



## 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:** 23 March 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 Limited and Another v AfriForum NPC (1049/2024) [2026] ZASCA 34  
(23 March 2026)*

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Today, the Supreme Court of Appeal (SCA) dismissed an appeal against a decision of the Gauteng Division of the High Court, Pretoria wherein the appellant had been directed to grant the respondent access to information it had refused to provide.

On 11 June 2022, the respondent (AfriForum) had, in terms of s 78 (read with s 82) of the Promotion of Access to Information Act 2 of 2000 (PAIA), formally requested access to the appellant's (Eskom) active coal and diesel contracts as well as its contracts to supply electricity to neighbouring countries. Eskom provided some of the information and relied on s 42(3)(b) and (c) alternatively s 36(1)(b) and (c), of PAIA to refuse access to the information that forms the subject of this appeal. The high court found that Eskom's initial and additional reasons for refusing access to the required information was insufficient and without any merit and directed it to provide AfriForum access to the outstanding information. The appeal against that finding, is with leave of the high court.

In correspondence dated 12 September 2022, Eskom relied on s 42(3)(b) and (c) of PAIA to refuse access to the coal and diesel contracts. On 28 September 2022, an internal appeal followed, in which AfriForum additionally relied on s 46 of PAIA to access the information sought. Thereafter, AfriForum approached the high court. At the time, Eskom had not given notice of its decision in respect of the internal appeal. That failure amounted to a dismissal of the internal appeal. In addition, AfriForum alleged that the information it sought was of high public interest and not commercially confidential. AfriForum relied on s 11 of PAIA for these assertions.

The SCA had to deal with the following issues: the correct test to be applied when considering whether Eskom's reasons show that disclosure 'would likely cause harm, as contemplated in s 42(3)(b), or could reasonably be expected to disadvantage Eskom in negotiations, as contemplated in s 42(3)(c); whether Eskom's refusal to grant access to the required information

is justified and whether the provisions of s 46 of PAIA were satisfied to justify the high court's orders, even if s 42(3)(b) and (c) alternatively s 36(1)(b) and (c) apply.

In granting leave to appeal, the high court accepted that the correct test was explained by this Court in *Transnet Ltd and Another v SA Metal Machinery Company (Pty) Ltd (Transnet)*. In *Transnet*, this Court, with reference to s 36(1)(b) and (c) of PAIA, held that the distinction between 'would be likely to cause harm' and 'could reasonably be expected' is not the degree of probability but the degree of expectation. The high court accepted that it had applied a more stringent test and on that narrow basis granted leave to appeal to this Court.

The SCA held that s 36 and s 42 are similar in context and text, and that the correct test to be applied in this instance is the *Transnet* test. Eskom had provided the same grounds for refusing access to its diesel contracts as for its coal supply contracts. In applying that test to these facts, Eskom had not dealt with the common-cause fact that the price of coal and diesel is a matter of public knowledge and further that it procures coal and diesel through a competitive and transparent tender process.

The SCA held further that the high court correctly observed that 'once a contract is awarded the confidentiality clause offers no further protection from disclosure as regards the tender price'. Eskom's reasoning is obviously contradictory, considering that bidders have historically known the existing price of coal before bidding. Disclosure, in those circumstances, would not affect Eskom's negotiation position negatively.

It follows that this Court could not fault the high court's finding that there is nothing to support the allegation that the agreements are confidential, contain information that is commercially sensitive, and would disadvantage Eskom or third parties in contractual negotiations. In the circumstances of this matter, the alleged harm is not a probable or reasonable apprehension and so the coal and diesel contracts should be disclosed.

Eskom did not meet the standard for refusal in terms of s 36(2)(a), (b) and (c) as well as s 42(3)(b) and (c). This then obviates the need to determine whether the requirements for s 46 have been met. This is so as the default position is that a public body must disclose the requested documents, in terms of s 11. The SCA concluded with the observation that compliance with s 46 requires evidence specific to the contracts sought to be accessed. General allegations of corruption at a public entity are not sufficient.

The SCA is persuaded that the high court reached the correct conclusion, despite applying the incorrect test and as a result, the appeal is dismissed with costs, such to include the costs of two counsel.

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