REPORTABLE

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 00589/10

DATE: 10/12/2010

In the matter between:

MAROGA PHIRWA JACOB	Applicant
and	
ESKOM HOLDINGS LIMITED	First Respondent
MAKWANA NO MPHO	Second Respondent
MINISTER OF PUBLIC ENTERPRISE	Third Respondent

J U D G M E N T

MASIPA, J:

INTRODUCTION

[1] The applicant (Mr Maroga) was employed as the Chief Executive Officer of the first respondent (Eskom) on a five year fixed term contract from 1 May 2007 to 30 April 2012.

[2] In or during October 2009 his contract of employment was terminated. In this application Mr Maroga is challenging the lawfulness of that termination and seeks re-instatement. Alternatively he seeks an amount of R85 716 830,00 as compensation.

[3] The relief sought as set out in the notice of motion constitutes four claims and reads thus:

> "*Claim 1: Breach of contract*
>
> *1. Declaring that:*
>
> *1.1 the first respondent has unlawfully repudiated the contract of employment concluded by or on behalf of the first respondent and the applicant when it purported to terminate that contract in terms of the letter dated 30 October 2009, which is annexed to the founding affidavit as "PJM1", which repudiation the applicant has elected not to accept;*
>
> *1.2 the applicant is entitled to enforce the said contract of employment;*
>
> *2. Ordering the first respondent to re-instate the applicant as the Chief Executive Officer of the first respondent retrospectively with effect from 2 November 2009.*
>
> *3. Directing the first respondent to pay to the applicant all his salary and other financial benefits he is entitled to, in terms of the said contract of employment.*
>
> *4. Insofar as is necessary ordering the second and third respondents to ensure that the first respondent gives effect to the orders sought in paragraphs 2 and 3 above.*

5. Alternatively to paragraphs 2 to 4 above, ordering the first respondent to pay to the applicant the amount described in annexure "X" to the notice of motion, in the event that the Court holds that it is not just or equitable to re-instate the applicant as the Chief Executive Officer of the first respondent.

Claim 2: Breach of corporate governance and company law principles

6. *Declaring that the first and/or third respondents have acted unlawfully, and in breach of the first respondent's Articles of Association and the provisions of the Companies Act, when they purported to terminate and give effected* (sic) *to the unlawful termination of the applicant's contract of employment in terms of a letter dated 30 October 2009.*

7. Directing the first and/or third respondents to re-instate the applicant as the Chief Executive Officer of the first respondent retrospectively with effect from 2 November 2009.

8. Directing the first respondent to pay to the applicant all his salary and other financial benefits he is entitled to in terms of the said contract of employment.

9. Insofar as is necessary ordering the second and third respondents to ensure that the first respondent gives effect to the orders sought in paragraphs 7 and 8 above.

10. Alternatively to paragraphs 7 and 9 above, ordering the first respondent to pay to the applicant the amount described in annexure "X" to the notice of motion, in the event the Court holds that it is not just or equitable to re-instate the applicant as Chief Executive Officer of the first respondent.

Claim 3: Breach of the Constitution

11. Declaring that the purported termination of the applicant's contract of employment in terms of annexure "PJM1" of the founding affidavit, and the conduct of the respondents which gave rise to that purported termination, is inconsistent with the provisions of sections 10, 22 and 33 read with section 195(1)(a) of the Constitution of the Republic of South Africa Act, 108 of 1996, as amended.

12. *Directing the first and/or third respondents to re-instate the applicant as the Chief Executive Officer of the first respondent retrospectively with effect from 2 November 2009.*

13. *Directing the first respondent to pay to the applicant all his salary and other financial benefits he is entitled to, in terms of the said contract of employment.*

14. *Insofar as is necessary, ordering the second and third respondents to ensure that the first respondent gives effect to the orders sought in paragraphs 12 and 13 above.*

15. *Alternatively to paragraphs 12 to 14 above, ordering the first respondent to pay to the applicant the amount described in annexure "X" to the notice of motion, in the event the Court holds that it is not just or equitable to re-instate the applicant as the Chief Executive Officer of the first respondent.*

16. *An order directing the respondents to issue an appropriate apology to the applicant*."

(During argument subparagraph 16 under claim 3 was abandoned and correctly so, in my view, as there was no basis for it.)

[4] Mr Maroga also seeks costs against such respondents as may choose to oppose the application.

[5] Although there are three respondents the main relief is sought against only the first respondent (Eskom).

[6] The second respondent is Mr Makwana, the Acting CEO of Eskom. He is the deponent to Eskom's affidavits. The third respondent is the Minister of Public Enterprise. Only limited relief is sought against both the second and the third respondent.

[7] The application is opposed by Eskom on the grounds that Mr Maroga's employment contract was validly terminated because he had offered to resign,

his offer was accepted and this was communicated to him, alternatively his contract of employment was validly terminated for poor performance soon after he had reneged on his offer to resign. The application is opposed by the Minister on the grounds that the Minister has no power either to re-instate Mr Maroga or to interfere in any way in the dispute between Mr Maroga and Eskom. The Minister also opposes re-instatement on the basis that the relationship between her and Mr Maroga has broken down irretrievably.

FURTHER AFFIDAVITS – APPLICATIONS TO STRIKE OUT

[8] It is convenient at this stage to deal with applications to strike out.

[9] Eskom brought two applications to strike out. The first application relates to the averments contained in Mr Maroga's founding affidavit setting out the attempts initiated by the Presidency to mediate the dispute between Mr Maroga and Eskom. The second application relates to new matter contained in Mr Maroga's replying affidavit in this application.

[10] The second application was brought only in the event that this Court did not grant Eskom leave to file its supplementary affidavit responding to the new matter.

[11] The parties eventually agreed that Eskom's supplementary affidavit be allowed in and that the application to strike out be abandoned.

[12] The court has a discretion to allow new matter to remain in the replying affidavit, giving the respondents the opportunity to deal with it in a second set of answering affidavits.

[13] In *James Brown & Hamer (Pty) Ltd (previously named Gilbert Hamer & Co Ltd) v Simmons NO* 1963 (4) SA 656 (A) the court held:

> "*It is in the interest of the administration of justice that the well-known and well established general rules regarding the number of sets and proper sequence of affidavits in motion proceedings should ordinarily be observed. That is not to say that those general rules must always be rigidly applied: Some flexibility, controlled by the presiding judge exercising his discretion in relation to the facts of the case before him, must necessarily also be permitted*." (My emphasis)

[14] In the present case even if there was no agreement between the parties I would have granted such indulgence on the basis that it would have been in the interests of the administration of justice to do so. Accordingly both the new matter in Mr Maroga's replying affidavit and Eskom's supplementary affidavit responding to new matter are allowed.

[15] I now deal with the first application to strike out averments made by Mr Maroga in his founding affidavit relating to mediation attempts initiated by the Presidency. The averments are to be found in paragraphs 32.2; 32.3; 32.4; 32.5; 32.6; and 32.7 of the founding affidavit.

[16] On behalf of Mr Maroga it was argued that since the paragraphs concerned related to mediation efforts of Mr Yunus Shaik between Mr Maroga

and Eskom they are causally related to the termination of Mr Maroga's employment contract. It was argued that this was so because in the answering affidavit Eskom stated that "*it was agreed*" at the dinner meeting of 28 October 2009 that a final payout, to which Mr Maroga's resignation was subject "*would be done later*". It was argued that this made the averments relevant and admissible. I do not agree.

[17] I am of the view that the application to strike out should succeed for a number of reasons, namely, *inter alia*, that the mediation attempts were initiated after the termination of Mr Maroga's contract with Eskom. They are, therefore, clearly irrelevant to the issue whether the termination of Mr Maroga's employment was lawful or not.

[18] Furthermore these averments relate to discussions and meetings which were held on a '*without prejudice basis*'. These discussions were, therefore, privileged and any averments pertaining to such discussions are inadmissible.

[19] Lastly I am of the view that to allow such averments would not only prejudice Eskom but would also compromise the individuals involved in those discussions. Most importantly, however, I do not see how the averments in the paragraphs sought to be struck out can assist this Court in the adjudication of the issues before it.

[20] In the premises I strike out paragraphs 32.2; 32.3; 32.4; 32.5; 32.6; and 32.7 in the applicant's founding affidavit.

ESKOM'S PRELIMINARY OBJECTION

[21] Eskom raised a preliminary objection. It contended that the application was incompetent because there were disputes of fact which were material and which the applicant knew of or should have anticipated. Eskom also contended that it is incompetent to bring a claim by way of application where there are material disputes of fact or for unliquidated damages as is the case in this matter. For that reason counsel for Eskom argued that the application ought to be dismissed.

[22] Counsel for Mr Maroga urged this Court to dismiss Eskom's "*preliminary objection*" on the basis that there were no factual disputes but only legal disputes. He also submitted that Mr Maroga was not suing for unliquidated damages as alleged by the first respondent but was suing for compensation.

[23] The fact, therefore, that Mr Maroga denies that he resigned or offered to resign does not give rise to a *bona fide* dispute of fact that cannot be resolved on the papers, it was argued. It is so that the mere allegation of a dispute of fact is not conclusive of its existence for in every case the court must examine the alleged dispute of fact and see whether in truth there is a real issue of fact which cannot be satisfactorily determined without the aid of

oral evidence. (Sewmungal and Another NNO vs. Regent Cinema 1977 (1) SA 814 (N) at 820A-B. See also Peterson vs Cuthbert and Company Ltd 1945 AD at 420 at 428.)

[24] My view is that there are indeed factual disputes as well as legal disputes but the factual disputes can satisfactorily be determined on the papers. In fact I do not find any profound disagreements or serious disputes that cannot be resolved on the papers.

FACTUAL BACKGROUND

[25] Circumstances which led to this application are the following:

1. On 28 October 2009 Mr Maroga, then Eskom's Chief Executive Officer, attended an Eskom Board breakaway meeting. Also in attendance was Mr Godsell, the then chairperson.

2. During the course of the meeting Mr Maroga and Mr Godsell recused themselves from the meeting. The reason for such recusal is in dispute.

3. Later the same evening Mr Maroga and Mr Godsell had dinner together. In their company were Mr Josefsson and Mr Dube, two members of the Eskom Board. They were there to give feedback to Mr Maroga and Mr Godsell on discussions and

decisions taken by the Board during their absence. Again there is a dispute concerning what exactly took place at this dinner meeting.

4. On the morning of 29 October 2009 Mr Maroga delivered a copy of his letter marked Annexure "*PJM3*" to the Minister as well as to every member of the Board.

5. The relevant extract from "*PJM3*" reads:

> "*I have not offered to resign and I am not offering to resign.*"

6. In response on 2 November 2009, a letter, Annexure "*PMJ1*", from the Board, dated 30 October 2009, was delivered to Mr Maroga. The letter stated that Mr Maroga had made a "*clear and unambiguous*" offer to resign at the Board meeting on 28 October 2009 which offer had been accepted and the acceptance conveyed to him that evening. Mr Maroga had accepted this decision. However, in the light of his denial that he had offered to resign, and if there was any doubt about his offer, the Board had resolved to terminate his contract of employment with immediate effect for poor performance.

[26] Because of the nature of the dispute it is necessary to set out in detail the version of each party. I shall proceed to deal with each party's version in turn.

THE APPLICANT'S VERSION

[27] Mr Maroga's version where he deals with the events of 28 October 2009 is to be found in his founding affidavit from page 22 in paragraphs 26.4 to 26.31.

[28] Briefly his version is the following:

[29] At the meeting Mr Godsell presented *inter alia*, his Roles Notes, after which Mr Maroga dealt at length with his Power-point presentation of his strategy document. Later Mr Godsell brought the debate back to his concern about his and Mr Maroga's respective roles. At this point Mr Godsell suggested that "*maybe he should step down as chairperson or maybe both of us should step down*".

[30] Mr Maroga "*expressed surprise*" at Mr Godsell's suggestions of on-going differences of approach between the two of them and regretted that the focus of the session had become their relationship rather than the future vision of Eskom. Mr Maroga added that "*if the clarity of his role and mine cannot be resolved then we may consider other elegant and amicable solutions which will be in the best interest of Eskom and all involved*".

[31] According to Mr Maroga he and Mr Godsell then left the room on the understanding that the Board was merely "*to define the roles that the then chairperson and I would play going forward*".

[32] At the dinner later that evening Mr Josefsson and Mr Dube informed him and Mr Godsell of the Board's decision. He had expected that Mr Josefsson would report back on the Board's deliberations "*with a clear indication to Mr Godsell and I of the respective roles, responsibilities and duties entailed in the leadership positions of Chair and Chief Executive*". Instead what was conveyed to him was that the Board wanted Mr Godsell to stay in the position of chair and wanted him to "*vacate the position of Chief Executive*".

[33] It becomes necessary to quote Mr Maroga *verbatim*:

> "*26.28 Mr Josefsson said that the Board:*
>
> *26.28.1 had concluded that the relationship between Mr Godsell and me had irretrievably broken down. He did not suggest at all that the relationship between me and the entire board had broken down;*
>
> *26.28.2 had considered my "generous offer" and had accepted it. He did not say what "generous offer" he was talking about. He certainly did not even mention the word "resignation";*
>
> *26.28.3 had resolved that Mr Godsell should continue as chairman of the Board, and that I would no longer be the Chief Executive; and*

> *26.28.4 had resolved that Mr Godsell and should begin a process of communicating that "decision". Mr Josefsson presented nothing in writing on that occasion as evidence of whatever Board resolution he sought to convey me. I was shocked by this development and left the dinner dumb-struck.*
>
> *26.29 I was deeply perturbed by the Board's construction of events, as conveyed to me by Josefsson, which attempted to create the impression that I had either resigned or that I had offered to resign. This was factually not true. The Board's action indicated to me that I was being dismissed and that they were shrouding that dismissal in an opportunistic "resignation".*"

[34] Mr Maroga concludes by stating that he did not acquiesce in, nor in any way accept, what was conveyed to him by Mr Josefsson and that is why he drafted his letter of 29 October 2009 to correct any misunderstandings of the events of the day before.

ESKOM'S VERSION

[35] Eskom's version of the events of 28 October 2009 is from page 139 in paragraphs 66 to 95 of the answering affidavit. The version is confirmed by all Eskom's directors other than Mr Maroga.

[36] At the meeting there were two papers prepared by the chair, Mr Godsell. The first was a note on "*Some Thoughts on the Respective Roles of Shareholder, Board, Management in Eskom ("the Roles Note")*". This paper sought to obtain clarity on the roles of the chair and the CEO by assigning particular functions to them. The second note was entitled "*Unfinished Business*" ("*the Unfinished Note*"). It listed extracts from Eskom's Board minutes over the previous 16 months of "*issues identified for action that are incomplete or late*". Mr Godsell said it illustrated his "*serious and urgent concerns about management capacity*".

[37] When Mr Maroga was asked to respond to these matters he presented his Power-point presentation which was a repetition of what had been presented to the Board before and did not address the issues raised by the Roles and Unfinished Business Notes.

[38] After the lunch break the meeting proceeded to discuss the roles of the chair and the CEO respectively. One of the Board members, Mr Modise, said that he thought that the Board would be happy with Mr Godsell's proposal on the roles of the chair and the CEO respectively. Mr Maroga responded to Mr Modise by saying that he could not go along with Mr Godsell's proposals, that he had thought long and hard about the matter and that he could no longer work with Mr Godsell. He concluded by saying that "*he was offering to resign and that he wanted his resignation to be elegant and amicable in the interests of all the parties concerned*".

[39] Mr Godsell also offered to resign in the light of Mr Maroga's statement that he could no longer work with him. This was to give the Board the opportunity to decide with whom it preferred to work. At Mr Godsell's suggestion, he and Mr Maroga left the meeting to allow the Board to deliberate on the matter.

[40] During deliberations the Board unanimously resolved to accept Mr Maroga's offer to resign and not to accept that of Mr Godsell. According to Eskom the reasons were that there was an irretrievable breakdown in Mr Maroga's relationship with Godsell and with the Board. In addition Mr Maroga's performance as CEO was poor.

[41] The Board mandated two of its members, Mr Josefsson and Mr Dube, to convey the decision to Mr Maroga and Mr Godsell. They did so over dinner that evening. Mr Josefsson said he hoped that Mr Maroga's separation would be elegant as he had proposed. Mr Maroga accepted the decision without demur. He participated in the discussion that followed on the implementation of the decision. They agreed that he and Mr Godsell would meet the following morning to prepare and agree on a public announcement.

[42] The following morning as the Board resumed its meeting Mr Maroga reneged on the agreement in a letter he gave to Mr Godsell and the Minister. This letter was also distributed to the members of the Board. The letter is marked Annexure "PJM3". In it Mr Maroga states *inter alia*, "*I have not offered to resign and I am not offering to resign*". He goes on to state that the Board had misconstrued "*remarks of frustration*" (presumably as an offer to

resign) that he had made at the Board meeting the previous day. He concludes that he is "*willing to fight for whatever the consequences*".

[43] The Board deliberated on Mr Maroga's letter and its implications. It was unanimous that the letter was dishonest and further proof that the trust in Mr Maroga had irretrievably been destroyed. The Board again discussed its dissatisfaction with Mr Maroga's performance discussed the previous day. Members of the Board then resolved unanimously to cancel his contract with immediate effect for poor performance. This was to ensure that any doubt regarding the termination of Mr Maroga's contract was removed.

[44] The Board notified Mr Maroga of its decision in a letter dated 30 October 2009. The letter stated that Mr Maroga had made a "*clear and unambiguous*" offer to resign at the Board meeting on 28 October 2009; the offer was accepted; that this was communicated to him later that evening and he had accepted the Board's decision and participated in the ensuing discussion on its implementation.

[45] The letter also stated that considering his denial that Mr Maroga had offered to resign, and if there was any doubt with regard to the offer to resign and its acceptance, the Board had resolved to terminate his contract of employment with immediate effect for poor performance.

THE ISSUE

[46] The issue to be determined is whether there was a valid termination of Mr Maroga's contract of employment. To determine this issue several questions must be discussed namely:

1. Did Mr Maroga offer to resign?

2. If yes, was the offer made conditionally?

3. Did the Board have the authority to accept the offer to resign?

4. Alternatively to subparagraphs 1, 2 and 3 above, did the Board have the authority to dismiss Mr Maroga? If yes, was the dismissal lawful?

[47] I proceed to deal with each of these questions in turn.

Did Mr Maroga offer to resign?

[48] There is a dispute as to what actually happened at the meeting of the Board on 28 October 2009 as well as at the dinner meeting that evening.

[49] It is common cause that during the course of the meeting Mr Maroga and Mr Godsell had to recuse themselves. According to Mr Maroga the

recusal was necessary to enable the Board to deliberate on the respective roles of the chairperson and the CEO. The version of Eskom, however, is that the two gentlemen had both offered to resign and the Board had to determine, in their absence, whose offer to accept and whose offer to reject.

[50] Eskom's version has a ring of truth for the following reason. At the dinner meeting that evening, the two directors, Mr Josefsson and Mr Dube gave feedback of the decision taken after the recusal and it is this: The Board accepted Mr Maroga's offer to resign and wanted Mr Godsell to proceed as the chairperson.

[51] Mr Maroga does not dispute the content of the feedback. His version amounts to this: The Board misunderstood its mandate. His statement is that he was shocked and left the meeting dumbfounded. His conduct in this regard is puzzling. It is also inconsistent with his version that the mandate to the Board had merely been to deliberate on the respective roles of the chairperson and the CEO and that nothing had been said about anyone offering to resign. Surely if the Board had misunderstood its mandate this was the time to draw Mr Josefsson's attention to that fact. Mr Maroga's statement that he did not know what "*generous offer*" Mr Josefsson was talking about as the word "*resignation*" was not even mentioned is not worthy of belief. I say this because the very next day in his letter he refers to his "*remarks of frustration*" having been misunderstood as an offer to resign. Strangely he does not explain how and when he became aware that Mr Josefsson had been talking about an alleged offer to resign when he referred to the generous

offer. In the absence of such an explanation this Court can safely conclude that Mr Maroga's version is a fabrication.

[52] In support of his case Mr Maroga annexes "*PMJ3*". However, rather than assist him Annexure "*PMJ3*" is supportive of Eskom's version. It contains the following significant *indicae* that Mr Maroga did make an offer to resign on 28 October 2009:

52.1 Mr Maroga claims to have "*reflected*" on the matter overnight. Why an overnight reflection was necessary is not clear. He does not explain why, if his version is correct, he did not say at the dinner on the evening of 28 October 2009 that he had not offered to resign.

52.2 Instead:

52.2.1 He agreed to meet with Mr Godsell to produce a joint media communication to announce his resignation to the public; and

52.2.2 He agreed to meet with Mr Godsell and the Human Resources and Remuneration Committee the next day in relation to the implementation of his resignation. This, in my view, is what seals his fate.

[53] Furthermore Mr Maroga's reference to his "*remarks of frustration*" which were allegedly construed to be an offer to resign are vague in the extreme as there is no attempt whatsoever to explain what they were.

[54] Mr Maroga's letter indicates that he was stunned by the response of the Board in accepting "*his offer*". If indeed there was no such offer one wonders why Mr Maroga failed to ask what Mr Josefsson was talking about. Mr Maroga's response in his replying affidavit that he had said nothing because he realised that the "*horse had bolted*" is absurd to say the least. It is worth repeating that if the Board had really misunderstood its mandate the time and the place to point this out or to express shock was at the dinner meeting not the morning after the meeting.

[55] Mr Maroga repeatedly denied that he offered to resign. He contended that even if it was found that he had offered to resign the resignation was not effective for the following reasons namely:

1. The offer was conditional and the conditions concerned were never fulfilled.

2. The Board had no authority to terminate the employment contract.

3. If it was found that the Board had the authority concerned the resignation was not effective because the acceptance of the offer never occurred.

[56] **Did the applicant offer to resign but subject to certain conditions?**

[57] Although the applicant denies there was any offer to resign he seems to be saying if it is found that he did offer to resign he did so subject to certain conditions. He relies on Eskom's version for this contention. The passage relied on is to be found at page 145 in paragraph 82.6 of Eskom's answer:

> "*He then said that he was offering to resign and that he wanted his resignation to be elegant and amicable in the interests of all the parties concerned.*"

[58] On behalf of the applicant it was argued that by stating the above Mr Makwana had effectively agreed with the applicant that there was no resignation since a "*final payout*" which was to be done later was never done.

[59] It is clear from the wording that this is not a conditional offer to resign at all. A conditional offer, if accepted, is one in which the operation of the contract brought about by acceptance depends upon fulfilment of the condition.[1]

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[1] *Design and Planning Service v Kruger* 1974 (1) SA 689 (T) at 695C-D; *Thiart v Kraukamp* 1967 (3) SA 219 (T) at 225A-C.

[60] On a proper reading of the statement attributed to Mr Maroga, his offer of resignation was unconditional. He merely added to his offer of resignation a desire that it should be "*elegant and amicable in the interests of all the parties concerned*". At best for Mr Maroga the statement is no more than a recordal of the atmosphere in which he wanted his agreement to take place – i.e. "*elegant and amicable and in the best interests of all parties*". It is evident the phrase refers to how to implement the agreement and can never be a pre-condition for its implementation.

[61] Mr Maroga's version is further that his offer of an agreed termination also depended on the "*condition*" that the parties first agree on his severance package. According to Mr Maroga this "*condition*" was not fulfilled.

[62] This contention has no merit at all. Mr Maroga could not have meant that he would resign only if the parties reached agreement on his severance package. A payout consequent upon Mr Maroga's agreed resignation is regulated by his employment contract. He is owed what has accrued to him under his employment contract before termination. His payout is a term of the agreed termination. The contract imposes an obligation on Eskom to pay him a severance or exit package when his agreed resignation is implemented.[2]

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[2] *Design and Planning Service v Kruger, supra* at 695D.

[63] However, even if the resignation depended on certain conditions that would not have assisted his case as Mr Maroga simply denied that he had resigned.

[64] In view of the above I find that Mr Maorga did offer to resign as alleged by Eskom, and that this agreed termination of his contract was effective when the Board communicated its acceptance of his offer of resignation to him on the evening of 28 October 2009. I also find that the offer to resign was not dependent on any condition and that it was clear and unequivocal.[3]

Did the Eskom Board have the authority to accept the offer to resign?

[65] One of the grounds upon which Maroga seeks to establish that his employment has been unlawfully terminated is the proposition that his contract of employment was terminated by a wrong entity. He states that he was appointed by the Minister and that he could, therefore, only be dismissed by her. Mr Maroga argues that the Board has no power to dismiss him (and by implication to accept his resignation, if there was any resignation) because that power is conferred on the Minister in her representative capacity for the government of South Africa (Record 55/34.4.5; 421/10; 422/10.2).

[66] Counsel for Mr Maroga submitted that the Board did not have the power to terminate Mr Maroga's contract of employment for the following reasons:

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[3] See *CGEE Alsthom Equipments et Enterprises Electriques, South African Division v GKN Sankey (Pty) Ltd* 1987 (1) SA 81 (A) at 92A-F.

1. Article 10.4 of Eskom Articles vests the power to appoint its CEO in the Minister.

2. The articles are silent on the power to terminate the CEO's contract of employment.

3. The law presumes that the person who has the power to appoint has the power to dismiss, and

4. Accordingly, the power to dismiss the CEO vests in the Minister and not in the Board.

[67] In my view this submission has no merit. It is so that article 10.4 vests the power to appoint the CEO in the Minister.[4] Article 10.4 empowers the Minister to appoint the chair and CEO after consultation with the Board. In my view this means that the Minister has the power to appoint the CEO to the Board. Article 10 after all regulates the appointment of directors to the Board and is not concerned with the employment of the CEO as an employee of Eskom.

[68] The power to enter into, enforce or terminate the CEO's contract of employment is governed by article 16.1. The relevant part thereof reads:

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[4] Articles BAH 13 p 834 at 395 article 10.4 Eskom's articles were adopted on 3 March 2003 and amended on 8 September 2003, 28 June 2005 and 27 August 2009.

> "*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 …*"[5]

[69] Articles 16.1 vests the Board with all the powers of the company except those expressly reserved for its members in a general meeting. Its effect is "*clearly to delegate to the directors the power to do everything that the company could do except where the authority of a general meeting of the company is expressly prescribed*".[6]

[70] What article 16.1 does is to empower the Board to enter into, implement, enforce and terminate Eskom's employment contract with its CEO because those powers are not reserved for anybody else. Article 16.1 is in line with the common law between directors and shareholders and their respective powers[7] and the general common law rule that, subject to Articles, directors not shareholders conclude and terminate employment contracts and dismiss employees.[8]

[71] This interpretation renders the Articles compatible with ss 51(1)(c) and (e) of the Public Finance Management Act 1 of 1999 ("*PFMA*").

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5 Articles BAH 13 p 384 at p 400 article 16.1.

6 See Privy Council decision in *Campbell v Rofe* [1933] AC 91 (PC) 99.

7 *Letseng Diamonds Ltd v JCI Ltd and Others; Trinity Asset Management (Pty) Ltd and Others v Investec Bank Ltd and Others* 2007 (5) SA 564 (W) at para [16].

8 *Mpofu v SABC* (unreported) SGHC case no. 2008/18386 (Malan J) at [23]-[25].

[72] On the other hand Mr Maroga's interpretation would render them incompatible with those provisions:

1. Eskom is a public "*entity*" listed in Schedule 2 of PFMA.

2. Section 46 makes the provisions of Chapter 6 comprising ss 46 to 62 applicable to all public entities listed in Schedule 2.

3. Eskom's Board is its "*accounting authority*" in terms of s 49(2)(a).

4. Section 51(1) provides *inter alia*, that the accounting authority of a public entity:

> "*(c) is responsible for the management … of the public entity;*
>
> *(d) …*
>
> *(e) must take effective and appropriate disciplinary steps against any employee of the public entity who (contravenes certain provisions*)."

[73] These provisions empower and oblige Eskom's Board, in appropriate circumstances, to terminate its CEO's employment contract. They are thus incompatible with Mr Maroga's interpretation of Eskom's Articles.

[74] Mr Maroga's contention is contradictory and self-defeating for the following reasons:

1. Mr Maroga's claim is founded and dependent upon his contract of employment with Eskom. The former chair of Eskom signed the contract for and on behalf of Eskom and under the authority of the Board.

2. It is significant that Eskom has the power to enter into the contract upon which Mr Maroga's claim is based. It, therefore, makes sense that the Board must have the power to implement the contract, to enforce its provision, to agree to its termination and to cancel it in the event of material breaches by Mr Maroga. In my view it would be illogical, impractical and would also not make business sense to empower the Board to enter, conclude, implement and enforce Mr Maroga's employment contract but not to empower it to terminate or cancel his employment contract but to give such power to the Minister.

[75] The power of the Minister to appoint directors to the Board of Eskom should not be confused with the power of the Board to employ and terminate the employment contract of the CEO when such is warranted.

[76] In any event the proposition on behalf of Mr Maroga flies in the face of a common cause fact in this matter which is that a written contract of employment exists between Mr Maroga and Eskom. The Minister is not a

party to that contract and has no right or power to interfere with it. In fact the Minister herself has said as much.

[77] The issue of continued employment or termination of the contract is regulated by the contract of employment between the parties. Although the Minister, as shareholder, plays a significant role in the appointment of the CEO, such appointment is, thereafter, fully regulated by the contract of employment and the related legal environment.

[78] The Minister performs no executive functions within Eskom. The Articles[9] make it clear that the management and control of Eskom shall be vested in the directors. The functions of the directors are broadly framed and the termination of the employment of any employee, including that of the CEO, would form a natural component thereof.

[79] The contract governed Mr Maroga's employment as CEO in all respects. This includes its termination. In this regard the contract contains express provisions, in clause 18, thereof, that governs how Mr Maroga's employment might terminate. Those provisions unambiguously declare, *inter alia*, that it is Eskom which is entitled to summarily terminate the contract. Nowhere in this contract is there any suggestion that such power has been placed in the hands of the Minister. Neither is there any indication that the

[9] Article 16.2 of the Articles of Association of the Eskom Board.

approval of the Minister is a prerequisite before the termination of employment by Eskom can become effective.

[80] It is worth repeating that the proposition that the power to terminate the contract rests with the Minister is incompatible with the existence and content of the employment contract. It is interesting and significant that Mr Maroga has failed to address this crucial fact anywhere in his papers even though he clearly refers to it in the notice of motion. In fact his cause of action arises from such employment contract. Even in his substantial replying affidavit in this application he has remained silent on this important aspect. This is strange since the relief that is sought is based on his employment contract. The only inference to be drawn is that he has no answer and is in fact at a loss how to deal with it.

[81] An interesting feature in this matter is that it is apparent from the papers that there has, at all times, been a common understanding that the parties to the employment contract were Eskom and Mr Maroga and that the Minister did not form part of it. I say this for the following reasons:

1. Both Eskom and the Minister have clearly stated this to be the case.

2. Mr Maroga himself has clearly always understood it so. This much is obvious from the following:

2.1 Paragraph 1 of the notice of motion refers to a contract of employment between Eskom and the applicant. It is significant that the language of '*repudiation*' has here been employed by him.

2.2 Mr Maroga correctly states that he was appointed CEO in terms of the written contract of employment. Not only does he thus identify the contract, but he goes on to cite its material terms, one of which is that Eskom may terminate the contract without notice, if there are reasons justifying a summary dismissal.

2.3 Mr Maroga invokes the terms of Eskom's disciplinary code and procedure in support of his contention that his employment was not lawfully terminated.

2.4 When Mr Maroga deals with the alleged undertaking by the Minister that she would ask the Board to rescind the letter of dismissal, there is no suggestion in that paragraph or anywhere else in his papers that he conveyed to the Minister that, in any event, the Board had no right to terminate his contract of employment as that was the prerogative of the Minister.

2.5 On 30 November 2009, Mr Maroga referred an unfair dismissal dispute to the CCMA. In that referral he identified Eskom Holdings Limited as the employer and in his summary of the fact of the dispute he had this to say: "*The Eskom Board dismissed me without following any procedure. There was no good reason for the dismissal.*" The Minister was not cited as a party and there is no suggestion that she was the employer.

2.6 On behalf of Mr Maroga reliance was placed on the contention that the Board acted in breach of the disciplinary code and that this code was incorporated in his contract of employment with Eskom.

[82] The above considerations traverse the facts of this application. They consistently point to one conclusion, which is that Eskom is the employer and that disciplinary matters are fully governed in the usual way through an employment contract.

[83] On behalf of Mr Maroga it was further submitted that the use of the word "*appoint*" in the Articles[10] was proof that the Minister was the only person responsible for employing and dismissing Mr Maroga. In his replying affidavit Mr Maroga further sought to rely on the Minister's affidavit in the interdict application, namely paragraph 11.2 thereof. It is clear, however, that the interpretation of "*appoint*" in the articles by Mr Maroga misconstrues the

[10] Article 2 of Eskom's Articles of Association.

correct position. In addition the Minister, in her affidavit, succinctly set out the procedure leading to the appointment of the CEO, which begins with the Eskom Board conducting the recruitment and interviewing process. This leads to the selection by the Board of a particular candidate, in respect of whom a recommendation is then forwarded to the Minister who makes a decision with due regard thereto and that is noted by Cabinet. The submission therefore is incorrect.

[84] It was submitted on behalf of Mr Maroga that the words '*recommendation*' and '*decision*' were a clear indication that only the Minister could dismiss. This argument ignores the remainder of paragraph 11.2 where the Minister goes on to state unambiguously that: "*The Board on behalf of Eskom then enters into a contract of employment with the CEO. I am not a party to that contract and the newly appointed CEO becomes an employee of Eskom, subject to its terms and conditions*." It is clear in this case that part of those terms and conditions is that the power to dismiss is in the hands of Eskom and not the Minister.

[85] From both Article 10.4 and from the Minister's description of the employment process as set out in paragraph 11.2 it is clear that the appointment of the CEO is effected by Eskom as his or her employer and recorded in a written contract of employment between those parties, to the exclusion of the Minister.

[86] Mr Maroga cannot have it both ways. On the one hand he relies on the written contract of employment to found his claim against Eskom. On the other hand he seeks to avoid the fact of that contract to found his contention that only the Minister can dismiss him. The fact of the matter is that only the written contract governs his position.

[87] It is significant that the CEO holds office as an executive director only because he is the CEO. It is an *ex officio* appointment. The appointment as CEO must hence be confirmed before the consequential appointment as executive director can be made. It does not follow from this that the step of '*appoint*' implies a degree of ongoing control or residual power.

[88] Clause 18.4 of the employment contract obliges the CEO to immediately resign as executive director on termination of the employment agreement. Again this requires no step on the part of the Minister and the fact that she has made the appointment does not mean that a removal can be effected by her. Article 18 dealing with the disqualification of directors is further support for this conclusion.

[89] Counsel for Mr Maroga argued that since the correct party i.e. the Minister was not a party to the termination of the employment contract, Mr Maroga's dismissal was done in breach of corporate governance and company law principles. He compared the present case to the case of *Masetlha v President of the Republic of South Africa and Another* 2008 (1) SA 566 (CC) at paragraphs [68] and [69].

[90] *Masetlha* 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 the pursuit of national security. That *Masetlha* is distinguishable from the present case is apparent from the court's finding in *Masetlha* that the dismissal by the President of Mr Masetlha as DG was not subject to PAJA[11] and that he was not entitled to a hearing before his dismissal.[12]

[91] The present case can, therefore, be easily distinguished from the case of *Masetlha* on both the facts and on the law. In that case the State President had dismissed the Director-General of the National Intelligence Agency, whom he had initially appointed in terms of section 209(2) of the Constitution, 1996 read with section 3(3)(a) of the Intelligence Services Act 65 of 2002. These sections provided that the State President had to make the appointment, but both were silent on the question of dismissal. It was held that the provisions of the Public Service Act Proc 103 of 1994 relating to dismissal were not applicable. That left a *lacuna*. The Court was of the view that a power to dismiss was essential for the effective business of government and that it was accordingly necessary to hold that such power was implicit in the power to appoint.

[92] Apart from the fact that we are not here dealing with the exercise of constitutional and executive powers, the huge difference between these two

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11 Promotion of Administrative Justice Act 3 of 2000.
12 At [68], [75] and [77].

cases is that the present case has, at its heart, a written contract of employment. There is no need, therefore, to locate a home for an implicit power to dismiss. The reason for this is simple – such power has already been unambiguously dealt with. Both parties agreed, by signing the employment contract, that the power vests in Eskom as Mr Maroga's employer. It is clear from the facts in Masetlha that the court there was dealing with a special category of appointment which is not the case in the present case.

[93] Counsel for Mr Maroga submitted that the employment relationship in the present case between Mr Maroga on the one hand, and the Board and the Minister on the other, is similar to that described in *Litha v Madonsela and Others* [2005] JOL 15694 (W). He argued that the *indicae* pointed out at paragraph [14] applied with equal force in this case namely:

1. The applicant is employed by the government of the Republic of South Africa represented by the Minister;

2. The employment of the CEO is approved by cabinet. The Board recommends his appointment, the Minister makes the decision to appoint him and the cabinet approves it;

3. By virtue of his employment as Chief Executive, Mr Maroga serves as *ex officio* member of the Board;

4. Mr Maroga reports to the Board which in turn reports to the government of the Republic of South Africa through the Minister;

5. The Board acts only in a supervisory capacity over Mr Maroga. In its supervisory capacity it behoves it to report repeated failure to perform duties or misconduct to the Minister who then has the power to dismiss the CEO after due process has been followed.

[94] In *Litha supra* the applicant was appointed as the Chief Executive Officer of the Railways Safety Regulator by the Minister of Transport, the fourth respondent. The appointment was made in terms of section 9(1) of the National Railway Safety Regulator Act 16 of 2002. Subsequent to a dispute between her and the Regulator's Board she was threatened with disciplinary proceedings and suspended for gross misconduct. In an urgent application she sought, *inter alia*, a declaratory order that the Chairman of the Regulator's Board and the Board had acted beyond their authority in seeking to bring the disciplinary proceedings against her and that it was the Minister who had the exclusive authority to discipline and dismiss her.

[95] Granting the order, Tsoka J held, on the facts, that the applicant was employed by the Government of the Republic of South Africa represented by the Minister. In terms of a clause in her contract, the Minister was *inter alia*, responsible for instituting disciplinary proceedings against her. The Board had no such authority. The learned judge held further that the Chairman of the Regulator's Board and the Board did not have the authority to institute disciplinary proceedings against the applicant under section 51(1)(e) of the

Public Finance Management Act 1 of 1999 on the grounds that she was an accounting authority.

[96] The case of *Litha* is clearly distinguishable from the present case on the facts. In *Litha* the parties to the contract were clearly the applicant and the Minister. After the applicant had signed the employment contract she sent it to the Minister of Transport for signature. There the learned judge stated the following at page 7 para [13]:

> "*The employment contract signed by the applicant is between the applicant and the Government of the Republic of South Africa, represented by the fourth respondent. Clause 3.6 of the employment contract signed by the applicant provides as follows:*
>
> > *'In the case of inefficiency and misconduct, the employer may deal with her, in accordance with the relevant labour legislation and any directive by the Minister.'*"

The learned judge concluded that it appeared, therefore, that the Government of the Republic of South Africa was the employer of the applicant.

[97] *In casu* this is clearly not the case. As can be seen from the facts, the Minister is not a party to the employment contract and plays no role in either disciplining or dismissing the CEO. There can, therefore, be no merit in the above submission.

[98] Counsel for Mr Maroga further argued that in any event Mr Maroga's employment did not give the Board the power to dismiss him as the employment contract was between "*the Company*" and him and that the

Board played no role at all. The meaning of "*company*" as considered in *Shillings CC v Cronje and Others* 1988 (2) SA 402 (A) shows that a company comprises its members *in solidum* i.e. members of an organised body. Directors are not members of the company and could, therefore, not be construed as "*the Company*" within the meaning of the employment contract. The Eskom Articles of Association define a member as the Minister in her capacity as representative of the Republic of South Africa. Thus to the extent that the employment contract empowers "*the Company*" to dismiss the CEO, that power is conferred expressly not to the Board but to the Minister in her capacity as the representative of the Republic, was the argument.

[99] This argument has no merit. To imply that the Minister has the power to dismiss in the present case, would fundamentally subvert the corporate identity of Eskom. The Minister is indeed "*member*" and holds the shares in Eskom on behalf of the Republic, whereas Eskom as a corporate entity is controlled and run by its Board of Directors. A shareholder does not have the right to interfere in the decision-making of the Board of Directors with respect to the company's internal affairs (*Beuthens Basic Company Law*, 2nd ed at 218-219).

[100] In his replying affidavit, Mr Maroga argues that the Minister appointed the second respondent, ("*Mr Makwana*"), as '*acting*' CEO and that this reinforces his contention based on Article 10.4 that only she could dismiss him. He cites the Minister's address to the National Assembly on 12 November 2009. This argument has no foundation for the reason that Eskom

made it clear that Mr Makwana was appointed by the Board to carry out the necessary executive functions until such time as an acting or new CEO took office. In addition, the Minister's address on 12 November similarly stated that it was the Board which had moved to resolve matters, *inter alia*, by appointing Mr Makwana as an interim Executive Chair.

[101] In the premises I find, therefore, that the Minister has no power to dismiss in the present case. As set out in the contract of employment the employer is Eskom with powers to employ and to dismiss the applicant.

Resignation not effective for lack of acceptance

[102] Counsel for Mr Maroga submitted that Eskom had failed to show that Mr Maroga's alleged resignation was in fact accepted by the Board as there is no valid resolution of the Board to that effect.

[103] There is no merit in the above submission for the following reasons: Mr Maroga argues that the "*round robin resolution*" that was belatedly introduced is not convincing as it was not produced at the time when the response to Mr Maroga's Rule 35(12) notice was produced.

[104] To resolve is merely to settle or find a solution (see page 1219 *Concise Oxford Dictionary* 10th ed). In my view, the validity of a resolution cannot be dependent on whether such resolution has been reduced to writing. It is common cause that Board members met and took a decision. In other words

they resolved to take a certain course of action. It has not been suggested that to be effective a resolution must be in writing. A written resolution is merely a recordal of a decision already taken just as minutes of a meeting are a recordal of the proceedings including decisions taken at a meeting. The absence of the minutes does not, by any means, mean that the meeting never took place or certain decisions at the meeting were never reached. Similarly the absence of a written resolution cannot be proof, in this case, that the Board did not accept the resignation by Mr Maroga. There is reliable evidence that the Board accepted the resignation and properly communicated this information to Mr Maroga. I have not been given any reason to reject this evidence and I accept it. I find, therefore, that the resignation was effective.

CONCLUSION

Termination of the employment contract by agreement

[105] Mr Maroga's denial that he resigned or offered to resign lacks plausibility and credence. His first account (his denial that he offered to resign) is not creditworthy. His second version (admission that he offered to resign but subject to conditions) is implausible. It was argued on behalf of the respondents that Mr Maroga's version taken as a whole on affidavits was so contradictory, unreliable and so demonstrably lacking in credence that it should be rejected out of hand on affidavits.[13] I agree. His version that it is Eskom's version that he resigned conditionally is just not true. There was no condition attached to his resignation. When one examines the affidavits as a

[13] *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at [55]-[56].

whole it is Eskom's account that is probable and true. This is the account which is consistent throughout and I accept it as the most probable.

[106] Eskom's version is that there was an agreed termination of Mr Maroga's contract of employment. Mr Maroga offered to resign, the Board unanimously resolved to accept the offer and conveyed its acceptance of the offer to him.

[107] Having regards to all the facts and argument by counsel I find that at the end of the dinner meeting on 28 October 2009, the employment contract of Mr Maroga was properly terminated when the offer to resign was unconditionally accepted by Eskom's Board and such acceptance was communicated to Mr Maroga.[14]

[108] I am also satisfied on the facts, that Mr Maroga had the intention to relinquish, surrender or give up his position as Chief Executive Officer of Eskom.[15] To find otherwise would be to accept that all the Board members present at the Board meeting of 28 October 2009 conspired against Mr Maroga by fabricating a version that he offered to resign when he had not. This would be absurd in the extreme.

[109] In view of the above finding it is not necessary to deal with the rest of the issues.

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[14] *Meyer v Provincial Department of Health and Welfare* [2006] 27 (ILJ) 2055 (T); *Lou Moran v Commission on Gender Equality* [2001] 22 (ILJ} (W) at 355-6.

[15] See *Ex Parte Moodley & Another* 1968 (4) SA 622 (D) at 624-627B.

[110] In the circumstances I am not persuaded that the applicant has made out a case for the relief that he seeks.

COSTS

[111] The applicant and the respondents had engaged both senior and junior counsel. All counsel were in agreement that the employment of more than one counsel for each party was warranted. I am in agreement with this submission. The matter is of national importance. In addition the issues dealt with were quite complex and the application was heard over two and a half days.

[112] Accordingly I grant the following order:

1. The application is dismissed.

2. The applicant is ordered to pay costs.

3. Costs are to include costs consequent upon the employment of five counsel.

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T M MASIPA
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

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DATES OF HEARING	7-9 JUNE 2010
DATE OF JUDGMENT	10 DECEMBER 2010