been no provision such as that in question, difficulties could arise between the municipality, on the one hand, and the consumers, on the other, as to whether the ~~particular~~ amount of A PARTICULAR ~~the~~ increase was justified. And it is precisely for that reason, I think, that the provision was introduced so that the consumers would be contractually bound by the amount of the percentage increase unilaterally fixed by the Council of the municipality - provided, of course, that the purpose thereof was limited to the objects aforestated and that the amount of the increase was not intended to exceed what was necessary for that purpose.

An interpretation such as I have indicated above admittedly places a restrictive meaning on the words employed in the Regulation, and particularly on the last sentence thereof, but that, I think, is fully justified in a case such as the present where, to give the words their literal meaning,

would 38/

as a rejection of the principle and practice contended for by Mr. McPherson, namely, that the electricity department of a municipality should, if necessary, make a contribution towards the general revenue of the municipality. That may be a sound and accepted municipal practice, and may indeed have been taken into account when the Administrator approved of the tariff scales laid down in 1955 and the subsequent amendments thereof, but Regulation 8 as such was clearly not designed to operate in further aid of that practice. Should the position be such that the present tariff scales are inadequate to allow of an increased contribution being made by the electricity department to the general revenue of the Municipality of Port Elizabeth, then nothing prevents the municipality from ~~the~~ approaching the Administrator for a revision of the tariff scales in order to meet present requirements. The Administrator can then decide to what extent the private consumers of electricity in Port Elizabeth should, under present circumstances, contribute towards the general revenue of the municipality.

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The question then remains whether Regulation 8, properly construed, can be said to be ultra vires Section 5 of Ordinance No. 6 of 1911. It forms a part of the tariff promulgated under Provincial Notice No. 68 of 1955 and, as such, has been approved of by the Administrator. Its purpose, as I have demonstrated, was to allow the municipality to effect, within prescribed limits, such increases in the tariff scales as might be necessitated by contingencies which would normally be expected in the operation of an electricity undertaking. In effect, the Regulation was intended to serve very much the same purpose, albeit in a wider compass, as the provision in tariff scale "C" directing that the fixed charges under that tariff scale "shall be increased or decreased by 0.004 cents per unit for each completed 5 cents that the average price of coal delivered at the power stations rises above or falls below R4.60 per short ton." The increases envisaged by the Regulation are, both as to purpose and extent, pre-eminently such as would unquestionably receive approval ~~if that requirement had~~ had specific approval not

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been rendered unnecessary by the Regulation for cases falling within its terms. And by eliminating approaches to the Administrator in such cases, which approaches could otherwise have caused delays in bringing the tariffs into line with increases in running costs, the Regulation seems to serve a very useful purpose.

In the light of these considerations, and looking at the matter from the point of view of reasonableness, it appears to me that a provision such as contained in the Regulation may fairly be regarded as part of an approved tariff within the contemplation of Section 5 of Ordinance No. 6 of 1911.(City of Cape Town vs. Claremont Union College 1934 A.D. 414 at p. 420 and Pretoria City Council vs. S.A. Organ Builders Limited 1953 (3) S.A. 400 (T) at p. 409).

It follows that, in my view, the Court a quo was wrong both in its interpretation of Regulation 8 and in its ~~judgment~~ DECISION declaring the said Regulation ultra vires.

That brings me to the next part of the enquiry, namely, whether, in increasing the tariff by 5%, the

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Municipality of Port Elizabeth acted within the bounds of the powers conferred by Regulation 8.

In this Court, as in the Court a quo, counsel for the Municipality of Uitenhage contended that, inasmuch as the 5% increase was imposed, not for the purposes envisaged in Regulation 8, but with the object of obtaining additional income from electricity supplied so as to permit of an increase of R350,000 in the contribution to be made by the electricity undertaking to the general revenue of the Municipality of Port Elizabeth, the said municipality was guilty of misuse of statutory powers. The learned Judges a quo did not, as I read their judgment, give a decision on this aspect of the case. They did refer in ~~their~~ THE judgment to the allegations made by the Municipality of Port Elizabeth concerning increases in the price of coal and in salaries and wages and ~~covering~~ CONCERNING expected deficits in the operation of the electricity undertaking, with regard to which ~~they~~ CLOETE, J. stated:

> "These allegations of increased costs and of the estimated deficits in the undertaking are not disputed by (the Municipality of Uitenhage) and I must accept that they were

present 43/

> present at the time the (Municipality of Port Elizabeth) took its decision to increase the tariff by 5%.

The learned Judges took the matter no further, presumably because of their conclusion that Regulation 8 was ultra vires. As I have already pointed out, with reference to the budget of the Municipality of Port Elizabeth for the year 1968, the estimated increase in expenditure, which must have allowed for increases in the price of coal and in salaries and wages, was outweighed by the estimated increase in income; and the deficit expected in the electricity account was brought about by the inclusion on the expenditure side of a sum of R350,000 as an increase in the contribution in aid of rates. The abovequoted statement by Cloete, J. cannot, therefore, serve as an answer to the contention of the Municipality of Uitenhage.

In considering the validity or otherwise of the contention that the Municipality of Port Elizabeth, in purporting to exercise its powers under Regulation 8, increased the tariff by 5% for reasons not authorised by the Regulation,

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it seems immaterial whether the matter is looked at as an enquiry concerning the exercise of statutory powers or as an enquiry concerning the exercise of a contractual right. On either basis the misuse of the power or right would render the act invalid. The Regulation is incorporated in the parties' agreement and, consequently, applicable on a contractual basis. It could, therefore, as between the parties, be used only for a purpose which, upon a proper construction of the Regulation, is within its contemplation - namely, a purpose in accordance with the interpretation which has been determined above.

As I have already indicated in this judgment, the increase of the electricity tariff by 5% was effected by the Municipality of Port Elizabeth for purposes not contemplated in Regulation 8. The increase was therefore invalid and unenforceable against the Municipality of Uitenhage. And the application should in the first instance have succeeded on that ground.

I come now to the question whether the Court a quo was correct in refusing to declare the Municipality of Uitenhage entitled to a refund of monies already paid by it in respect of the 5% increase. I have already mentioned that such payments were made subject to certain reservations. Those reservations were

recorded in a letter addressed by the Town Clerk of Uitenhage to the Municipality of Port Elizabeth. This letter, dated 22 February 1968, was written at the time when the Municipality of Uitenhage had just received the electricity account for January 1968, which was the first account based on the increased tariff. In the letter reference is made to Regulation 9 of the tariff, quoted above, which makes provision for a discount of 5% on electricity charges where accounts are settled within 14 days provided "no previous balance for energy is outstanding under any scale whatever." The letter concludes as follows:

> "To avail itself of its discount clause, my Council would have paid your account before the date but not including the 5% increase which you have included therein. In view of your account, however, including the 5% surcharge and since my Council naturally does not want to risk the possibility of losing its discount, the whole account is being paid to you in full.
>
> However, it must be clearly understood that this payment in no way whatsoever represents any acceptance by my Council of your proposed 5% increase and, in fact, my Council repudiates entirely your right to claim such an increase.
>
> If your Council, following upon the representations made, agrees to relinquish its claim for the 5% increase, or should the proposed 5% increase, in fact, not be legally enforceable on this Municipality, my Council hereby reserves the right in respect of this payment and in respect of future payments made to you which includes the 5% surcharge prior to a settlement being effected, to deduct the sum total of all

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the nett additional amounts paid in respect of the said 5% increase."

The Town Clerk of Port Elizabeth replied thereto by letter dated 8 March 1968 as follows:

"I refer to your letter dated the 22nd February, 1968, under reference ADE/SM.E. 3 (a)/347 and note the reservations under which you are paying the electricity accounts submitted to you for electricity supplied by the City Council.

The Council has given careful consideration to the submissions made by your Municipality and at its meeting on the 29th February, 1968, the following resolution was adopted:-

'That the Town Clerks of Uitenhage and Humansdorp be advised that the Council regrets that it is unable to accede to their requests that a 5% surcharge in the Council's electricity tariff be not charged to their respective Municipalities.'

The accounts will therefore continue to be rendered showing the 5% surcharge."

Further accounts rendered by the Municipality of Port Elizabeth did in fact include the 5% surcharge and these accounts were duly paid.

In the Court a quo the contention of the Municipality of Uitenhage was that it was entitled to obtain a refund of the monies in question inasmuch as payments thereof had been made under protest. The Court, after referring to the above letters and to certain authorities, held that the

monies 47/

monies paid were not ~~reasonable~~ RECOVERABLE. The ratio of the Court's decision was that the payments were not made under any form of duress or compulsion but voluntarily in order to obtain the benefit of the discount allowed for prompt payment.

In this Court Mr. Mullins, for the Municipality of Uitenhage, contended that the monies in question were recoverable under the condictio indebiti: either as monies paid under duress or as monies paid subject to a condition that the same should be recoverable if found not to be due. The alternative contention was apparently not argued in the Court a quo.

I have difficulty with the notion that the monies in question were, in the circumstances of this case, paid under duress - i.e. that the payments were not voluntary. See Union Government vs. Gowar 1915 A.D. 426. The payments were made not by reason of any pressure brought to bear on the Municipality of Uitenhage - such as for example the withholding of property or a right or a refusal to continue

supplying 48/

supplying electricity under the contract - but with the object of obtaining the benefit of the discount allowed under the contract for prompt payment. But, as I am of the opinion that the monies paid in the instant case are indeed recoverable on the alternative basis - namely, as monies paid on condition that the same should be recoverable if found not to be due - it is unnecessary to decide whether the payments in question can be regarded as having been made under duress. In Union Government vs. Gowar (supra) at p. 446, de Villiers, A.J.A., after refering to Roman and Roman Dutch authorities, stated:

> "But if he pays under protest he is entitled to recover, for the protest is inconsistent either with the idea of a gift or of a compromise between the parties. The other party was not bound to accept money so paid, but if he accepts it he must be considered to have agreed that it should be recoverable if not due; in the language of the Digest, the negotium between the parties is a contractus (Donellus lib. 14, c. 14, 3)."

The above passage was referred to by Wessels, J.P., in Lilienfeld & Co. vs. Bourke 1921 T.P.D. 365 at p. 370 where the learned Judge explained as follows as to what de Villiers, A.J.A., meant by a payment "under protest":

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> "I do not think the learned Judge meant to lay down the general rule that a protest always makes a payment made under it an involuntary payment. The learned Judge shows clearly when dealing with the passages quoted from the Digest that what was meant was that if a person says 'I will pay you now subject to the condition that if it is afterwards found that this payment was not due, then we will consider it as if no payment had been made.' If the word protest is used as an abbreviation of that form of expression, if it is used to mean a payment under the condition that if it is afterwards found that the payment was not due, it must be handed back, I have no quarrel with what was said by the learned Judge. But if he meant that any payment made which is accompanied by words protesting against the payment is sufficient to enable the solvens to get the money back again, I do not agree with such a view. I do not think that if a person pays money simply saying that he pays it under protest, that that is equivalent to payment under pressure."

The above seems to me, and I say so with due respect, to be a correct statement of the law.

In the present case the Municipality of Uitenhage paid the charges levied pursuant to the 5% tariff increase, but, not only did it deny liability and protest against paying, it also, by express stipulation, reserved the right to recover the monies paid if such were found not to be due. I can hardly see what else the Municipality of Uitenhage could have done to protect its interests. The Municipality of Port Elizabeth, in accepting payment, noted the reservations "under which

you 50/

you are paying the electricity accounts submitted", and, while it indicated that accounts would continue to be rendered in accordance with the increased tariff, raised no objection to the reservations made by the Municipality of Uitenhage. It must, therefore, I think, be regarded as having by implication agreed to accept the monies subject to the reservations made. That being so, there can, in my view, be no question but that the monies paid in ~~error~~ EXCESS of what was legally due, can be recovered. A declaration as prayed for by the Municipality of Uitenhage with respect to such monies should, therefore, have been made by the Court a quo.

Finally there is the question of costs to be dealt with. In regard thereto Mr. Reichman argued that, if the Municipality of Port Elizabeth should succeed in having the order declaring Regulation 8 ultra vires, set aside, then costs should be awarded as if it had substantially succeeded on appeal. I cannot agree with that proposition.

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From the outset the Municipality of Uitenhage had made it clear in the correspondence inter partes that it was concerned about the increased tariff being applied to it. It was not concerned about the validity or otherwise of the increase as it affected other consumers. Although the Court a quo was called upon to declare Regulation 8 ultra vires, that was only one of the grounds for contending that the Municipality of Uitenhage was not obliged to pay the increased charges. The Court a quo held in favour of the Municipality of Uitenhage on that particular ground. Although it may have been a matter of vital interest to the Municipality of Port Elizabeth to have the order declaring Regulation 8 ultra vires, set aside, it noted an appeal, not only against that order, but also against the general order declaring that the Municipality of Uitenhage was not obliged to pay the 5% tariff increase. The Municipality of Uitenhage was therefore entitled to contend on appeal that the last-mentioned order should be supported on the alternative ground raised in the Court a quo. (Western Johannesburg

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Rent Board and Another vs. Ursula Mansions (Pty.) Ltd., 1948 (3) S.A. 353 (A.D.) at p. 355 and Sentrale Kunsmis Korporasie vs. N.K.P. Kunsmisverspreiders (Edms.) Beperk 1970 (3) S.A. 367 (A.D.) at p. 395). And, indeed, ~~before~~ IN this Court argument was presented on behalf of the Municipality of Uitenhage that, even if Regulation 8 ~~was~~ WERE held to be intra vires, the order declaring that the Municipality of Uitenhage was not obliged to pay the 5% tariff increase, should nevertheless be upheld on the alternative ground argued in the Court below. On the other hand, it was contended on behalf of the Municipality of Port Elizabeth that, even if Regulation 8 ~~was~~ WERE held to be ultra vires, the Municipality of Uitenhage should nevertheless be held obliged on a contractual basis to pay the 5% tariff increase.

Although the Municipality of Port Elizabeth has on appeal succeeded in having the order declaring Regulation 8 ultra vires, set aside, the costs of appeal should, in the circumstances be awarded, in fairness, I think, on the basis that the Municipality of Uitenhage has substantially succeeded

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on appeal in view of this Court's decision upholding the ruling of the Court a quo that the said municipality is not obliged to pay the 5% tariff increase. It also, of course, succeeds in the cross-appeal; and the fact that it has so succeeded on a legal argument not propounded in the Court below, should not, in my view, deprive it of any costs.

The order which this Court makes is as follows:

(1) The appeal, in so far as it was directed against the order declaring Regulation 8 of Provincial Notice No. 68 of 1955 ultra vires, succeeds. In its other respects the appeal is dismissed.

(2) Appellant, the Municipality of Port Elizabeth, is to pay the costs of appeal, such costs to include the costs of two counsel.

(3) The cross-appeal is allowed with costs, such costs to include the costs of two counsel.

(4) The order made by the Court a quo is set aside and is replaced by an order reading as follows:

"(a) It is declared:

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(i) That the applicant is not obliged to pay the 5% tariff increase imposed by the respondent in respect of electricity supplied to the applicant.

(ii) That the applicant is entitled to recover from the respondent any monies already paid in respect of the said 5% tariff increase.

(b) Respondent is to pay the costs of the application."

G.J.K. Muller

.....

M U L L E R, A.J.A.

OGILVIE THOMPSON, J.A.)
POTGIETER, J.A.) Concurred.
DE VILLIERS, A.J.A.)
CORBETT, A.J.A.)