THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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Eskom Holdings SOC Limited v Letsemeng Local Municipality and Others (Case no 990/2020) [2022] ZASCA 26 (9 March 2022)

Today the Supreme Court of Appeal (SCA) handed down a judgment upholding, with costs including the costs of two counsel, an appeal against the decision of the Free State Division of the High Court of South Africa, Bloemfontein (the high court).

Eskom Holdings SOC Limited (Eskom), the appellant, and Letsemeng Local Municipality (Letsemeng), the respondent, were locked in a dispute over the non-payment by Letsemeng of its electricity supply account. Based on Letsemeng's recurrent failure to comply with its obligations, Eskom issued a final notice to interrupt electricity supply. This precipitated the launching of an urgent application in the high court by Letsemeng to interdict Eskom from implementing the interruption pending the review of that decision and the determination of a dispute between the parties to be referred to the National Energy Regulator of South Africa. Eskom filed a counter-application in which it sought, inter alia, to compel Letsemeng to comply with its obligations in terms of the electricity supply agreement (ESA) that it had concluded with Letsemeng. The high court granted Letsemeng the interim interdict but dismissed Eskom's counter-application.

On appeal to this Court, with leave of the high court, the primary issue was whether Eskom was entitled to the relief sought in its counter-application.

In the counter-application Eskom sought several prayers, amongst others: to compel Letsemeng to comply with the payment conditions set out in the ESA; a declarator that Letsemeng was in breach of section 153(a) of the Constitution in that it had failed to structure and manage its administration, budgeting and planning processes in order to give priority to inter alia, the basic needs of the community including the payment of electricity to Eskom; it sought structural interdicts: directing Letsemeng to deliver monthly notices to the high court and Eskom indicating compliance with its obligations under the acknowledgement of debt (AOD) and repayment plan; that the Municipal Manager be ordered to ensure compliance with the terms of the order; a declaratory that Letsemeng had a legal obligation, on a monthly basis, to ring fence such portion, as determined in its electricity distribution licence, of its electricity revenue collected from all electricity sales in terms of sec 27(i) of the Electricity Regulation Act 4 of 2006; an order directing Letsemeng to pay directly to Eskom such portion of the equitable share, as may be determined, as relates to electricity, within 24 hours of receipt of the share; and further directing Letsemeng to pay the amount of R5 million to Eskom which National Treasury had made available for payment to Eskom.

The SCA (in the majority judgement) held that Eskom was not entitled to an order declaring that Letsemeng was in breach of s 153(a) of the Constitution because it had not made out a case for that relief. It further held that Eskom sought vaguely drafted structural orders that would require affidavits being filed with the high court regularly with no explanation why these orders were necessary and the

purpose they intended to serve. As to the ring-fencing of funds, the SCA held that it was not borne out by the legislation.

With regard to prayers to compel Eskom to comply with the payment conditions set out in the ESA, the SCA held that, these were aimed at securing payment from Letsemeng on the basis of its contractual and statutory obligations. Letsemeng did not honour any of the AODs and the various payment arrangements it made with Eskom. Furthermore, Letsemeng undertook to pay the amount of its equitable share earmarked for electricity. R5 million had been advanced to it by treasury solely to pay Eskom but it reneged. In the context of Letsemeng having applied to interdict Eskom from interrupting the supply of electricity, Eskom had no suitable alternative remedy other than its counter-application for the mandatory orders to enforce Letsemeng's reciprocal obligations to pay for the electricity it receive. Letsemeng's defence that it not be ordered to pay what it agreed to pay because it was unable, due to its financial weakness, was no defence. Held that, to the extent that this may amount to the tacit raising of a defence of impossibility of performance, the position is clear: if a person promises to do something that can be done, such as delivering a thing or paying a debt, but which that person cannot do due to circumstances peculiar to themselves, they are nonetheless liable on the contract. The commercial mayhem that would result, if the rule was otherwise, is not difficult to imagine. Contractual obligations are enforced by courts irrespective of whether a defaulting party is able to pay or not. The focus is on the rights of the innocent party, not the means of the defaulting party.

The SCA held that the high court erred in dismissing Eskom's counter-application in its entirety. Accordingly, the appeal was upheld and the order of the high court dismissing the appellant's counter-application was set aside and replaced with an order in terms of which Letsemeng was directed to pay Eskom (a) all amounts, in respect of the electricity it received from Eskom, when such amounts are due and payable as set out in the ESA and s 65(2) of the Local Government: Municipal Finance Management Act 56 of 2003; (b) all arrear debts due and payable to Eskom, in accordance with the terms of the AOD; (c) such portion of the equitable share that relates to electricity within 24 hours of receipt of the share; (d) the amount of R 5 million which the national treasury made available to the municipality for payment to Eskom; (e) costs, including the costs of two counsel.'

Plasket JA (in a separate concurring judgment) held that the relief granted related to admitted liabilities on the part of Letsemeng which it had not suggested that it was not liable to pay. The repayment plan figures were prepared by Letsemeng taking into account its own affordability and revenue collected from the sale of electricity to customers. Therefore, Letsemeng 'warranted' that it could afford to pay the amounts it had agreed to pay. Accordingly, there was no dispute between Eskom and Letsemeng about its liability to Eskom and how it would pay its debt which required resolution by negotiation.

Schippers JA (in the dissenting judgment) held there was a dispute between the parties concerning the manner in which Letsemeng could be enabled to settle its indebtedness to Eskom as envisaged in s 41(3) of the Constitution. Both parties were obliged to make every reasonable effort to resolve the dispute in accordance with the procedures provided for in, amongst others, s 139 of the Constitution, ss 40, 41 and 45 of the Intergovernmental Relations Framework Act 13 of 2005 (the IRFA) and ss 44 and 139 of the Municipal Finance Management Act 56 of 2003. Further held that there was a practical difficulty in implementing the orders granted in that Letsemeng, like most municipalities, was in financial crisis. Eskom was aware that Letsemeng did not have the means to settle its outstanding electricity debt of some R41 million. It was therefore, unrealistic of Eskom to expect Letsemeng to comply with its obligations under the AODs and the ESA, liquidate its indebtedness of R41 million, and pay a portion of its equitable share relating to electricity to Eskom. Thus, the high court was correct in its observation that the grant of the wide-ranging orders sought in the counter-application would not assist Eskom, if Letsemeng could not pay. Consequently, the orders sought by Eskom in the counter application, save for an order that Letsemeng be directed to pay the sum of R5 million which the Free State Provincial Treasury made available for payment, were difficult to implement. The minority would have set aside the order dismissing the counter-application and replaced it with an order, inter alia, remitting the dispute between the parties, concerning the non-payment of the bulk electricity supply, to Letsemeng and Eskom for resolution in terms of s 40(1) of the IRFA. In the event that the dispute was unresolved within four months of the date of the order, Eskom would be entitled to set down the counter-application for its determination.

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