



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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Topigs Norsvin (Pty) Ltd v Eskom Holdings SOC Ltd and Others (117/2025) [2026] ZASCA 108 (14 August 2026)

Today, the Supreme Court of Appeal (SCA) handed down judgment partially upholding an appeal arising from an application in the Gauteng Division of the High Court, Pretoria (the high court). The SCA set aside the order of the high court and substituted it with an order of its own.

This matter arises from activities concerning the construction, operation, and maintenance of the Kusile Power Station (Kusile), located in Witbank, Mpumalanga, which are the responsibility of Eskom Holdings SOC Ltd (Eskom), the first respondent. The appellant, Topigs Norsvin SA (Pty) Limited (Topigs), is a swine genetics producer responsible for supplying specific pathogen-free breeding material to pork markets. The Topigs operations are conducted on a farm adjacent to Kusile. The remaining respondents are directors of Eskom, the Department of Water and Sanitation (DWS), the Department of Forestry, Fisheries and the Environment (DFFE), the Department of Mineral Resources and Energy (the Energy Department), and their respective Ministerial representatives and Director-Generals (State respondents).

The planning for Kusile started well before 2008. Amongst other legal requirements, Kusile required certain environmental authorisations for the activities it would undertake, as contemplated in ss 24-24F of the National Environmental Management Act 107 of 1998 (NEMA). and water use licences, as contemplated in s 21, read with s 22 of the National Water Act 36 of 1998 (the NWA). On 17 March 2008, Eskom was awarded the necessary environmental authorisation (EA) issued under the Environment Conservation Act 73 of 1989. Despite being adjacent to Kusile, Topigs was never given notice about the construction of Kusile, nor was any public participation process embarked upon before the construction commenced. The EA granted to Eskom stipulated specific conditions, including that all polluted water be recycled until all pollutants are captured as waste for disposal with the ash deposition. Eskom had to establish an Environmental Monitoring Committee (EMC), whose purpose was, among others, to monitor and audit compliance with the conditions of the EA and to oversee the environmental impacts associated with the construction, operation, and management of Kusile. The various water-use licences issued to Eskom over the years required it to, inter alia, investigate all uncontrolled leakages, manage dirty water runoff, and set limits to the quality of water containing waste disposed of into the pollution control dam. Eskom was also required to monitor, every month, the water resources at surface water monitoring points and groundwater monitoring points and provide updates to the EMC.

Dissatisfied with what it considered to be an ongoing detrimental impact on the water resources caused by the construction, operation, and management of Kusile, Topigs decided to institute legal proceedings in the high court in 2023, seeking several declaratory orders and a structural interdict against Eskom

and the other respondents. The high court held that Topigs had failed to make out a case on two bases: first, Topigs had failed to prove the third requirement of an interdict, namely the absence of an alternative remedy. Second, since Topigs had failed to invoke the provisions of s 28(12) of NEMA, granting an order on the terms it sought would amount to a failure to observe the principle of subsidiarity. The high court dismissed Topigs' application with no order as to costs.

On appeal to the SCA, this Court considered two central issues, the first being non-compliance by Eskom with the conditions of the EA under NEMA and the water-use licences issued to it, the second being the failure of the DWS and DFFE to enforce compliance by Eskom with the conditions of the EA and water-use licences and all other relevant legal requirements. In relation to the determination of appropriate relief, the central question was whether granting relief to Topigs would infringe on the doctrine of separation of powers.

Addressing a preliminary issue regarding the citation of senior management employees of Eskom, this Court held that regardless of their seniority, the employees did not have a substantial and direct interest in the matter, as it is Eskom, as the licensee, that was responsible for any non-compliance. This Court concluded that the inclusion of these employees constituted misjoinder. Having laid out the applicable laws, particularly the overarching principles of environmental development, the SCA considered each issue in turn.

Regarding Eskom's non-compliance, this Court pointed out that on a conspectus of the evidence, Eskom failed to comply with several conditions of the EA and the IEA, and, on the other hand, the DFFE and DWA failed to enforce compliance with those conditions and NEMA as well as the NWA, and thus failed to hold Eskom accountable. This Court concluded that Eskom's non-compliance amounted to a breach of its statutory duties and that the State respondents had failed to undertake reasonable and effective measures within their statutory authority to ensure Eskom's compliance with the applicable instruments. That failure constituted a breach of their obligations under NEMA, the National Environmental Management: Waste Act 59 of 2008 (NEMWA), and the NWA, as well as of the duty imposed by s 7(2) of the Constitution on the State.

Concerning the principle of subsidiarity, the SCA held that it cannot be said that Topigs bypassed NEMA and related environmental legislation by invoking s 24 of the Constitution. The Court found that Topigs' cause of action was substantively grounded in Eskom's alleged non-compliance with the conditions stipulated in the EA and the IEA, granted in terms of NEMA and NEMWA. Additionally, it was held that Topigs also founded its case on the State respondents' failure to comply with the obligations set out in NEMA, NEMWA, and NWA. In this regard, it was concluded that there could be no doubt that Topigs founded its case on the provisions of s 28(1) and (2) of NEMA on the basis that, in its construction, management and operation of Kusile, Eskom was under a duty to 'minimise and rectify pollution or degradation of the environment' and failed to do so. The Court clarified that our current jurisprudence does not prevent a litigant from claiming that an act or omission is both a statutory and a constitutional violation and therefore, in the circumstances of this case, the principle of subsidiarity was not triggered.

On the relief sought by Topigs, the SCA pointed out that a careful scrutiny of the relief sought by Topigs revealed that Topigs not only sought a structural interdict, but also sought a declaratory order and a mandamus. The Court held that against the backdrop of an existing duty of care as set out in s 28(1), (2) and (3) of NEMA, and undisputed non-compliances with various provisions of the EA, IEA, NEMA and NWA, it was plain that the declaratory orders and a mandamus compelling the responsible authorities to consider and exercise their statutory enforcement powers was the minimum relief necessary to vindicate legality, without encroaching upon the separation of powers principle. As such, the SCA concluded that the declaratory order, and the attendant mandamus, merely echoes what is envisaged in the EA, IEA, NEMA, and NWA and that a case had been made out for such relief. Regarding the structural interdict, the SCA held that, given the highly technical nature of the mitigatory measures sought, granting the structural interdict in the manner proposed by Topigs could position the court as an active participant in a dispute that would transcend its judicial function.

As a result, the SCA partially upheld the appeal, set aside the order of the high court, and substituted it with an order of its own.