



## 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:** 9 April 2026

**Status:** Immediate

*The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal*

*Eskom Holdings Soc Ltd v Botha and Others (1332/2024) [2026] ZASCA 48 (9 April 2026)*

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Today, the Supreme Court of Appeal (SCA) handed down judgment in an appeal against a judgment of the Free State Division of the High Court, Bloemfontein (the full court), sitting as a court of appeal. The appeal was with the special leave of the SCA.

This appeal concerned whether Eskom qualifies as an organ of state within the meaning of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 (the Act). The appeal originates from a damages action initiated by the respondents against Eskom. The respondents alleged that their farms sustained damage because of fires, which they attribute to the negligence of Eskom. These fires are said to have occurred in September 2018. Following these events, the respondents commenced legal proceedings against Eskom in August 2021.

It was not disputed that the respondents did not serve a written notice on Eskom to inform it of their intention to initiate civil proceedings, as required under s 3(1) of the Act before instituting the action. In response, Eskom raised a special plea, maintaining that it qualifies as an organ of state according to the definition set out in s 1 of the Act, interpreted together with s 239 of the Constitution. Eskom argued that it is a functionary or institution wholly owned by the state, which carries out public functions in accordance with the Constitution or relevant legislation, or exercises public powers. Based on this characterisation, Eskom contended that it was entitled to the prescribed notice.

The respondents filed a replication in which they asserted that they were not obligated to provide notice to Eskom under the Act. Their position was based on the assertion that Eskom does not qualify as an organ of state according to the definition provided in the Act. Specifically, the respondents claimed that Eskom neither performs functions in terms of the Constitution (or a Provincial Constitution) nor does it

fit within the scope of the Act's definition of an organ of state. As a result, the respondents contended that the statutory notice requirement was not applicable to their claim.

Eskom's special plea served before the Free State Division of the High Court, Bloemfontein (the high court) as a separated issue to be determined in terms of rule 33(4). The high court handed down its judgment on 15 February 2023, in which it dismissed Eskom's special plea and ordered it to pay the respondents' costs. Following the high court's decision, Eskom, with leave from the high court, appealed the outcome to the full court.

In its judgment, the full court determined that Eskom qualifies as an organ of state in terms of s 239(b) of the Constitution. This conclusion was reached on the basis that Eskom performs a function 'in terms of any legislation' and is a state-owned entity. The full court further noted that Eskom, as a state-owned company, has a constitutional duty to supply electricity in order to promote the economic and social welfare of the public. The full court, however, found that Eskom does not carry out its functions directly in terms of the Constitution since it neither specifically mentions Eskom nor provides for its creation or existence.

At the hearing of the matter before the SCA, Eskom argued that it satisfies the Act's definition in two distinct ways. First, it asserted that it falls under s 1(c) of the Act because it performs its function in terms of the Constitution. Second, Eskom contended that it meets the requirements of s 1(g) of the Act, as the National Treasury – an acknowledged organ of state – is responsible for its debts. Eskom asserted that it is therefore entitled to the statutory notice provided for in terms of s 3 of the Act prior to the institution of legal proceedings.

The respondents joined issue with these arguments, asserting that, where the National Treasury is held liable for Eskom's debt, individuals harmed by fires caused by Eskom's power lines would have recourse to pursue claims against the National Treasury rather than Eskom. However, such an option is unavailable because, although the National Treasury may provide funding to Eskom, it does not assume liability for Eskom's debts. Consequently, the respondents argue, Eskom does not fall within the scope of s 1(g) of the Act.

The SCA held that organs of state that operate only under statutory authority, like Eskom, are not incorporated within the definition of an organ of state as set out in s 1(c) of the Act. This conclusion is evident from a plain reading of the section's language. One does not require a restrictive interpretation or reliance on the report of the Law Commission to reach this conclusion. Eskom accordingly does not fall within the ambit of s 1(c) of the Act

The SCA held further that the argument that individuals seeking compensation for damages arising from Eskom's negligence could elect to pursue claims against either Eskom or the National Treasury, is unsupported by both the Constitution and the Eskom Debt Relief Act. Neither legal instrument

provides a basis for holding the National Treasury liable for Eskom's debts in such a way that would permit claimants to bring proceedings against the Treasury for the actions or omissions of Eskom. Effectively, no statutory or legal basis exists to establish liability on the part of the National Treasury for debts accrued by Eskom. As a result, Eskom cannot invoke s 1(g) of the Act to claim protection in terms of s 3 of the Act. Accordingly, the appeal must fail.

Accordingly, the SCA dismissed the appeal with costs including the costs of senior counsel.

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