THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 325/2021

In the matter between:

PIONEER FOODS (PTY) LTD **APPELLANT**

and

ESKOM HOLDINGS SOC LIMITED **FIRST RESPONDENT**

WALTER SISULU LOCAL MUNICIPALITY **SECOND RESPONDENT**

NATIONAL ENERGY REGULATOR OF SOUTH AFRICA **THIRD RESPONDENT**

Neutral citation: *Pioneer Foods (Pty) Ltd v Eskom Holdings SOC Limited & Others* (325/2021) [2022] ZASCA 171 (1 December 2022)

Coram: VAN DER MERWE, MAKGOKA and HUGHES JJA and BASSON and WINDELL AJJA

Heard: 8 November 2022

Delivered: 1 December 2022

Summary: Appeal – section 16(2)(*a*)(i) of Superior Courts Act 10 of 2013 – mootness of appeal – issues of law in appeal settled by an earlier judgment of this Court – disputes overtaken by events – appeal moot – no discrete legal issue of public importance that would affect matters in the future.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Mbongwe AJ, sitting as a court of first instance):

1 The appeal is dismissed.

2 There is no order as to costs.

JUDGMENT

Makgoka JA (Van der Merwe and Hughes JJA and Basson and Windell AJJA **concurring):**

[1] On 8 November 2022 when this matter was called, counsel for the appellant, Pioneer Foods (Pty) Ltd (Pioneer) and for the first respondent, Eskom Holdings Soc Limited (Eskom)[1] were invited to address the Court on the submission by Eskom in its heads of argument that the appeal had become moot. Upon hearing counsel, this Court dismissed Pioneer's appeal with no order as to costs, and undertook to furnish reasons later. These are the reasons for the order, which are premised on our finding that the appeal has become moot, and that there is no basis to exercise this Court's discretion to hear it. Section 16(2)(*a*)(i) of the Superior Courts Act 10 of 2013 provides that:

'When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.'

[2] Pioneer appealed, with the leave of this Court, against the order of the Gauteng Division of the High Court, Johannesburg (the high court) which

[1] Both the second respondent, the Walter Sisulu Local Municipality and third respondent, the National Energy Regulator of South Africa (NERSA) did not participate in the appeal.

dismissed its application to review and set aside certain decisions of Eskom to implement intermittent electricity supply interruptions in the area of jurisdiction of the second respondent, the Walter Sisulu Local Municipality (the Municipality).

[3] Eskom supplies electricity to the Municipality, which, in turn, distributes electricity to the end-users in its area of jurisdiction. The Municipality fell into arrears with payment for electricity to Eskom. The arrears eventually amounted to over R100m. As part of its measure to exert pressure on the Municipality to pay the arrears, Eskom took decisions to implement intermittent electricity supply interruptions in the area of jurisdiction of the Municipality between July 2017 and January 2018 (the impugned decisions). The notices for the interruptions were published by Eskom in local newspapers.

[4] Pioneer is a producer of food and beverages. It runs a maize mill located within the area of the Municipality, and was as such affected by Eskom's electricity supply interruptions. After unsuccessful attempts to resolve the issue with Eskom, Pioneer launched a two-part application in the high court in January 2018. In Part A, which it brought on an urgent basis, it sought and obtained, interim interdictory relief against Eskom from implementing its decision of 2 January 2018 to interrupt the supply of electricity to Pioneer's business premises.

[5] In Part B, Pioneer sought the judicial review and setting aside of the relevant Eskom decisions. It relied on various grounds including that Eskom was not entitled to interrupt the supply of electricity to the Municipality solely for the purpose of coercing the latter to pay its debt. Pioneer also contended that where Eskom sought to interrupt the supply of electricity, it had to comply with the substantive and procedural requirements of the Promotion of Administrative

Justice Act 3 of 2000 (the PAJA). Pioneer also sought an order that Eskom should supply electricity to its business premises, alternatively to the Municipality. In the further alternative, Pioneer sought orders: (a) compelling the Municipality to pay the outstanding debt to Eskom; and (b) compelling Eskom and the Municipality to agree to a payment plan to ensure uninterrupted supply of electricity to its business premises.

[6] In response, Eskom raised a preliminary point that Pioneer's application was premature, based on the provisions of s 30 of the Electricity Regulation Act 4 of 2006 (the ERA). That section provides for the resolution of disputes by the third respondent, the National Energy Regulator of South Africa (NERSA) in relation to any dispute arising out of the ERA. Section 30(1)(*b*) reads:

'[Nersa] must, in relation to any dispute arising out of this Act –

…

if it is a dispute between a customer or end user on the one hand and a licensee, registered person, a person who trades, generates, transmits or distributes electricity on the other hand, settle that dispute by such means and on such terms as [NERSA] thinks fit.'

[7] Eskom contended that since the PAJA was applicable to each of the decisions which Pioneer sought to impugn, s 30 was the 'internal remedy' envisaged in s 7(2) of the PAJA which Pioneer had to first exhaust before launching the review application.[2] I refer to this as 'the prematurity defence.' Substantively, to justify the lawfulness of its decisions, Eskom relied on s 21(5) of the ERA. The section, among other things, grants Eskom the right to reduce or terminate the supply of electricity to a customer if the latter has 'failed to honour, or refuses to enter into, an agreement for the supply of electricity,' or 'contravened [its] payment conditions.' I refer to this as 'the s 21(5) defence.'

[2] Section 7(2) of the PAJA reads: '[No] court or Tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.'

[8] Part B came before the high court in July 2020, and judgment was delivered on 12 October 2020. The high court held that Pioneer, as a customer of the Municipality, had no locus standi to seek the orders it did against Eskom, as the electricity supply agreement was between Eskom and the Municipality. Despite this finding, the high court proceeded to determine the merits of the application. It upheld both of Eskom's two defences referred to above. With regard to the 'prematurity defence', the high court stated that 'the engagement of [NERSA] is part of the internal problem resolution processes envisioned in section 7(2) of the PAJA…' and that the failure to comply with it, was fatal to Pioneer's application.

[9] As to the s 21(5) defence, the high court, with reliance on ***Rademan v Moqhaka Local Municipality***[3] held that Eskom was empowered by s 21(5) of the ERA to interrupt the supply of electricity to a defaulting customer such as the Municipality. The high court also held that Eskom had followed proper procedures, including the PAJA and regulatory provisions, when it gave notices to implement the electricity supply interruptions. Consequently, the high court dismissed Pioneer's application with costs.

[10] On 29 December 2020, judgment in *Eskom v Resilient Properties and Two Similar Matters*[4] (*Resilient*) was delivered. This Court provided clarity on two issues raised in this appeal, namely, whether: (a) Eskom was in law entitled to invoke s 21(5) of the ERA without a court order authorising it to do so; (b) s 30 of the ERA provides for an internal remedy envisaged in the PAJA which must be exhausted before resorting to the courts.

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[3] *Rademan v Moqhaka Local Municipality* [2013] ZACC 11; 2013 (4) SA 225 (CC).

[4] *Eskom Holdings SOC Ltd v Resilient Properties (Pty) Ltd and Others; Eskom Holdings SOC Ltd v Sabie Chamber of Commerce and Tourism and Others; Chweu Local Municipality and Others v Sabie Chamber of Commerce and Tourism and Others* [2020] ZASCA 185; [2021] 1 All SA 668 (SCA); 2021 (3) SA 47 (SCA) (*Resilient).*

[11] As to the first issue, this Court concluded that s 21(5) of the ERA empowers Eskom to reduce or terminate the supply of electricity to its customers in the circumstances spelt out in the section. And that it may exercise that power without prior authorisation by a court.[5] As to the second issue, this Court rejected Eskom's contention that s 30 constituted an internal remedy envisaged in s 7 of the PAJA. It explained that the section 'cannot apply to a dispute where Eskom seeks to interrupt bulk electricity supply to a municipality which, although willing to settle its indebtedness, is unable to do so because it is not only facing financial crisis but also contests Eskom's right to interrupt electricity.'[6]

[12] Additionally, in *Resilient*, this Court also made another important finding (which did not feature in the present case). It held that Eskom was obliged to resolve its disputes with the municipalities to which it supplies electricity, through the framework of the Intergovernmental Relations Framework Act 13 of 2005 (the IRFA). This Court alluded to the unique nature of the relationship between Eskom and such municipalities. Eskom as an organ of state, and the municipalities as local spheres of government, bear constitutional obligations to provide communities with electricity, and any interruption thereof, implicates the municipalities' ability to discharge its obligations.[7]

[13] This brought the relationship within the purview of the IRFA.[8] Therefore, before taking the decision to interrupt electricity supply to the municipalities failing to pay for the electricity supplied, Eskom is required to comply with ss 40 and 41(3) of the IRFA, which require organs of state to exhaust all other remedies to resolve disputes before they approach a court.[9] Thus, Eskom should bear in

[5] *Ibid* para 55.
[6] *Ibid* para 84.
[7] *Ibid* para 80.
[8] *Ibid* para 79.
[9] *Ibid* para 81.

mind that terminating the supply of electricity to an entire municipality in the circumstances provided for in s 21(5), would have the effect of collapsing the entire municipality, rendering it unable to fulfil its constitutional and statutory mandate to provide basic services.[10]

[14] The effect of this Court's judgment in *Resilient* is that the jurisprudential issues in this appeal, namely the application of s 21(5) and whether s 30 constitutes an internal remedy envisaged in s 7(2) of the PAJA, have now been decided. This Court has also clarified Eskom's obligation to comply with the relevant provisions of the IRFA before it decides to interrupt electricity supply to the municipalities. Furthermore, it is common cause that as an organ of state, Eskom's decision to interrupt electricity to municipalities, constitutes 'administrative action' envisaged in s 1 of the PAJA, and that accordingly, it must in each instance comply with both the substantive and procedural fairness requirements of the PAJA. In this Court, counsel for Eskom gave an assurance of Eskom's commitment in this regard.

[15] What then, is left of the dispute between the parties? The impugned decisions, which were time-bound, have come and gone, and it is not possible for Eskom to implement them again. Whether they were tainted by procedural and substantive irregularities, as Pioneer asserted, is immaterial now. An order in respect of those decisions would have no practical effect. If in future it needs to implement electricity supply interruptions, Eskom would have to take new decisions, which would have to comply with the relevant provisions of the IRFA and the PAJA.

[10] *Ibid* para 58.

[16] Viewed in light of the above, the appeal has become moot, and it must therefore be dismissed on this basis alone in terms of s of 16(2)(*a*)(i) of the Superior Courts Act. However, this Court has a discretion to enter into the merits of an appeal, notwithstanding the mootness of the issue as between the parties when 'a discrete legal issue of public importance arose that would affect matters in the future' and on which adjudication of this Court is required.[11] In the present case, no such issue arises. For all these reasons, the appeal was dismissed. With regard to costs, we deemed it fair that there should not be any order in respect thereof.

T MAKGOKA
JUDGE OF APPEAL

[11] *Qoboshiyane NO and Others v Avusa Publishing Eastern Cape (Pty) Ltd and Others* [2012] ZASCA 166; 2013 (3) SA 315 (SCA) para 5.

APPEARANCES:

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