REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

Case No. A5021/11

DATE:16/10/2011

REPORTABLE

In the matter between:

MR PHIRWA JACOB MAROGA	Applicant
and	
ESKOM HOLDINGS LIMITED	First Respondent
MAKWANA, MPHO N.O.	Second Respondent
MINISTER OF PUBLIC ENTERPRISES	Third Respondent

JUDGMENT

MEYER, J

[1] This is an appeal against the whole of the judgment and orders, including the order as to costs, delivered by Masipa J on 10 December 2010. The Court *a quo* dismissed the application of the appellant, Mr PJ Maroga. The relief which he sought

against the first respondent (Eskom) and the third respondent (the Minister) was an order for specific performance of his employment contract – for re-instatement as the Chief Executive Officer of Eskom retrospectively as from 2 November 2009 - or for the payment of damages to him of nearly R86 mil.

[2] The Court *a quo* found that Mr Maroga had made a clear, unequivocal, and unconditional resignation offer to the Eskom Board on 28 October 2009, that the Eskom Board had accepted Mr Maroga's resignation, and that the consensual termination of his contract of employment had been effective once the acceptance of his offer of resignation by the Eskom Board had been communicated to him during the evening on 28 October 2009.

[3] In making these findings the Court *a quo* adopted a robust approach to the materially disputed issues of fact that had arisen on the papers. The correctness of the affidavit version of Eskom on the relevant disputed issues was accepted and the version of Mr Maroga, which *inter alia* is that he had not '… by any stretch of the imagination …' conveyed an intention to resign as Chief Executive Officer and that the Eskom Board had deliberately and unlawfully repudiated his written contract of employment', was rejected. The Court *a quo* found '… that Mr Maroga's version, taken as a whole on affidavit, was so contradictory, unreliable and so demonstrably lacking in credence that it should be rejected out of hand on affidavit.' The factual background and conflicting versions are extensively set out in the judgment of Masipa J. I need only refer to Eskom's version tersely.

[4] On Eskom's version, Mr Maroga informed the board members present at the Eskom Board meeting on 28 October 2009 that he had thought long and hard about the matter and that he had concluded that he could not continue to work with Eskom's Chairperson, Mr Godsell. He then made an offer to resign. Following his offer to resign, Mr Godsell also offered to resign. Mr Maroga and Mr Godsell later recused themselves from the board meeting so that the remaining members of the board who were present could decide whose offer of resignation to accept. After due consideration, the Eskom Board resolved unanimously to accept Mr Maroga's offer of resignation. Two directors were mandated by the Eskom Board to convey its decision to Mr Maroga and to Mr Godsell. A dinner was arranged with them that evening at a hotel. The Eskom Board resolution was communicated to them and Mr Maroga did not object to the communication that the board had accepted his resignation. The four directors, including Mr Maroga, parted ways fully recognising that Mr Maroga's employment contract had been terminated by the Board's acceptance of his resignation offer and it was agreed that the calculation of his final payout would be done later. The next morning, 29 October 2009, Mr Maroga handed out copies of his letter to the Eskom directors present at the resumed board meeting and to the Minister, who joined the meeting, wherein he stated that, upon reflection overnight, his 'remarks of frustration' could not be construed as an offer to resign.

[5] Mr Maroga, in the Court *a quo* and in this Court, chose for the matter to be argued on the conflicting affidavit evidence. The basis upon which the disputed issues of fact are to be approached was thus stated by Heher JA in *Wrightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA), at para [12]:

> 'Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers: *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E – 635C.'

[6] In the words of Cameron JA in *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para 56:

> '…a respondent's version can be rejected in motion proceedings only if it is 'fictitious' or so far-fetched and clearly untenable that it can confidently be said, on the papers alone, that it is demonstrably and clearly unworthy of credence.'

[7] When the disputed issues of fact are approached in accordance with these principles the Court *a quo* would, in my view, not have been justified in rejecting Eskom's version as not raising 'real, genuine or bona fide' disputes of fact or that its allegations and denials are 'so far-fetched or clearly untenable' that they could confidently be rejected on the papers as 'demonstrably and clearly unworthy of credence. I am satisfied that the affidavits of Eskom extensively, 'seriously and unambiguously' addressed the facts that are disputed by it. See: *Wrightman*, para [13]. The reasons given by the Court *a quo* for accepting Eskom's version and rejecting that of Mr Maroga are convincing and lead me to conclude that the veracity of the disputes raised by Eskom can at face value not be questioned. It is clear from a reading of the judgment that the Court *a quo* was, correctly in my view, not satisfied as to the inherent credibility of the appellant's factual averments on the disputed issues. See: *Ripoll-Dausa v Middleton NO and Others* 2005 (3) SA 141 (CPD), at p 151 I – J.

[8] It was submitted on behalf of Mr Maroga that even if Eskom's version is accepted the offer of resignation made by Mr Maroga was not clear and unequivocal and is accordingly not legally effective or that it was conditional. Counsel referred to decided cases, including *Kragga Kamma Estates CC & Another v Flanagan* 1995 (2) SA 367 (A), *Amazwi Power Products (Pty) Ltd v Turnbull* (2008) 29 ILJ 2554 (LAC), *Fijen v Council for Scientific and Industrial Research* (1994) 15 ILJ 759 (LAC), and *Chemical Energy Paper Printing Wood and Allied Workers Union and Another v Glass and Aluminium* 2000 CC (2002) 23 ILJ 695 (LAC) in support of the legal propositions that a voluntary resignation, which is accepted by an employer, brings about the termination of the employment contract by mutual and voluntary agreement between the parties, but to be legally effective, an employee, either by words or conduct, has to evince a clear and unambiguous intention not to go on with his or her contract of employment - the employee has to lead a reasonable person to the conclusion that he or she does not intend to fulfill his or her part of the contract - and resignations in the heat of the moment have been held not to be effective. I need not review these judgments. On Eskom's version, which must in these proceedings be accepted, there is no room for finding that Mr Maroga's words and conduct did not evince a clear and unambiguous intention on his part not to go on with his contract of employment should his offer of resignation be accepted or that the Eskom Board's conclusion that he did not intend to fulfill his part of the contract in such event did not meet the reasonable person requirement or that Mr Maroga's offer to resign had been made in the heat of the moment. The undisputed facts also do not support the contention that Mr Maroga's

resignation offer had been a conditional one, and such contention was, in my view, correctly rejected by the Court *a quo*.

[9] Mr Maroga also contends that the conduct of the Eskom Board and that of the former Minister was inconsistent with the Constitution of the Republic of South Africa, Act 108 of 1996, and more particularly sections 10, 22, 33 and 195 thereof. This contention is founded upon the facts set out by Mr Maroga that are bona fide and on reasonable grounds disputed by Eskom and the Minister. Again, the undisputed facts do not support such a case that Eskom or the former Minister acted in a way that is inconsistent with the Constitution and particularly the basic values and principles governing public administration that are set out in section 195(1) thereof to which counsel for Mr Maroga limited his argument before us. This finding makes it unnecessary to consider the other constitutional issues that arise from Mr Maroga's contention in this regard, such as whether or not section 195 of the Constitution is directly justiciable. The Court *a quo*, correctly in my view, also decided this matter without reaching the constitutional issues. Kentridge AJ, in *S v Mhlungu and Others* 1995 (3) SA 867 (CC), para [59], said this:

> 'I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.'

[10] I interpolate to refer to the striking out of paragraphs 32.2 – 32.7 of Mr Maroga's founding affidavit by the Court *a quo*. It was contended on behalf of Mr Maroga that the matter struck out was relevant to the central question whether or not Mr Maroga had offered to resign. I disagree. A dispute about his consensual resignation had only arisen on the morning of 29 October 2009. The matter struck out relates to mediation

attempts initiated by the presidency since then, which was after the termination of Mr Maroga's contract of employment with Eskom. The paragraphs struck out are irrelevant to the central question referred to by Mr Maroga's counsel.

[11] I now turn to the next question, which is whether the Eskom Board had the authority to accept Mr Maroga's offer to resign. It was contended on behalf of Mr Maroga in the court *a quo* and also in this Court that the Eskom Board did not have the power in law to terminate his contract of employment. The high water mark of this contention was that Article 10.4 of the Eskom Articles of Association vests the power to appoint its CEO in the Minister and, because the Eskom Articles are silent on the power to terminate the CEO's contract of employment, the principle laid down by the Constitutional Court in *Masetlha v President of the Republic of South Africa and Another* 2008 (1) SA 566 (CC), paras [68] and [69], finds application, which is that the person who has the power to appoint also has the power to dismiss. This contention, which was in my view correctly rejected by the Court *a quo*, is refuted by the provisions of the Eskom Articles of Association and particularly Article 16.1 thereof, by the conclusion of a contract of employment between Eskom and its CEO, by the distinction between the CEO's capacity as a director and his or her capacity as an employee (see: *Amazwi Power Products (Pty) Ltd v Turnbull* (2008) 9 BLLR 817 (LAC), paras [12] – [15], and the unreported decision of Malan J in *Daloxolo Mpofu v South African Broadcasting Corporation Limited (SABC) and Others* (WLD 2008/18386), para [23]), and by the fundamental distinguishing features between *Masetlha* and the present matter.

[12] The Eskom Articles of Association define 'Minister' as '… the Minister of Public Enterprises in his capacity as the representative of the Republic, as the Member, or if

any other Minister is designated as being responsible to hold the shares on behalf of the Republic, then that Minister acting in such capacity'. It defines 'Member' in turn as '… the Minister.' Article 10.4 provides that the '… Member shall appoint the Chairperson as well as the Chief Executive/Managing Director after consultation with the board of directors.' Article 16.1 reads:

> 'The management and control of the company shall be vested in the directors who, in addition to the powers and authorities by these Articles expressly conferred upon them, may exercise all such powers, and do all such acts and things, as may be exercised or done by the company and are not hereby or by any Act expressly directed or required to be exercised or done by the company in general meeting but subject nevertheless to such management and control not being inconsistent with these Articles or with any resolution passed at any general meeting of the member in accordance therewith and directors shall not have authority to perform any act which falls outside the capacity of the company, including any act referred to in clause 5 of the Memorandum of Association but no resolution passed by the company in general meeting shall invalidate any prior act of the directors which would have been valid if such resolution had not been passed. The general powers given by this Article shall not be limited or restricted by any special authority or power given to the directors by any other Article.'

[13] Article 10.4 accordingly empowers the Minister to appoint a CEO. This is a power given to the shareholder to appoint a CEO to the board of directors. The Minister is not empowered to appoint a CEO as employee of Eskom or to conclude an employment contract with a CEO. Article 16.1 vests the board, and not the shareholder, with all the powers of the company, except those expressly reserved to its members in general meeting. The powers to appoint, implement, enforce and terminate contracts of employment form part of the usual management and control powers of a board of directors, the exercise of which powers have not in this instance been conferred upon the shareholder, which is the Minister in his representative capacity. The CEO of Eskom enjoys a dual status of director and of employee. His or her

appointment as Chief Executive/ Managing Director of Eskom falls within the prerogative of the member, who is the Minister, after consultation with the board of directors and his or her appointment as such is followed by the conclusion of a contract of employment between Eskom and the CEO. The Eskom Articles of Association do not contemplate that the Republic of South Africa, or its representative, the Minister, becomes the employer of the CEO. Masipa J, in my view, correctly emphasised the fact that the contract of employment upon which Mr Maroga's cause of action is founded was one concluded between him and Eskom.

[14] *Masethla* was concerned with a special statutory power of appointment of the Director-General of the National Intelligence Agency that was required to be exercised by the President in pursuit of the interests of national security. The powers of the Minister in this instance to *inter alia* initially have appointed the first board of directors upon the conversion of Eskom into a company (Article 10.2) and the Minister's continued power to appoint the Chairperson as well as the CEO (Article 10.4) are not constitutional or statutory powers, but powers conferred upon the Minister by Eskom's Articles of Association.

[15] In conclusion, I am accordingly of the view that there would not have been any valid basis for the Court *a quo* to have rejected the version of Eskom or of the Minister in these motion proceedings on the materially disputed issues of fact. The Eskom Board, as was correctly held by the Court *a quo*, had the authority to accept Mr Maroga's offer to resign. Masipa J accordingly, in my view, correctly accepted the version of Eskom that Mr Maroga had made a clear, unequivocal, and unconditional offer to resign to the Eskom Board, which offer had been accepted by the Eskom Board,

and that the consensual termination of his contract of employment had been effective once the acceptance of his offer of resignation had been communicated to him at the dinner during the evening of 28 October 2009. These findings make it unnecessary for me to consider whether or not it is appropriate to order specific performance on the facts of this matter or whether Mr Maroga could pursue a claim for damages in motion proceedings such as these.

[16] Finally, the matter of costs. Counsel for Mr Maroga submitted that the costs order made by the Court *a quo* is ambiguous. Mr Maroga was ordered to pay the costs and for such costs to include the costs consequent upon the employment of five counsel. The first and second respondents were represented by three counsel in the Court *a quo* and the third respondent by two counsel. I interpret the costs order made as one in which Mr Maroga was ordered to pay the costs of the first and second respondents, including the costs consequent upon the engagement of the services of three counsel, and he was also ordered to pay the costs of the third respondent, including the costs consequent upon the third respondent having engaged the services of two counsel. Interference by this Court with the costs order made by the Court *a quo*, is in my view, accordingly not warranted.

[17] Counsel for Mr Maroga submitted that we should follow the approach laid down by the Constitutional Court in *Biowatch Trust v Registrar, Genetic Recourses, and Others* 2009 (6) SA 232 (CC) for constitutional litigation matters and not grant a costs order against Mr Maroga should he be unsuccessful in this appeal. In *Biowatch*, Sachs J, at pp 56 I – 57, said this:

> 'I conclude, then, that the general point of departure in a matter where the State is shown to have failed to fulfil its constitutional and statutory obligations, and where different private parties are affected, should be as follows: the State should bear the costs of litigants who have been successful against it, and ordinarily there should be no costs orders against any private litigants who have become involved. This approach locates the risk for costs at the correct door – at the end of the day, it was the State that had control over its conduct.'

[18] In my view the *Biowatch* approach finds no application in this appeal. The state has not been shown to have failed to fulfill its constitutional and statutory obligations. The Court *a quo* concluded that Mr Maroga's contract of employment had been terminated by mutual consensus between him and the Eskom Board. Such finding, in my judgment, should be confirmed by this Court. I am further of the view that the engagement of one senior and of one junior counsel on behalf of the first and second respondents and on behalf of the third respondent was prudent and warranted.

[19] In the result the following order is made:

1. The appeal is dismissed.
2. The appellant is ordered to pay the costs of the first and second respondents, including the costs consequent upon the employment of two counsel, one being a senior counsel.
3. The appellant is ordered to pay the third respondent's costs, including the costs consequent upon the employment of two counsel, one being a senior counsel.

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P.A. MEYER
JUDGE OF THE HIGH COURT

MAKHANYA J

I agree with my brother Meyer J.

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G.M. MAKHANYA
JUDGE OF THE HIGH COURT

COPPIN J

I agree with my brother Meyer J.

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P. COPPIN
JUDGE OF THE HIGH COURT

16 November 2011

Date of hearing:	31 October 2011
Date of Judgment:	16 November 2011
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