



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF
APPEAL

From: The Registrar, Supreme Court of Appeal

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Framatome v Eskom Holdings SOC Ltd (357/2021) [2021] ZASCA 132 (1 October 2021)

Today the Supreme Court of Appeal (SCA) handed down judgment upholding an appeal from the Gauteng Division of the High Court, Johannesburg (high court). The SCA set aside the high court order and substituted it with an order dismissing the appeal with costs, including the costs of two counsel.

On 5 September 2014, Eskom concluded a written NEC3 Engineering and Construction Contract (with amendments of June 2006) with Areva NP for the replacement of the steam generators at Koeberg Nuclear Power Station, Units 1 and 2, located in Cape Town. (the Contract). Areva NP later ceded the Contract to Framatome. Under the Contract, Framatome is the contractor and Eskom is the employer, represented by the Project Manager. The Project Manager's role is to manage the contract on behalf of the employer which is based on the NEC3 Engineering and Construction Contract (ECC), which is a standard contract used within the construction industry.

The Contract makes provision for what is called 'compensation events' which allows the contractor to claim additional payment and extra time to do the work from the employer. There was a compensation event for which Framatome provided a quotation and on 29 May 2017, the Project Manager notified Eskom of a compensation event which had risen because of the agreed need for the redefinition of specified key dates. This led to a dispute between the parties as to the consequences of the changed key dates and whether the Project Manager's notification amounted to a compensation event. Framatome referred the dispute to adjudication and on 26 February 2019, the adjudicator issued his decision which recorded that the project manager's instruction was indeed a compensation event. After the decision was

issued, the Project Manager did not assess the compensation event and Framatome notified the Project Manager and Eskom of a dispute regarding the failure to assess. The dispute was referred to the adjudicator as 'Dispute 11' to determine whether the Project Manager had made a full assessment of the compensation event and whether the Project Manager had properly assessed the impact of the changed to key dates.

The adjudicator concluded that Framatome's quotation was deemed to have been accepted by Eskom. Eskom refused to give full effect to Decision 11 and this prompted Framatome to institute enforcement proceedings in the high court. The high court upheld Eskom's argument on Decision 11 on the ground that the adjudicator did not decide the dispute that was referred to him under the Contract by the parties. It is against that finding that the appellant appealed. Before the SCA Eskom argued that Decision 11 was taken by the adjudicator outside the terms of his jurisdiction as it was not a dispute that had been notified and referred to him whereas Framatome argued that the judgment of the high court be overturned and the adjudicator's award be enforced.

Mathopo JA, writing for the Court refused to adopt the interpretation proffered by Eskom, indicating that such an approach would substantially undermine the effectiveness of the scheme of adjudication. The Court went on to indicate that the purpose of adjudication was to introduce a speedy mechanism for settling disputes in construction contracts on a provisional interim basis and requiring the decisions of adjudicators to be enforced pending the final determination of disputes by arbitration. The SCA stated that only a tribunal may revise an adjudicator's decision and seeing as that decision has not been revised, the adjudicators award remained binding and enforceable. As a result, the SCA upheld the appeal and set aside the high court order and granted an order reflecting what the true position should be in relation to the amounts still to be paid by Eskom.

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