



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal
DATE 15 March 2013
STATUS Immediate

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

BHP BILLITON PLC INCORPORATED v DE LANGE (189/2012) [2013] ZASCA 11 (15 MARCH 2013)

Today (15 March 2013) the Supreme Court of Appeal by majority dismissed an appeal by BHP Billiton PLC Incorporated and Hillside Aluminium (Pty) Ltd, both of which conduct business as smelters in Richards Bay and Maputo respectively. The appeal was against an order of the South Gauteng High Court (Kgomo J) in which they and Eskom were ordered to furnish Media 24 with certain information relating to two contracts in respect of the supply of electricity.

Under these two contracts these companies consumed 5.68 per cent of Eskom's total base load electricity capacity and were entitled to receive electricity from the 1990's until March 2026 and Hillside until 2028, at a lower rate than the standard tariff.

According to Media 24, Eskom incurred an operating loss of R3,2 billion in the 2008 financial year. And a further loss of R9,5 billion on embedded derivatives, which represented the assessment by Eskom of the losses that it was likely to incur due to exposure to embedded derivatives over future years. Media 24 is of the view that the embedded derivatives arise entirely out of the contracts that Eskom has with Billiton.

Eskom initially refused to furnish the requested information, but later agreed to furnish information concerning the identities of the signatories to the agreements and the dates of commencement and termination of the agreements. In so far as the pricing formulae are concerned, it elected to abide the decision of the court.

Media 24 initially requested the information on 30 June 2009. On 20 July Eskom refused the request advancing various grounds for its refusal. Media 24 did not persist in its request.

On 18 September 2009, Media 24 submitted another request, couched in much narrower terms than the earlier one.

On this occasion Eskom agreed to furnish information concerning the identities of the signatories and dates of the commencement and termination of the contracts, but elected to abide the decision of the court in respect of the remainder of the information. Billiton and Hillside opposed the application on two main grounds. The first was that the application to compel Eskom to furnish the requested information in terms of s 78(2) of the Promotion of Access to Information Act was out of time and Media 24's application should, on that ground alone, be dismissed. The two companies contended that the second request was the self-same request that had been made on 30 June 2009. The minority of the SCA agreed with this stance. The majority of the court held that the two requests were separate and distinct and that Media 24 was not out of time. The majority held that the point in limine (to the effect that Media 24's application to compel compliance with s 78(2) was out of time) fell to be dismissed.

The second point relied on by Billiton and Hillside, namely that they would be prejudiced if information concerning the two contracts, especially the pricing formulae, was disclosed, was also rejected by the majority of the court.

The majority of the court held that the decision of the high court to dismiss the point in limine and to compel disclosure of information in terms of the Promotion of Access to Information Act 2 of 2000 was correct.

Accordingly, the SCA, by majority, dismissed the appeal but ordered Eskom to pay the costs of the application in the high court. The SCA made no order as to costs on appeal.