SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 29 December 2020

Status: Immediate

***Eskom Holdings SOC Ltd & others v Resilient Properties (Pty) Ltd and Others* (Case no 663/19)*; Eskom Holdings SOC Ltd v Sabie Chamber of Commerce and Tourism, and Others* (Case no 664/19); *Thaba Chweu Local Municipality and Others v Sabie Chamber of Commerce and Tourism, and Others* (Case no 583/19) [2020] ZASCA 185 (29 December 2020)**

Please note that the media summary is for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

The Supreme Court of Appeal (SCA) today dismissed two appeals by Eskom Holdings SOC Limited Eskom) and at the same time upheld an appeal by the Thaba Chewu Local Municipality (the TCLM), its Municipal Manager, Executive Mayor and Chief Financial Officer, all of which were against the judgment of the Gauteng Division of the High Court, Pretoria (the high court). For convenience, the three appeals were heard together even though they were lodged separately by the appellants in the three appeals.

Prior to litigation in the high court, disputes had arisen between Eskom on the one hand and Emalahleni Local Municipality (the ELM) and the TCLM on the other in relation to electricity supplied in bulk by Eskom to the two municipalities which had not been paid for over several years. At that stage, the ELM owed Eskom some R1,2 billion whilst the TCLM owed approximately R407 million. Because the amounts owed by the ELM and the TCLM had escalated to unmanageable levels, as the two municipalities had only been making sporadic payments, Eskom threatened to interrupt the supply of electricity to the affected municipalities unless they settled their respective arrear debt over a period of 12 months. Ostensibly, to demonstrate their intention to settle the arrear debt, that had been outstanding for several years, both the ELM and TCLM signed acknowledgments of debt in favour of Eskom undertaking to reduce the amount in arrears over a period of 12 months whilst at the same time paying for their ongoing electricity consumption. Despite concluding these agreements, the ELM and TCLM still failed to pay the arrears and for their monthly consumption, save for the erratic payments that they, from time to time, made. As a result, the debt continued to mount.

Faced with this predicament, Eskom published notices in terms of which it invited interested parties within the affected municipalities to make representations as to why it should not implement its decision to interrupt the bulk supply of electricity to the ELM and the TCLM for four and a half hours a day.

Although Resilient Properties (Pty) Ltd and its associated companies, which own a 68,000 m² shopping mall in Emalahleni with 185 retail shops, had made representations to Eskom to dissuade the latter from implementing its threatened decision, Eskom still went ahead to implement it. When the bulk electricity supply was interrupted, the very fabric of society was threatened because hospitals, schools, households and businesses were severely disrupted, after being without water for several days. The municipal water sewage works were also brought to a standstill. Thus sewage, for example, could not be pumped into sewage processing plants but would instead spill over into the streets and municipal water catchment areas, posing a serious health and environmental risk. As a result of the total interruption of bulk electricity supply, the two municipalities were left without electricity which meant that they would, in turn, not be able to supply electricity to their customers.

Resilient and its associated companies in the ELM, and the Sabie Chambers of Commerce in the TCLM, brought separate applications in the high court against Eskom and the ELM and TCLM in which they sought declaratory orders that Eskom's decision to interrupt the bulk supply of electricity was both unconstitutional and unlawful, and therefore liable to be reviewed and set aside.

Eskom opposed the applications. It contended that it was empowered to interrupt or terminate the supply of electricity to its customers, the ELM and TCLM, in terms of s 21(5) of the Electricity Regulation Act 4 of 2006 (the ERA). Eskom also relied on clauses 9.1, 9.2 and 22.3 of the Electricity Supply Agreements (the ESAs) that it had separately concluded with the ELM and TCLM which accorded it a contractual right to discontinue or terminate the bulk supply of electricity to a municipality that is in arrears with its accounts.

The ELM and TCLM countered Eskom's contentions and argued that Eskom was precluded from invoking s 21(5) of the ERA or asserting its contractual rights under clauses 9.1, 9.2 and 22.3 until it has complied with its statutory obligations in terms of ss 40 and 41 of the Intergovernmental Relations Framework Act 13 of 2005 (the IRFA) which oblige organs of state to make every reasonable effort to settle intergovernmental disputes amongst themselves before resorting to litigation. Resilient and the Chambers further contended that if Eskom sought to invoke s 21(5) of the ERA, it was required first to approach a court and obtain prior judicial sanction to do so. As Eskom had not done so, its conduct in interrupting the supply of electricity to the ELM and TCLM amounted to self-help which is inimical to the rule of law.

The high court held that Eskom had every right in terms of s 21(5) of the ERA to reduce or terminate the supply of electricity to a customer if such customer fails to honour an agreement for the supply of electricity, or contravened the payment conditions of a Distributor's licence. And that Eskom can do so without prior judicial sanction like any other Distributor of electricity. The high court, however, upheld the principal argument advanced by Resilient and the Chambers that Eskom failed to comply with its constitutional and statutory obligations to make every reasonable effort to settle the dispute that had arisen between it on the one hand and the ELM and TCLM on the other in relation to the implementation of its decision to interrupt the supply of bulk electricity. Consequently, Eskom's decision to interrupt the bulk supply of electricity to the two municipalities was reviewed and set aside on the grounds that it was both unconstitutional and unlawful. Eskom, the ELM and TCLM were ordered to pay the costs of Resilient and the Chambers. Subsequently, Eskom was granted leave to appeal against the order of the high court. The TCLM was also granted leave to appeal against the costs order insofar as it related to it.

Before the SCA, Eskom argued that ss 40 and 41 of the IRFA were not implicated because it was not the party that instituted proceedings in the high court. It further argued that Resilient and the Chambers were in fact the parties that took Eskom and the ELM and TCLM to court. Eskom also contended that in any event there was no dispute between it on the one hand and the ELM and TCLM on the other because the two municipalities had admitted that they were lawfully indebted to it. The SCA rejected this argument, and held that Eskom has mischaracterised the nature of the dispute in thinking that the dispute is confined to the payment of a debt. The SCA stated that the dispute in issue concerned the lawfulness of the decision to implement Eskom's decision to interrupt the bulk supply of electricity. The SCA therefore concluded that a dispute of that kind fell within the purview of ss 40 and 41 of the IRFA. For this reason, Eskom was obliged first to make every reasonable effort to resolve such dispute before it could resort to the drastic action of interrupting electricity supply. But the SCA held that the conclusion reached by the high court in relation to s 21(5) of the ERA was correct.

Insofar as the appeal of the TCLM is concerned, the SCA held that the high court erred in awarding costs against the TCLM. As a consequence, the appeal of the TCLM was upheld. This was because Resilient and the Chambers had, during the hearing, unequivocally abandoned their prayer for substantive relief and attendant costs against the TCLM. Thus, the high court did not exercise its discretion judicially in relation to the issue of costs as against the TCLM.

The SCA also lamented the fact that although the ELM and TCLM were facing financial crisis and clearly unable to pay their debts the National Government and the Member of the Executive Council: Cooperative Governance and Traditional Affairs for Mpumalanga still failed to intervene in the affairs of these municipalities in terms of s 139 of the Constitution and ss 139 and 150 of the Municipal Finance Management Act 56 of 2003 when they were obliged, in light of the prevailing circumstances, to do so.

In the circumstances, Eskom's two appeals were dismissed with costs, including the costs of two counsel. The appeal of the TCLM was upheld with costs, and paragraph 2 of the order of the high court was altered to one awarding costs against Eskom only, including the costs of two counsel.