



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 34000/22

Appeal Case No: A169/24

- (1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED: YES/~~NO~~

2025 / 107 / 10 / 2025

In the matters between: -

ESKOM HOLDINGS SOC LTD

APPELLANT

And

SILICON SMELTERS PROPRIETARY LIMITED

RESPONDENT

Summary:

The appellant launched a special review application for the Court a quo to determine the proper interpretation of clause 7.2.1 of the Pilot Supplementary Agreement (PSA) and further to determine whether the said clause amounted to a double compensation and whether such compensation amounted to a fruitless and wasteful expenditure as defined in section 51(1)(b)(ii) of the Public Finance Management Act (PFMA).

The Court a quo found that the PSA or clause 7.2.1 read with the Demand Response Agreement (DRA), did not amount to a fruitless and wasteful expenditure and thus did not contravene section 51(1)(b)(ii) of the PFMA.

On appeal, it was held that upon considering the contents of the PSA and the DRA, the irrefutable conclusion is that there was a financial benefit (quid pro quo) for both parties in complying with the relevant provisions thereof. As a result, section 51 of the PFMA was not contravened and there was, accordingly, no fruitless and wasteful expenditure

The appeal was dismissed with costs.

Regarding the cross-appeal:

The cross-appeal was upheld and paragraph 62.3 of the order, a quo that the relief in prayer 3 of the notice of motion (prayer 2 in the amended notice of motion) be stayed until determination of the arbitration proceedings, was set aside.

JUDGMENT

BAQWA, J (MUDAU et LENYAI JJ Concurring)

Introduction

[1] Eskom Holdings SOC Ltd, the appellant, appeals to this court against the whole judgment and order, including the costs order, of Justice Meintjies AJ (the court a quo), handed down on 25 July 2023.

[2] The appeal lies before this court with leave having been granted by the Supreme Court of Appeal on petition on 13 March 2024 after leave had been refused by the court a quo on 23 November 2023.

[3] In delivering its judgment, the court a quo issued an order in the following terms:

“1. The relief sought in prayers 1 and 2 of the applicant's notice of motion (dated 24 June 2022) is dismissed.

2. The relief sought in prayer 3 of the applicant's notice of motion (dated 24 June 2022) is stayed pending final determination of the applicant's counterclaim for rectification in the arbitration proceedings between the applicant and the respondent.

3. The applicant shall pay the respondent's costs of the application.”

[4] The respondent also cross-appeals against the judgment of the court a quo.

The Facts

[5] The respondent and the appellant entered into an Electricity Supply Agreement (the ESA) during November 2010, in terms of which the appellant agreed to supply the respondent with electricity for the latter's Smelter situated at Witbank, and in return, the respondent agreed to pay for the electricity at the rates chargeable by the appellant for its customers, as approved by NERSA.

[6] During 2018, the appellant introduced a programme called the Offer Sales Incentives Programme (OSIP). The object of the OSIP was to reward material consumption of electricity by key customers, based on achievement by them of certain stringent gatekeeping requirements, and in the process grow their businesses. The idea and intention behind the OSIP was to encourage customers to consume more energy. In return, the appellant offered to pay a rebate to any customer who achieved their gatekeeping requirements or target. If the appellant did not achieve its incremental sales, there would be no funding and no basis to pay the rebate.

[7] Another objective of the OSIP was to ensure that the appellant charged the effective flat rate for the incentivized incremental consumption of electricity, such as that of the respondent.

[8] The OSIP laid out the rules which set out the mechanism for the appellant to incentivise its customers, such as the respondent, to create electricity consumption. This included the minimum electricity growth requirement for a customer, such as the respondent, to participate, and the structure regarding how a customer, such as the respondent, could benefit from cheaper electricity and increase productivity through the incentivised electricity.

[9] During June 2018, at Megawatt Park, the appellant and the respondent concluded a written agreement known as the Pilot Supplement Agreement (the PSA).

[10] Several other customers who had also participated in OSIP also concluded similar PSAs with the appellant. The purpose of the PSA was mainly to record and set out the terms and conditions of the customer's participation in OSIP, according to the appellant.

[11] In terms of the PSA, "consumption baseline" means the agreed historical half-hourly load profile representing the amount of electricity that the customer would have consumed over the 12 consecutive billing periods, after adjusting the customer's actual consumption in accordance with the programme's rules.

[12] The "growth target" was defined as the amount of electricity which the customer undertakes to consume over and above the consumption baseline.

[13] Clause 7.2 of the PSA deals with programme monitoring target rephasing, and it, inter alia, provides:

"7.2.1 Eskom shall adjust the consumption baseline in respect of the customer's participation in supplemental demand response during this agreement period...."

[14] It is this clause that the appellant sought to have declared unlawful, alternatively rectified, in the proceedings before the court a quo.

Grounds of Appeal

[15] In summary, the appellant's appeal is mainly based on its submissions that the court a quo erred in conducting an interpretation exercise of section 51 of the PFMA because, so it argues, the fact that there was "double compensation" was common cause, and all the court a quo had to determine was the illegality of the "double compensation" in terms of section 1 of the PFMA, without any interpretation and consideration of whether the facts of this case called for the application of section 51 of the PFMA.

[16] Put differently, the suggestion that "double compensation" was common cause resulted in the appellant arguing this appeal from an incorrect or false assumption which is not supported by the record.

[17] It is true that the appellant's pleaded a case before the court a quo was that as an organ of state, the appellant was obliged to comply with the requirements of section 51(1)(b)(i) and (ii) of the PFMA, and that clause 7.2.1 of the PSA is inconsistent with the programme rules and the principles of the PFMA, as it amounts to a fruitless and wasteful expenditure. Without dwelling on the double payment issue, it is useful to note, even at this stage, that the court a quo remarked in its judgment that the "double

compensation" issue was contested not only in the court a quo but also in the arbitration proceedings.

[18] Even though there seemed to have been some concern on the part of the appellant that the court a quo had ignored its amended notice of motion, the appellant seemed to have accepted that the fact that the judgment was based on the relevant notice of motion had not caused any prejudice to the parties.

[19] This is confirmed by paragraphs 19 and 20 of the judgment, in which the court a quo correctly noted that in its notice of motion, the appellant sought

"an order declaring the PSA unlawful, invalid and that it be set aside in its entirety, alternatively, clause 7.2.1 of the PSA be declared unlawful, invalid, and set aside. In addition, further alternative relief is also sought to the effect that clause 7.2 of the PSA be rectified by, in a nutshell, substituting the word "consumption baseline" in clause 7.2.1 of the PSA with the word "growth target".

[20] What is clear from the above is that the court a quo had a proper grasp of the issues at hand, and in the absence of any prejudice being pointed out that the appellants suffered as a result of the court a quo's adjudication of the dispute based on the initial notice of motion, the appellant's appeal on this ground must fail.

In my vote counts *NPC v Speaker of the National Assembly and Others*¹ Constitutional Court said:

"It is in any view imperative that a litigant should make out its case in the founding affidavit and certainly not bit by bit in argument. The exception, of

¹ 2016 (1) SA 132 (CC).

course, is that a point that has not been raised in the affidavit may only be argued or determined by the court if it is legal in nature, foreshadowed in the pleaded case, and does not cause prejudice to the other parties."

NERSA Approval

[21] The appellant has also premised the review application on the ground that the PSA was unlawful due to the lack of approval by NERSA. This assertion is denied by the respondent on two grounds. Firstly, there is no legal requirement prescribing the prior approval of an operational agreement such as the PSA by NERSA. Secondly, the license documents do not require the respondent to obtain NERSA's approval for any agreement such as the PSA. In its replying affidavit, the appellant merely persists, without more, with the assertion of unlawfulness. However, in the heads of argument, the appellant suggests that the respondent did not dispute its assertion that the NERSA did not approve the PSA.

[22] The correct position appears from paragraphs 66 and 67 of the judgment of the court a quo which confirms the respondent's submission that the allegation that the non-approval by NERSA was a contravention of section 14 of the ERA is not a correct statement of the law.

[23] In the circumstances, this court is not persuaded that the court a quo misdirected itself in any way in this regard, and this ground of appeal must also fail.

The appellant's reliance on section 51 of PFMA

[24] The appellant's reliance on the PFMA form the crux of its case before the court a quo and before this court, to a point where it almost overstated its case by submitting that the fact that there was "double pay" was common cause. This assertion was contested by the respondent throughout the dispute, up to the point where, having

failed to reach a common ground, the respondent opted to cancel the PSA and did so via a notice of termination sent via an email to the appellant on 30 April 2019.

[25] The respondent states that it is fair to say that between December 2018 and October 2019, the appellant and the respondent relentlessly tried to persuade each other regarding the proper application of the PSA, and from the beginning, there was simply no compromise from either side.

[26] Even the criticism of the judgment of the court a quo by the appellant centres around the provisions of the PFMA when it makes the submission that the court a quo erred in embarking on an exercise of interpreting the implicated provisions of the PFMA because, so it argues, "what needed to be interpreted are the provisions of clause 7.2.1 and to test whether they are contrary to the PFMA".

[27] The fact of the matter is that for this court to accept the appellant's submissions, this court would have to agree with the underlying premises postulated by the appellant that in its assessment of whether clause 7.2.1 of the PSA amounted to fruitless and wasteful expenditure, the court a quo was precluded from an interpretative assessment of what section 51 provides for in the context of the PFMA as a whole, and that there was fruitless and wasteful expenditure regardless of the context of the dispute.

[28] The proposition by the appellant is legally not sustainable especially when one considers the appellant's stance before the court a quo, when it read out the provisions of section 51(1)(b)(ii) of the PFMA and proposed its own interpretation. This constitutes a self-contradiction by the appellant, as it was its case that an interpretation of section 51 was unnecessary. That was the essence of its attack on the judgment a quo.

[29] The court a quo reached its conclusion after approaching the interpretation of the PFMA provision in light of the well-known *Endumeni* decision and observing as follows:

"Interpretation of any statutory instrument or a provision thereof must be approached in a way indicated by Wallis JA in the Natal Joint Municipality Provincial Fund v Endumeni Municipality²

"The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax, the context in which the provision appears; the apparent purpose to which it is directed, and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to an insensible or unbusinesslike result or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as a reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context, it is to make a contract for the parties other than the one they in fact made. The "inevitable point of

² 2012 (4) 593 SCA [2019].

departure is the language of the provision itself," read in context and having regard to the purpose of the provision and the background to the preparation and production of the document. From the outset one considers the context and the language together, with neither predominating over the other. This is the approach that the courts in South Africa should now follow, without the need to cite authorities from an earlier era that are not necessarily consistent and frequently reflect an approach to interpretation that is no longer appropriate..... An interpretation will not be given that leads to impractical and unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or the contract under consideration."

[30] The views expressed in the preceding paragraph are wholly accepted, as is evident from paragraph 43 of the appellant's heads of argument and it is in that context that the court a quo looked at the facts and the law in this matter and interpreted both clause 7.2.1 of the PSA and section 51(1)(b)(ii) and (1.2) of the PFMA. Any criticism in that regard is therefore misplaced.

Double compensation.

[31] The appellant does not contest the ordinary meaning of the words used in clause 7.2.1 of the PSA but anchors its contestation in the "double compensation" narrative, and based on that, it seeks substitution of the word "consumption baseline" with the words "growth target", alternatively, a declaration of unlawfulness of clause 7.2.1.

[32] The approach adopted by the appellant defies logic in that it suggests that there was no "quid pro quo" tendered by the respondent in its actions taken to fulfil its side

of the bargain, and that the compensation required from the appellant was 'in vain'. In *Bolombe 82 Trading and Projects CC v Prasa*³,

Prasa contended that it should not be obliged to make payment of Bolombe's invoice without Bolombe rendering actual maintenance and support services. Similarly to the case before the court a quo, the reason advanced was that such payment would constitute a fruitless and wasteful expenditure and would be struck by the provisions of the PFMA and, in fact, be an illegality. Killian AJ did not agree with Prasa and held at paragraph 51 as follows:

"PRASA received a quid pro quo with the fixed monthly maintenance and support costs. It retained the service of a willing and able service provider who would render those services on an 'as and when' basis. That was the nature of the maintenance and support portion of the contract. It would have been a different matter altogether if there was evidence before me to suggest that Bolombe in fact lacked the capacity and was in fact unwilling and unable to render maintenance and support services. In those circumstances, the payments made to Bolombe could possibly be labelled as fruitless and wasteful expenditure."

[33] Similarly, in the present case, the respondent was simultaneously a consumer of electricity and a service provider in that, at the instance of the appellant, it would increase electricity for the benefit of both appellant and respondent, in that the appellant would be better able to manage the overall provision of electricity to its clients. Conversely, at the instance of the appellant, the respondent would have to

³ 79684/2019 (5 July 2019 unreported)

reduce its consumption of electricity to enable the appellant to achieve the same goals. While this process was going on, they were regulated on an agreed basis at both ends of the spectrum. The "as and when" was regulated by the appellant, but on each occasion, there would be a quid pro quo for both the appellant and the respondent. No action was engaged in, in vain, by both participants.

[34] There was no evidence before the court a quo to the effect that the respondent was unwilling or unable to reduce or increase consumption when called upon to do so by the appellant. Despite the "quid pro quo", the appellant was receiving it suddenly sought the implementation of section 51 of the PFMA on the basis contended for above. The error lies in this sudden about turn, by the appellant. In my view, it was totally unjustified.

[35] It is common cause that the minutes of the OSIP revealed that it was developed to solve the appellant's excess capacity it was able to generate at that time. Unable to reach common ground regarding the correct calculations, and with the end of the first year of the OSIP looming, the respondent opted to cancel the PSA and did so through a notice of termination, as indicated, sent via email to the appellant on 30 April 2019.

Fruitless and Wasteful Expenditure

[36] It is also common cause that between December 2018 and October 2019, the appellant and respondent were involved in serious engagement to try and resolve the disagreement regarding the application of the PSA. But in the absence of compromise from either side, the respondent initiated arbitration proceedings when its statement of claim was served upon the appellant in November 2020. Those proceedings are still pending before the arbitrator.

[37] I have considered the submissions of the appellants and the respondent, especially regarding the appellant's grounds of appeal, that the court a quo was wrong in its interpretation of section 51 of the PFMA.

[38] I have also considered that the approach adopted by the court a quo in applying the interpretive approach enunciated in both the *Natal Joint Municipality and Bolombe* decisions, and reaching the conclusion that the PSA, and clause 7.2 thereof, read with the DRA, did not amount to a fruitless and wasteful expenditure as defined in the PFMA.

[39] I accept the succinct elucidation and the conclusion as outlined in paragraphs 100.1 to 100.4 of the judgment of the court a quo, where it pronounced as follows:

"100.1 OSIP was developed to solve the applicant's excess capacity problem. For this reason, the PSA was concluded, whereby the respondent is compensated for additional electricity taken over and above the consumption baseline.

100.2 The DR agreement is one whereby the respondent was compensated for reducing its electricity consumption below the consumption baseline in order to ensure the technical integrity of the electricity network.

100.3 Viewing each of these agreements separately, the conclusion is inevitable that there was a financial benefit to both parties in complying with the relevant provisions thereof, and therefore a quid pro quo. Accordingly, viewing each agreement separately, it follows that they did not result in a fruitless and wasteful expenditure.

100.4 Viewed together, it is clear that there are two programmes that can and did exist alongside each other. They were running parallel to one another, each

with opposite effect. Thus, the respondent was incentivized to consume more electricity in terms of the OSIP and less electricity in terms of the DR agreement. In other words, each of the programmes has opposing operational outcomes. The problem appears to be that the generation capacity of the applicant decreased substantially, which has resulted in load shedding that has become the order of the day in South Africa. Put differently, simply because the ultimate result (post facto) is not to the liking of the applicant, cannot mean that when the agreements were concluded, they constituted a fruitless and wasteful expenditure."

Conclusion

[40] The court a quo, therefore, concluded correctly, in my view, that the text, context, and purpose of the OSIP, read with the DR agreement as contained in clause 7.2.1 of the PSA, given the quid pro quo, which was provided for, and there for the taking by both parties, did not result in a fruitless and wasteful expenditure. This, in my view, is dispositive of the appellant's case and the appeal falls to be dismissed.

Cross Appeal

[41] This court also must deal with the respondent's cross-appeal on the second order of the court a quo, for the reason that the court a quo erred in not dismissing the appellant's rectification claim contained in prayer 2 of the amended notice of motion

42. The order of the court a quo was as follows.

1. The relief in prayers 1 and 2 of the applicant's notice of motion (dated 24 June 2022) was dismissed.

2. The relief sought in prayer 3 of the applicant's notice of motion (dated 24 June 2022) is stayed pending the final determination of the applicant's counterclaims for rectification in the arbitration proceedings between the applicant and the respondent.

3. The applicant shall pay the respondent's costs of the application.

[43] Rule 49(3) of the Uniform Rules of Court provides that a notice of cross-appeal should be delivered within 10 days after a notice of appeal has been filed, and it provides as follows:

"A notice of cross-appeal shall be delivered within 10 days of the delivery of the notice of appeal, or within such longer period as may upon good cause shown be permitted, and the provisions of these rules with regard to appeals shall mutatis mutandis apply to the cross-appeal."

[44] The respondent's notice of cross-appeal was delivered on 4 April 2024, within 10 days of 26 March 2024, when the notice of appeal was delivered. It is a recognised practice in our courts that a cross-appeal is an appeal conveniently tacked to another appeal., *Itzikowitz v Absa Bank Limited*⁴.

[45] The wording in terms of the Supreme Court Act⁵ precluded appeals and cross-appeals without distinction, as it stated that "no appeal shall lie..." On the contrary, the current (directory) wording in the Superior Courts Act⁶ provides that an appeal (including a cross-appeal) lies, upon leave having been granted.

⁴ 2016 (4) SA 432 (SCA) at Para 25.

⁵ Act 59 of 1959 (S.20 (4))

⁶ Act 10 of 2013 (the Act).

[46] In the present case, the appellant sought leave to appeal the entire judgment and order of the court a quo, and such leave having been granted by the Supreme Court of Appeal without any condition as to the issues on appeal. I accept that the respondent may not be precluded from tacking on to the appeal by delivering a notice of cross-appeal within 10 days of the notice of appeal having been delivered.

[47] The submission by the respondent is that the court a quo erred when it held, in paragraph 62.3 of its judgment, that the relief in prayer 3 of the notice of motion (prayer 2 in the amended notice of motion) falls to be stayed until determination of the arbitration proceedings. The respondent submits further that the error of the court lies in the fact that the court a quo's conclusion that the appellant had failed to discharge its onus, ought to have resulted in the dismissal of the appellant's claim for rectification or setting aside of the PSA agreement. I cannot but accept the respondent's submissions that to hold otherwise results in the appellant unjustly having two bites at the proverbial cherry. The consequence would be a rehearing of the same evidence and argument at an enormous cost to the respondent.

No Practical Effect

[48] Given the fact that the respondent has since cancelled the agreement with the appellant, a re-hearing of the matter would have no practical effect or result. It is trite that courts ought should not decide issues purely for academic interest. *Centre for Child Law v The Governing Body of the Hoerskool School Fochville*⁷.

[49] The doctrine of mootness states that where a case no longer presents any live controversy, it can no longer be justiciable. A live controversy is necessary to prevent

⁷ 2016 (2) SA 121 SCA at para 10.

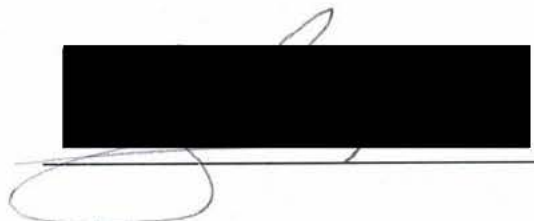
a court from dispensing advisory opinions on abstract questions of law. *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*⁸.

Conclusion

[50] In the result, I propose that the following order be made:

The order of the court a quo is set aside and substituted with the following order:

1. The appeal is dismissed, and the cross-appeal is upheld.
2. The relief sought in prayers 1, 2, and 3 of the notice of motion (dated 24 June 2022) is dismissed.
3. The appellant shall pay the respondent's costs of the appeal and the cross-appeal.

A handwritten signature in blue ink, which appears to be 'Selby Baqwa', is written over a solid black rectangular redaction box. The signature is fluid and cursive.

SELBY BAQWA

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

⁸ 2000 (2) SA (1) (CC) at para 21.

I agree

[REDACTED]

T.P MUDAU

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

I agree

[REDACTED]

MABAENG LENYAI

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Date of hearing: 23 April 2025

Date of Judgment: 07 October 2025

APPEARANCES:

For the Appellant

Adv ZZ Matebese SC

feziwe@renge.co.za

Instructed by

Renge FY Inc

For the Respondents

Adv M Phalane

Instructed by

Cliffe Dekker Hofmeyr Inc

