



## **THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

### **MEDIA SUMMARY OF JUDGMENT DELIVERED**

**FROM** The Registrar, Supreme Court of Appeal  
**DATE** 06 October 2021  
**STATUS** Immediate

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

*Eskom Holdings Limited v The Joint Venture of Edison Jehamo (Pty) Ltd and KEC International Limited and Others (case no 177/2020) [2021] ZASCA 138 (06 October 2021)*

### **MEDIA STATEMENT**

Today the Supreme Court of Appeal (SCA) upheld an appeal against an order of the Gauteng Division of the High Court, Johannesburg in terms of which an arbitral award was set aside. In terms of the arbitral award 13 claims that had been made by the first respondent, the Joint Venture of Edison Jehano (Pty) Ltd and KEC International Limited, against the appellant, Eskom Holdings Limited, for payment of moneys had been dismissed.

Eskom and the Joint Venture concluded a written engineering and construction agreement in terms of which the Joint Venture would construct a 100 km Section B 765 KV Gamma-Kappa single circuit transmission line. The project was to be completed within 547 days from the date of conclusion of the agreement. The contract price was R320 404 064. 98.

The parties had an obligation to notify each other as soon as they became aware of any matter that could result in an increase in the total price, or a delay in the completion of the works, or impairment of performance of the works. In the agreement a number of compensation events were stipulated which would entitle the Joint Venture to extension of time for completion of the works, together with consequent change in the contract prices. The agreement further provided that disputes should be submitted to an adjudicator within two to four weeks after an event.

The Joint Venture failed to complete the works within the stipulated period and could still not do so despite being granted two extensions. In its recovery plan it listed challenges that it had encountered, including some which it attributed to Eskom. The delays resulted in the escalation of the cost of the project.

The Joint Venture notified Eskom of 13 claims which it alleged resulted from delays and disruptions caused by Eskom. Eskom denied responsibility for the delays and raised four special pleas. One of these was a time-bar in terms of which Eskom pleaded that the Joint Venture had failed to notify 11 of its 13 claims and the related compensation events, and to refer disputes emanating therefrom within the stipulated period. Eskom also filed a counterclaim to recover from the Joint Venture penalty damages payable in relation to the delays. The dispute was referred for adjudication as per the written agreement.

In terms of the adjudicator's decision, Eskom's special pleas were all dismissed and it was ordered to give Joint Venture time extension as well as pay to the Joint Venture an amount for the extended contract period. Although the adjudicator held that the time periods were not adhered to, he ultimately found that nothing in the language of the time-bar clauses reflected an intention by the parties to preclude any claim for relief not notified within the stipulated period. After being dissatisfied with the adjudicator's ruling, both parties referred, by agreement, for arbitration, issues set out in their dissatisfaction notices.

In the arbitration proceedings Eskom's special pleas were heard as initial separated issues. Its time bar special plea was upheld in respect of all 13 claims based on, amongst other factors, the time schedules prepared by each party in respect of each

claim. The arbitrator also took into account the adjudicator's factual finding that the time frames had not been adhered to. The adjudicator's decision was then set aside.

The Joint Venture launched an application in the high court for a review of the arbitrator's findings. It contended that the arbitrator committed gross misconduct and acted outside the scope of his powers by accepting Eskom's schedule as conclusive proof of the facts on the time bar dispute and failing to give the Joint Venture an opportunity to challenge the adjudicator's finding relating to the non-adherence to time frames in respect of each claim. The high court reviewed and set aside the award in respect of six of the 13 claims, ordering that they be considered afresh by another arbitrator. It found that the hearing before the arbitrator was unfair in that the two claims in respect of which the time bar has not been raised in Eskom's pleadings, but were only raised in argument, were not fully dealt with. The high court however found that the adjudicator did not exceed his powers as he dealt with the issues that were set out in the dissatisfaction notices filed by the parties.

On appeal against the high court order the SCA found that the arbitrator did consider the pleadings filed by the parties; to that extent even finding that the Joint Venture had responded in detail to the time-bar special plea raised by Eskom. In addition, the court found that the factual finding made by the adjudicator, that the time limits agreed on between the parties for notification of claims and disputes had not been met, was never in contention before the arbitrator. It further found that in Eskom's Notice of Dissatisfaction, which was the only one filed in the appeal record, the time bar plea was referred to the Arbitrator in relation to all claims. Submissions were made in the Heads of Argument and the issue was argued before the arbitrator on the basis that the time bar plea was applicable to all 13 claims. In the result the SCA found that no gross irregularity or exceeding of authority was shown on the part of the Arbitrator.

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