REPORTABLE

IN THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Case No: 536/97

In the matter between:

THE GREATER JOHANNESBURG TRANSITIONAL METROPOLITAN COUNCIL **Appellant**

and

ESKOM **Respondent**

CORAM : **MAHOMED CJ, VIVIER, SCOTT JJA, MELUNSKY AND FARLAM AJJA**
HEARD : **11 NOVEMBER 1999**

DELIVERED : **30 NOVEMBER 1999**

JUDGMENT

MEANING OF 'THE STATE' IN SECTION 24 OF ESKOM ACT, 40 OF 1987 - WHETHER ESKOM EXEMPTED FROM PAYING REGIONAL ESTABLISHMENT LEVIES

MELUNSKY AJA

MELUNSKY AJA:

[1] The question for decision in this appeal is whether the respondent, Eskom, is exempted from paying the regional establishment levies provided for in s 12(1)(a)(ii) of the Regional Services Councils Act, 109 of 1985 ("the RSC Act") for the period 1 November 1987 to 30 November 1995.

The background to the appeal is the following. With the approval of the Receiver of Revenue, Johannesburg, the appellant assessed the respondent to pay such levies for the period 1 August 1987 to 30 November 1995. The respondent's objection to the assessment was disallowed and it appealed to the Income Tax Special Court. For the purposes of the appeal a period of three months - from 1 August to 31 October 1987 - was left out of the reckoning. The Special Court (Southwood J) found in the respondent's favour and with the leave of the Judge *a quo* the appellant appeals directly to this Court against that decision.

[2] Section 12(1) of the RSC Act authorises a regional services council to levy and claim regional service levies and regional establishment levies. The section

reads:

> "12(1)(a) Subject to the provisions of section 4(1), a council shall levy and claim from -
>
> (i) every employer who employs or is deemed to employ employees within its region, and each person carrying on or deemed to be carrying on an enterprise within its region as referred to in paragraph (b) of the definition of 'regional services levy', a regional services levy;
>
> (ii) every person carrying on or deemed to be carrying on an enterprise within its region, a regional establishment levy.
>
> (b) The Minister of Finance may from time to time, after consultation with the Council for the Co-ordination of Local Government Affairs established by section 2 of the Promotion of Local Government Affairs Act, 1983 (Act No 91 of 1983), and by notice in the *Gazette*, determine the manner in which the regional services levy and the regional establishment levy shall be calculated and paid."

[3] The Central Witwatersrand Regional Services Council ("the CWRSC") was established pursuant to s 3 of the RSC Act. The appellant, the Greater Johannesburg Transitional Metropolitan Council, succeeded to the rights and

obligations of the CWRSC on 3 December 1994 in terms of Proclamation 24 ("Premier's") of 1994 which was issued under s 10 of the Local Government Transition Act, 209 of 1993 ("the LGT Act"). The right to claim the levies, therefore, vested in the CWRSC until 2 December 1994 and thereafter in the appellant.

[4] The respondent is a juristic person. It was established pursuant to the Electricity Act, 42 of 1922 under the name of the Electricity Supply Commission and remained in existence in terms of the Electricity Act, 40 of 1958, which replaced the 1922 Act. The Eskom Act, 40 of 1987 ("the Eskom Act") which superseded Act 40 of 1958, provides for its continued existence under the name of Eskom. It is not disputed that the respondent carries on an enterprise in terms of the RSC Act and that, had it not been for s 24 of the Eskom Act, it would have been liable to pay the levies for which it was assessed, although in the Special Court it reserved the right to raise certain other defences which are not relevant in this appeal. Section 24 of

the Eskom Act at the relevant time read as follows:

> "Eskom is hereby exempted from the payment of any income tax, stamp duty, levies or fees which would otherwise have been payable by Eskom to the State in terms of any law (excluding a law regarding customs and excise or sales tax)."

[5] The Judge *a quo* concluded that the levies payable in terms of s 12(1) of the RSC Act were payable to "the State" within the meaning of s 24 of the Eskom Act and that the respondent was therefore exempted from paying such levies. On the appellant's behalf it was submitted both in the Special Court and in this Court that the exempting provision has no application to this matter as neither the appellant not its predecessor should be regarded as part of "the State" for the purposes of the section. The issue that arises in this appeal is whether the expression "the State" in s 24 of the Eskom Act included the CWRSC and the appellant. Southwood J was of the view that the Minister of Finance enjoys such powers of control over the activities of regional services councils particularly in relation to the manner in

which the levies are to be calculated and paid that the councils are

> "a manifestation of the State and that the levies payable to regional services councils are levies payable to the State."

As the Minister also has the power in terms of s 12(1)(b) of the RSC Act to determine the manner in which the levy due to the appellant is to be calculated and paid, the State, so it was held by the Special Court, also controls the appellant insofar as its right to claim levies is concerned.

[6] Before considering the meaning to be ascribed to the expression "the State" in s 24 of the Eskom Act, two other matters need to be dealt with. The first concerns the status and functions of regional service councils and local transitional metropolitan councils, and the second is whether the test of control, which was adopted by Southwood J, is the correct yardstick to apply in the instant case.

[7] The system of government in South Africa from 1910 is described as follows in an article by Robert Cameron: *Regional Service Councils in South Africa - Past,*

Present and Future (Vol 71, *Public Administration*, at 417-418):

> "South Africa became a Union in 1910 as a result of the South Africa Act of 1909 which created a three-tier unitary system of government. Firstly, there was a Parliament based on the British Westminster system in terms of structure, procedure and practice. The second tier consisted of four Provinces, whereby power was shared between a centrally appointed Administrator and the elected provincial council. The third tier of government was local government. Local authorities were created by provincial authorities which defined the scope of their local jurisdiction. Local authorities were single-tier, multi-purpose authorities with both legislative and executive powers. No metropolitan form of local government existed. This led to fragmentation of urban areas, which caused disparities in the standards of service provision and expenditure, particularly on racial lines (as will be shown). Major functions of local authorities included the construction and maintenance of roads, the supply of water and electricity, provision of housing, traffic control, refuse collection, health services, public library services, museums, fire-fighting services, motor vehicle and business licencing, sewerage, cemeteries and crematoria, ambulance services and stormwater drainage. Public protection (except for traffic control), education and welfare, were not however local government functions."

[8] The position did not change materially when South Africa became a Republic in 1961, save that the State President became the head of the State. When the

Eskom Act came into operation, a new constitution, introduced by the Republic of South Africa Constitution Act, 110 of 1983, was in force. In terms of this Constitution the State President remained the head of the Republic and presided over the Cabinet but he became an executive President. Parliament consisted of three houses divided on racial lines. The Act vested the governance of the provinces in administrators, each acting with an executive committee for the province concerned. The powers of administrators were not conferred by specific legislation but by the State President and Parliament. The executive arm of government was described in the following words in *Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others* 1995 (4) SA 877 (CC) at 910, para 71:

> "In the Republic of South Africa executive authority was vested in the State President under s 19 of the 1983 Constitution. It was exercised by the State President himself and by Ministers, Deputy-Ministers, Provincial Administrators, and members of the Executive Councils of the provinces. These were all functionaries of the national

> government and all held their positions at the discretion of the State President."

In 1986 provincial governments were abolished. Their functions were taken over by administrators and executive committees for each province (s 2 of the Provincial Government Act, 69 of 1986). It was in this constitutional re

-arrangement that regional service councils were established. They were part of the constitutional restructuring that took place at the time. The councils consist of members nominated by local bodies in a particular region. They exercise such powers referred to in the second schedule of the RSC Act as may be assigned to them. In turn each council provides public services to the local authorities in the area. In terms of s 4(1) of the RSC Act, a council has all the powers and duties of a local authority, save for the power to levy rates on immovable property.

[9] In this Court counsel for the appellant submitted that a regional services council was "in a sense" a public corporation with the characteristics of a local

authority. According to Baxter : *Administrative Law* at 159-160, a public corporation or institution, is either wholly or partly independent of ordinary administrative departments. In South Africa such institutions include bodies such as Iscor, Sasol, the Land and Agricultural Bank and the South African Mint. In *Tamlin v Hannaford* [1950] 1 KB 18 (CA) it was pointed out at 24 that a public corporation is a public authority and its purposes are public purposes. However, said Denning LJ, it is not a government department and its powers do not fall within the province of government.

Public corporations of the kind referred to by counsel appear to have at least two common characteristics. One is that they are established to perform a particular but limited function. A second is that the members are not publicly elected but are appointed to their positions, usually by central government, that is by the Minister of the department concerned with the activity in question. Regional services councils do not fit into this category. They have a broad range of functions all of

which are connected with the supply of services for the public benefit, including the bulk supply of water and electricity, the control of sewerage works, traffic matters, land usage and transport planning, passenger transport services, health services, the establishment, improvement and maintenance of "other infrastructural services and facilities" and, generally, "other regional functions". As I have indicated earlier the councils came into existence as part of a restructuring of the constitutional, and, indeed, the political order which then existed. Moreover their members are elected, albeit indirectly. It is clear from the aforegoing that although regional service councils are subject to more ministerial direction and control than municipalities, they operate as a form of local government at regional level.

[10] Section 10 of the LGT Act authorises the "competent authority" to establish transitional metropolitan councils and to disestablish regional service councils. It was in terms of this section that Proclamation 24 (Premier's) of 3 December 1994 was issued. In para 10 it established the appellant for the purpose of unifying local

government structures within the Johannesburg area. The thirteen local government structures were dissolved and were replaced by a transitional metropolitan council (the appellant) and seven transitional metropolitan substructures (see *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) at 382, para 5). The CWRSC was dissolved in terms of para 30 of the Proclamation. The functions, powers and duties of the appellant include those contained in schedule 2 to the LGT Act and all other local government functions, powers and duties of the dissolved local government bodies. The appellant was also expressly authorised to exercise certain powers under the RSC Act including, as I have indicated, the right to levy and claim the regional establishment levy. The powers and duties contained in schedule 2 of the LGT Act are similar to those reflected in the second schedule to the RSC Act. In my view, it is clear that the appellant is a local authority, established to exercise governmental functions at a local level. I did not understand

counsel to suggest the contrary.

[11] I turn to consider whether Southwood J correctly applied the test of Ministerial control in reaching his conclusion. In *Banco de Mocambique v Inter-Science Research and Development Services (Pty) Ltd* 1982 (3) SA 330 (T), Goldstone J at 333E referred to an article by V K Moorthy in vol 30 (1980) *International and Comparative Law Quarterly* 638, entitled "The Malaysian National Oil Corporation - is it a Governmental Instrumentality?" At 640-1 the author states:

> "The courts have evaluated the relationship between the Government and a statutory corporation for the purpose of determining whether or not the corporation is a Government instrumentality by the application of various tests.
> The tests are as follows:
> (1) Whether the body has any discretion of its own; if it has, what is the degree of control by the Executive over the exercise of that discretion;
> (2) Whether the property vested in the corporation is held by it for and on behalf of the Government;
> (3) Whether the corporation has any financial autonomy;

(4) Whether the functions of the corporation are Governmental functions."

Moorthy went on to say at 641:

> "Of all the above-mentioned tests the courts have tended to regard the test of control as the most important factor, although in some cases the question of whether the function of the body is a governmental function has also received some consideration. If the degree of control is significant, the functional test has been held to be of little or no importance."

Although Goldstone J accepted the views expressed by Moorthy, he did so, as Corbett CJ explained in *The Shipping Corporation of India Ltd v Evdomon Corporation and Another* 1994 (1) SA 550 (A) at 563J-564A, for the purposes of the case before him, i.e. in order to decide whether a corporation (the Central Bank of Mocambique) should be classified as an instrumentality, servant or organ of the Government of Mocambique. Moorthy, too, as the title to his article indicates, was concerned with whether a corporation, the Malaysian National Oil Corporation, was to be regarded as a government instrumentality.

[12] It is not difficult to see why the test of control is appropriate for the purpose of deciding whether a public corporation is the *alter ego* of the government that establishes it. The cardinal factor that has to be considered in that type of case is the relationship between the corporation and the State and, more especially, whether the corporation is properly to be regarded as a separate institution to which specific powers have been delegated by the State or whether it is a department of the government in the guise of a public corporation (cf *Trendtex Trading Corporation v Central Bank of Nigeria* (1976) 3 All ER 437 at 442d-443h). It may then become necessary to "pierce the corporate veil" in order to determine whether the corporation is a mere puppet with the *de facto* control vesting in the government. That problem does not arise in this case. The CWRSC and the appellant are statutory bodies entrusted with wide functions of government at a regional or local level. They have the power to raise money from the public and the duty to spend their income on the supply of essential services in the public

interest. In determining whether these bodies are organs of the state the question of control is not decisive. What is of importance is the need to decide what functions they perform- whether they carry out functions of government at a local level.

[13] The control test adopted by the Special Court is, therefore, not dispositive of this case. It may be added that I am far from satisfied that the degree of control exercised by the Minister of Finance over regional councils is so significant that the councils have hardly any discretion of their own and are little more than the Minister's pawns. However this is an aspect that does not require further consideration in this appeal.

[14] I turn to consider what is meant by the expression "the State". In *"'The State' and Other Basic Terms in Public Law"* (1982) 99 *SALJ* 212 at 225-226, L G Baxter suggests that, as a rough description, 'the State' appears to be used as a collective noun for:

"(a) the collective wealth ('estate') and liabilities of the sovereign territory known as the 'Republic of South Africa' which are not owned or owed by private individuals or corporations; and

(b) the conglomeration of organs, instruments and institutions which have as their common purpose the 'management' of the public affairs, in the public interest, of the residents of the Republic of South Africa as well as those of her citizens abroad in their relations with the South African 'Government'."

In the Shorter Oxford English Dictionary Vol II 2112, "State" is defined to mean, *inter alia*

"IV. 1. ...

2. A particular form of government;

3. The state: the body politic as organised for supreme civil rule and government; the political organisation which is the basis of civil government; hence the supreme civil power and government vested in a country or nation."

[15] Some of these definitions describe what is meant by "the State" for the purposes of international law. These are irrelevant for the purposes of this appeal. In its ordinary meaning for the purposes of domestic law the word is frequently used to include all institutions which are collectively concerned with the

management of public affairs unless the contrary intention appears. In this sense the State may manifest itself nationally (through the executive or legislature arm of central government), provincially, locally and, on occasions, regionally. In *Rex v Bethlehem Municipality* 1941 OPD 227, van den Heever J said the following at 231:

> "A facile distinction is sometimes drawn between municipalities and other entities with legislative and executive powers on the ground that municipalities are mere creatures of statute. This is undoubtedly so, but so are provincial councils and, for that matter, the Union Parliament. With respect to authority of course they differ vastly and are ordered in a definite hierarchy, but the function of each is government. A municipality is not merely a corporation like a company; it is a phase of government, local it is true, but still government."

And in *Hleka v Johannesburg City Council* 1949 (1) SA 842 (A) the same judge commented at 855:

> "The modern trend is to recognise that municipal government may be local, yet it is a phase of government."

In *Chandler and Others v Director of Public Prosecutions* [1962] 3 All ER 142

(HL), the phraseology that had to be construed was "the safety and interests of the state". Lord Devlin, after asking "what is meant by 'the state'?" gave the following answer at 156D-E:

> "Counsel for the appellants submits that it means the inhabitants of a particular geographical area. I doubt if it ever has as wide a meaning as that. I agree that in an appropriate context the safety and interests of the state might mean simply the public or national safety and interests. But the more precise use of the word "state", the use to be expected in a legal context, and the one which I am quite satisfied for reasons which I shall give later was intended in this statute, is to denote the organs of government of a national community."

And in the same case Lord Reid suggested that the "organised community" comes as near to a definition of state as one can get.

[16] As Baxter points out in *Administrative Law* at 95 although the expression "the State" is extensively employed in legislation, it is not used with any consistency. The precise meaning of "the State" depends on the context within which it is used.

That brings me to certain other provisions of the Eskom Act. The objects of

Eskom are stated in section 3 of the Eskom Act as follows:

> "to provide the system by which the electricity needs of the consumer may be satisfied in the most cost-effective manner, subject to resource constraints and the national interest, and to perform such other functions as may be assigned to it ..."

Subject to the rights of local authorities and holders of licences, the respondent is authorised to generate and supply electricity within the Republic. It has the power to carry on undertakings to provide an efficient and cost-effective supply of electricity to "any body or person in the Republic".

[17] In view of the role played by the respondent in overseeing the supply of a valuable commodity to the country as a whole, it is not surprising that it was at the relevant date exempted from paying transfer duty in terms of s 9(1)(bA) of the Transfer Duty Act, 40 of 1949, stamp duty under s 4(1)(b)(iv) of the Stamp Duties Act, 77 of 1968, and marketable securities tax in terms of s 3(c)(vii) of the Marketable Securities Tax Act, 32 of 1948. (All of these exemptions were removed

with the repeal of the relevant provisions by s 4 of the Eskom Amendment Act, 126 of 1998, the same statute that repealed s 24 of the Eskom Act.) The respondent was also exempted from paying municipal rates in terms of s 5(1)(c) of the Local Authorities Rating Ordinance, 11 of 1977 (Transvaal), a provision that was repealed by Administrator's Proclamation 17 of 1994 and, it seems, it is still exempted from paying income tax (s 10(1)(cA)(i)(bb) of the Income Tax Act, 58 of 1962). Furthermore, the provisions of the Companies Act, 61 of 1973, do not apply to it (s 23 of the Eskom Act).

[18] In view of the important functions that the respondent performs in the national interest, I can think of no compelling reason why the exemptions in s 24 of the Eskom Act should be limited to levies or fees payable by the respondent to the central government. To the contrary, it is far more likely that the legislature, having decided to exempt the respondent from levies and fees, probably for the purpose of securing and protecting its economic viability, would not have excluded

other tiers of government. In fact counsel for the appellant conceded that provincial governments were included in the expression "the State" in s 24.

[19] Counsel for the appellant also referred to s 16 of the RSC Act which in its original form read:

> "This Act shall bind the State."

The section was amended by s 10 of the Regional Services Councils Amendment Act, 78 of 1986 with effect from 4 July 1986 to provide:

> "This Act shall bind the State and all bodies established by or under any law, and no provision contained in any other law published on or before 31 July 1985 providing for an exemption from any taxes or levies shall be applicable to the regional services levy or regional establishment levy."

This provision appears to have a two-fold effect - firstly to "bind" statutory bodies, including the respondent, and secondly to provide that exemptions from taxes or levies in force prior to 31 July 1985 (the date of commencement of the RSC Act) would not be applicable to the regional establishment levy. The section does not

apply to the exemption contained in s 24 and it does not assist the appellant.

[20] The appellant's counsel referred to numerous statutes that expressly distinguish the State (in the sense of the supreme legislative or executive authority) from local authorities and public corporations. These include the Black Communities Development Act, 4 of 1984, which refers to "the State or the board or local authority" in ss 34(8), 49(1) and (2) and 52(1)(a); the Alienation of Land Act, 68 of 1981, which mentions "the State or a local authority" in s 27(4); the Rating of State Property Act, 79 of 1984, which contains separate definitions for "State", "local authority" and "governmental institution"; and the State President's Committee on National Priorities Act, 119 of 1984 which, in s 5(1)(a) refers to "the State or any local authority or governmental institution". It was submitted that these provisions - and there are many more to similar effect - show that the legislature generally regarded the "State" as an institution distinct from a local authority.

Counsel for the respondent argued that no regard may be had to the way in

which a particular word is interpreted or defined in an act other than the one under consideration. This proposition seems to go too far. In *Craies* on Statute Law, (7th ed by SGG Edgar), it is pointed out that in construing a word in an act caution is necessary in adopting the meaning ascribed to the same word in other acts. The reason is obvious but that is not to say that in an appropriate case regard cannot be had to a common construction placed on the same word in other statutes. The meaning of s 24 of the Eskom Act can, however, be ascertained from the section itself and from other provisions of the Eskom Act, without resorting to unconnected statutes. Counsel's submission that regard should be had to other acts for the purposes of deciding how "the State" is to be interpreted in s 24 is not justified.

[21] Counsel for the appellant, relying on the principle that the same words in the same statute should generally be given the same meaning, referred to other provisions in the Eskom Act which, he submitted, indicated that "the State" in s 24

does not include local authorities. Particular emphasis was placed on s 5(7) which reads:

> "A member of the Electricity Council, excluding a member who is in the full-time employment of the State or Eskom, shall be appointed on such conditions, including conditions relating to the payment of remuneration and allowances, as the Minister may determine with the concurrence of the Minister of Finance."

Counsel's submission would have force only if it is sufficiently clear that the word "State" in s 5(7) should be restrictively construed so as to exclude local authorities. As no satisfactory grounds were advanced for interpreting the word restrictively in s 5(7) or in the other sections to which counsel referred, this is not a persuasive argument.

[22] Further submissions were based on the definition of "undertaking" in s 1 of the Eskom Act. The relevant part of the definition reads:

> "'undertaking' means any undertaking for the supply of electricity ... whether under the control of Eskom, the Government, (including the South African Transport Services), a local authority, a company or

other association of persons or a natural person."

The argument was premised on the assumption that the word "Government" in the definition was to be equated with "State" in s 24. It was therefore submitted that if the legislature had intended to include regional service councils or local authorities in s 24 it would have used the same method of expression that it did in the definition of "undertaking". The premise on which this argument was based is, in my view, fallacious simply because there is no justification for assuming that "Government" and "State" are used interchangeably in the Act. On the contrary it is more likely that the legislature expressed itself differently precisely because it intended the words to have different meanings. If this is so, the word "State" in s 24 would have a wider meaning than "Government" and would include bodies such as regional service councils and transitional metropolitan councils.

[23] To sum up: regional service councils and the appellant are both authorities which exercise a myriad of governmental functions - at a regional level in the case

of the former and at a local level in the case of the latter. As such they are organs of government. On a proper construction of the Eskom Act the expression "the State" in s 24 is not limited to central and provincial government: it includes the State in all of its manifestations. To hold otherwise would be to limit the meaning of the "State" in the section for no obvious reason, while, on the other hand, there are convincing grounds for holding that the exemption in s 24 was not to be applied in a restrictive manner. It is only necessary to mention that although both counsel referred to various provisions of the Interim Constitution in order to further their arguments, this matter is capable of resolution without reference to that statute.

[24] The appeal is therefore dismissed with costs, including the costs of two counsel.

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L S MELUNSKY

ACTING JUDGE OF APPEAL

Concur:

Mahomed CJ
Vivier JA
Scott JA
Farlam AJA