



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Reportable

Case no: 1332/2024

In the matter between:

ESKOM HOLDINGS SOC LTD

APPELLANT

and

LOUIS JOHANNES BOTHA

FIRST RESPONDENT

HENDRIK FRANCOIS NAUDE

SECOND RESPONDENT

WESDAN BOERDERYE (PTY) LTD

THIRD RESPONDENT

GOUEVELD BOERDERY (PTY) LTD

FOURTH RESPONDENT

CHRISTOFFEL PETRUS SCHEEPERS

FIFTH RESPONDENT

Neutral citation: *Eskom Holdings Soc Ltd v Botha* (1332/2024) [2026] ZASCA 48 (9 April 2026)

Coram: SCHIPPERS, MBATHA and SMITH JJA, STEYN and VALLY AJJA

Heard: 4 March 2026

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, published on the Supreme Court of Appeal website, released to SAFLII. The date and time for hand-down is deemed to be 9 April 2026 at 11h00.

Summary: Statutory interpretation – Institution of Legal Proceedings against certain Organs of State Act 40 of 2002 (the Act) – whether Eskom exercises power or performs functions as an organ of state in terms of the Constitution (s 1(1)(c)) – whether National Treasury liable for Eskom’s debts (s 1(1)(g)) – Eskom not an organ of state under s1(1) of the Act.

ORDER

On appeal from: Free State Division of the High Court, Bloemfontein (Mhlambi J, Daffue J and Mgudlwa AJ sitting as court of appeal):

The appeal is dismissed with costs, including the costs of senior counsel.

JUDGMENT

Smith JA (Schippers and Mbatha JJA, Steyn and Vally AJJA concurring):

Introduction

[1] The appellant, Eskom Holdings SOC Ltd (Eskom), appeals against the judgment of the Full Court of the Free State Division of the High Court, Bloemfontein (the Full Court). That Court dismissed Eskom's special plea based on the respondents' failure to serve it with a written notice in terms of s 3 of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002 (the Act). The appeal is with the special leave of this Court.

[2] The central question on this appeal – as was the case in the court of first instance and the Full Court – is whether Eskom is an organ of state as defined in s 1(1) of the Act. Eskom argues that it satisfies the Act's definition in two distinct ways. First, it asserts that it is a functionary or institution contemplated in s 1(1)(c), because it performs its functions in terms of the Constitution. Second, it meets the requirements of s 1(1)(g), as the National Treasury – an organ of state – is responsible for Eskom's debts. Eskom therefore contends that it is entitled to the statutory notice required in terms of s 3 of the Act prior to the institution of legal proceedings.

[3] Sections 3(1) and 3(2) of the Act set out the prerequisites for instituting legal proceedings to recover a debt from an organ of state as defined. In particular, they stipulate that a creditor must first serve a written notice on the organ of state, indicating

an intention to commence legal proceedings. Alternatively, proceedings may commence if the organ of state grants written consent that the proceedings may be instituted 'without such notice'; or 'upon receipt of a notice which does not comply with all the requirements set out in subsection (2)'.

[4] Section 3(2) of the Act requires that written notice must be served within six months from the date the debt becomes due. The notice must briefly set out the facts that give rise to the debt and must include particulars of the debt known to the creditor. The statutory protection provided by the Act applies exclusively to organs of state, as defined in s 1(1) of the Act.

The facts

[5] The relevant facts are common cause and can be briefly stated. The appeal originates from a damages action instituted by the respondents against Eskom in August 2021. The respondents allege that in September 2018 their farms were damaged by fires, due to the negligence of Eskom.

[6] In their particulars of claim, the respondents invoked s 25 of the Electricity Regulation Act 4 of 2006 (the Regulation Act) as the basis for their damages claim. It provides that in any civil proceedings against Eskom, as a licensee, arising from damage or injury caused by induction, electrolysis, or any other means involving electricity generated, transmitted, or distributed by Eskom, such damage or injury is presumed to have been caused by Eskom's negligence unless credible evidence is presented to the contrary.

[7] It is not disputed that the respondents did not serve a written notice on Eskom to inform it of their intention to institute civil proceedings, in terms of s 3(1) of the Act before instituting the action. Eskom raised a special plea, in which it alleged that it is an organ of state as defined in s 1(1) of the Act, read 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. Eskom therefore contended that it was entitled to the prescribed notice.

[8] The respondents filed a replication in which they asserted that they were not required to provide notice to Eskom under the Act. They asserted that Eskom is not an organ of state as contemplated in the Act. Specifically, the respondents alleged that Eskom neither performs functions in terms of the Constitution (or a Provincial Constitution), nor does it meet any other element of the definition of an 'organ of state' in s 1(1) of the Act.

[9] 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) of the Uniform Rules of Court. The High Court dismissed Eskom's special plea and ordered it to pay the respondents' costs.

[10] The High Court granted Eskom leave to appeal to a full court. As stated, the Full Court upheld the High Court's decision and confirmed the dismissal of Eskom's special plea.

[11] 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 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 the Constitution neither specifically mentions Eskom nor provides for its creation or existence.

The legal principles

[12] The approach to statutory interpretation in our law is well established. The Constitutional Court in *AmaBhungane Centre for Investigative Journalism NPC v President of South Africa*,¹ explained the approach as follows:

'As always, in interpreting any statutory provision one must start with the words, affording them their ordinary meaning, bearing in mind that statutory provisions should always be interpreted purposively, be properly contextualised and must be construed consistently with the Constitution. This is a unitary exercise. The context may be determined by considering other subsections, sections or the chapter in which the keyword, provision or expression to be interpreted is located. Context may also be determined from the statutory instrument as a whole. A sensible interpretation should be preferred to one that is absurd or leads to an unbusinesslike outcome.'

[13] Section 39(2) of the Constitution places a clear obligation on courts to interpret legislation in a manner that advances the spirit, purport, and objects of the Bill of Rights, provided that such an interpretation can reasonably be ascribed to the legislative provision in question.² This constitutional injunction is a guiding principle in the interpretive process. Whenever a statutory provision is reasonably capable of being understood in more than one way, courts must choose the interpretation that most closely aligns with constitutional values. This approach ensures that the interpretation of statutes upholds and promotes the rights and values enshrined in the Constitution.³

[14] Another relevant principle of statutory interpretation is that legislation that restricts the constitutional rights of individuals – in this case the right of access to court in s 34 of

¹ *AmaBhungane Centre for Investigative Journalism NPC v President of the Republic of South Africa* [2022] ZACC 31; 2023 (2) SA 1 (CC); 2023 (5) BCLR 499 (CC) para 36; *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA); *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) at para 28.

² *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2000 (10) BCLR 1079 (CC); 2001 (1) SA 545 (CC); 2000 (2) SACR 349 (CC) paras 22 and 23.

³ *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* (CCT1/00) [2000] ZACC 12; 2000 (10) BCLR 1079 (CC); 2001 (1) SA 545 (CC); 2000 (2) SACR 349 (CC).

the Constitution – must be construed narrowly.⁴ The relevant provisions of the Act must be interpreted in light of these principles.

The parties' submissions

[15] Eskom submits that the phrase 'in terms of' as used in s 1(1)(c) should be interpreted broadly. Citing this Court's judgment in *Oosthuizen and Another v Standard Credit Corporation*,⁵ Eskom contends that the expressions 'in terms of', 'pursuant to', and 'in accordance with' are essentially synonymous, differing only slightly in meaning. Consequently, Eskom contends that only those entities that are clearly outside this broad definition should be excluded from the Act's operation.

[16] Eskom asserts that following its transformation under the Eskom Conversion Act 13 of 2001 (the Conversion Act), it became a public company, with the state as its sole shareholder. This conversion obliged Eskom to enter into a shareholder compact or performance agreement with the Minister of Public Enterprises. Through this arrangement, Eskom accepted the responsibility of promoting universal access to electricity and ensuring that electricity remains affordable.

[17] According to Eskom, it carries out this function in accordance with legislation, specifically the Conversion Act and, to some extent, the Regulation Act. Furthermore, it is designated as a major public entity in Schedule 2 of the Public Finance Management Act 1 of 1999.

[18] Eskom points out that, historically, it held a near monopoly over the generation, transmission, and distribution of electricity in South Africa. It has been described as a 'national asset upon which the welfare of the entire country depends'.⁶

⁴ *S v Zuma and Others* (CCT5/94) [1995] ZACC 1; 1995 (2) SA 642; 1995 (4) BCLR 401 (SA); 1995 (1) SACR 568 para 14.

⁵ *Oosthuizen and Another v Standard Credit Corporation Ltd* 1993 (3) SA 891 (AD); [1993] 4 All SA 591 (AD).

⁶ *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and Others* 2023 (5) BCLR 527 (CC); 2023 (4) SA 325 (CC).

[19] In addition, Eskom argues that the courts have affirmed its status as an organ of state with constitutional responsibilities. In *Eskom Holdings SOC v Resilient Properties*,⁷ this Court recognised that Eskom bears specific constitutional duties, including enabling municipalities to fulfil their obligations under the Constitution. This obligation is derived from s 8(1), read with s 7(2) of the Constitution, which requires the state to respect, protect, promote, and fulfil the Bill of Rights.

[20] Moreover, as an organ of state, Eskom is bound by s 41(3) of the Constitution to endeavour to resolve intergovernmental disputes amicably. The judgment in *Eskom Holdings SOC Ltd v Letsemeng Local Municipality and Others*⁸ further confirmed that Eskom operates as an organ of state within the national sphere of government and is subject to the Constitution, which regards the generation and transmission of electricity as a national competence. Based on these features, Eskom argues that it clearly falls within the definitions of an organ of state under both the Constitution and s 1(1)(c) of the Act.

[21] Conversely, the respondents argue that the Act should be construed narrowly since it curbs the rights of members of the public and limits access to justice. Eskom's contention that the words 'in terms of' must be given a wide meaning is contrary to this legal injunction. Furthermore, such an interpretation goes against the explicit wording of the Act, even if it is not narrowly construed, because it limits the right of access to justice.

[22] Regarding legislative intent, the respondents cite the South African Law Commission's report from October 1985 and its supplementary report from September 1998, both of which were also referenced by Eskom in its heads of argument. Eskom acknowledges that the 1985 report expressly excluded Eskom and further concedes that

⁷ *Eskom Holdings SOC Ltd v Resilient Properties (Pty) Ltd and Others; Eskom Holdings SOC Ltd v Sabie Chamber of Commerce and Tourism and Others; Chweu Local Municipality and Others v Sabie Chamber of Commerce and Tourism and Others* [2020] ZASCA 185; [2021] 1 All SA 668 (SCA); 2021 (3) SA 47 (SCA).

⁸ *Eskom Holdings SOC Limited v Letsemeng Local Municipality and Others* (990/2020) [2022] ZASCA 26; [2022] 2 All SA 347 (SCA).

the 1998 report did not reflect any change in this position. The respondents contend that this Court may consider these reports to clarify the legislature's purpose and the specific mischief the legislation sought to address, as exemplified in *Fundtrust (Pty) Ltd (in liquidation) v Van Deventer*.⁹ According to the respondents, this serves as clear evidence that the Act was not intended to apply to Eskom.

[23] The respondents further submit that since the Free State Province does not have a Provincial Constitution, the question arises as to whether Eskom is a functionary or institution exercising its power or performing a function in terms of the Constitution. For Eskom to perform its functions in terms of the Constitution, Eskom, its powers and functions must explicitly be stated in the Constitution. Neither Eskom nor its functions are mentioned in the Constitution.

Does Eskom fall within the scope of s 1(1)(c) of the Act?

[24] Section 239 of the Constitution defines an organ of state as 'any department of state or administration in the national, provincial or local sphere of government'. That definition also encompasses any other functionary or institution exercising a power or function in terms of the Constitution; or 'exercising a public power or performing a public function in terms of any legislation but does not include a court or a judicial officer'. Since Eskom is a functionary or institution performing a public function in terms of legislation, it clearly falls within the ambit of s 239 of the Constitution.

[25] The Act's definition of an organ of state, however, differs substantially from that of the Constitution. Section 1(1)(c) of the Act limits the definition to functionaries or institutions carrying out functions 'in terms of the Constitution or a Provincial Constitution'. In contrast to the broader constitutional definition, s 1(1)(c) does not encompass entities whose functions derive only from legislation.

⁹ *Fundtrust (Pty) Ltd (in liquidation) v Van Deventer* [1996] ZASCA 125; [1997] 1 All SA 644.

[26] Section 1(1) of the Act provides:

“**organ of state**” means—

- (a) any national or provincial department;
- (b) a municipality contemplated in section 151 of the Constitution;
- (c) any functionary or institution exercising a power or performing a function in terms of the Constitution, or a provincial constitution referred to in section 142 of the Constitution;
- (d) the South African Maritime Safety Authority established by section 2 of the South African Maritime Safety Authority Act, 1998 (Act No. 5 of 1998);
- (e) The South African National Roads Agency Limited contemplated in section 3 of The South African National Roads Agency Limited and National Roads Act, 1998 (Act No. 7 of 1998);
- (f) National Ports Authority Limited, contemplated in section 4 of the National Ports Act, 2005, and any entity deemed to be the National Ports Authority in terms of section 3 of that Act;
- (g) any person for whose debt an organ of state contemplated in paragraphs (a) to (f) is liable.’

[27] Turning to the text of the relevant provisions, the respondents correctly argue that there are several explicit indications in the Act that not all organs of state are included in its ambit of operation. First, the title of the Act clearly states that it relates only to ‘certain Organs of State’. This means the Act is not intended to apply universally to every public body that qualifies as an organ of state under the constitutional definition. Instead, its scope is deliberately restricted.

[28] As a result, not all public bodies recognised as organs of state by the Constitution are subject to the Act’s provisions. The Act’s operation is limited to departments in the national and provincial spheres of government, municipalities, and specific functionaries and institutions. The definition of ‘organ of state’ is both explicit and significant in understanding the purpose of the Act.

[29] The preamble to the Act makes it clear that its primary purpose is ‘to regulate prescription and to harmonise the periods of prescription of debts for which *certain organs of state* are liable’; and further, ‘to make provision for notice requirements in connection with the institution of legal proceedings against *certain organs of state*...’ Moreover, the Act recognises ‘the need to harmonise and create uniformity in the provisions of existing laws’, which previously set out varying notice periods for initiating legal proceedings

against *certain organs of state*. (own emphasis.) These organs of state are those defined in s 1(1).

[30] The stated purpose of the Act is to address the inconsistencies that existed across these laws by introducing a uniform notice period. This standardised period is intended to apply only to those organs of state for which existing laws have already provided notice requirements. In other words, the Act does not create new notice periods for functionaries and institutions where none previously existed but instead consolidates and streamlines those that were already established.

[31] The term 'certain organs of state' in the long title and preamble to the Act, refers exclusively to those functionaries and institutions that were subject to such notice provisions under prior legislation. In this context, the word 'certain' is a term of limitation. It indicates that the Act does not apply to every entity that might generally be considered an 'organ of state' under the broader legal definition in s 239 of the Constitution, but only to the specific subset listed in the Act's own definition. Those organs of state are specifically mentioned in the Schedule to the Act. Eskom is not among them. The question which then arises is whether Eskom is nevertheless an organ of state contemplated in terms of s 1(1)(c) of the Act.

[32] The submission on behalf of Eskom that it is an organ of state as contemplated in s 1(1) of the Act, because it carries out functions under a range of statutes, or that the phrase 'in terms of' is synonymous with 'pursuant to' and 'in accordance with', is unsound. While Eskom is an organ of state, this does not equate to performing its functions pursuant to constitutional authority. The distinction is important, as s 1(1) requires that, for an institution to fall within the scope of the Act's definition, its functions must be carried out directly in terms of the Constitution, and not simply by virtue of statutory provisions.

[33] Section 1(1)(c) of the Act refers to a functionary or institution 'exercising a power or performing a function in terms of the Constitution'. Given the Act's application to 'certain' organs of state which are specifically defined, the phrase 'in terms of' must be

narrowly construed. Thus, there must be a direct and immediate connection between the institution, and its powers and functions set out in the Constitution. The clearest example of this is s 205(3) of the Constitution. It states that the functions of the police service include the prevention, combating and investigation of crime.¹⁰ Likewise, the powers and functions of the Defence Force are set out in s 200(2). Eskom, by contrast, is not referred to in the Constitution, nor does it perform any function 'in terms of the Constitution'.

[34] This interpretation is reinforced by the context. The legislature deliberately restricted the definition of 'organ of state' for the purposes of the Act to only those institutions that perform functions 'in terms' of the Constitution itself; or to the institutions specified in s 1(1). These latter institutions are the South African Maritime Safety Authority, the South African National Road Agency Limited and the National Ports Authority. The statutes establishing these institutions are also specified. Eskom is not one of these institutions – a clear indication that it is not an organ of state as contemplated in s 1(1). This provision creates a closed list. If an entity like a state-owned company, such as Eskom or Transnet, is not explicitly named or described in paragraphs (a) to (g), the Act does not apply to it, even if it is an organ of state for other purposes.

[35] The above construction is further reinforced by the rule that the legislature is presumed to be aware of the prevailing state of the law at the time of enacting legislation. The Act was passed in 2002, some eight years after the coming into force of the Constitution. It follows that Parliament was cognisant of the constitutional definition of an 'organ of state', specifically that the Constitution distinguishes between organs of state which perform public functions directly in terms of the Constitution and those that do so under statutory authority.

¹⁰ Section 205(3) of the Constitution provides:

'The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.'

[36] In the proceedings before the Full Court, Eskom relied on the judgment in *Pegma Thirteen Investments (Pty) (Ltd) v Free State Development Corporation (Pegma)*.¹¹ In that case, the court concluded that on a proper interpretation of s 1(1)(c) of the Act, an entity which fulfils a task or purpose referred to in the Constitution, falls within the definition of an 'organ of state' in that provision. It held that "[b]y virtue of the obviously public functions the corporation performs for the general population of the province, it falls within the ambit of s 1(1)(c) of the Act'. Consequently, the court upheld the defendant's special plea.

[37] The Full Court rightly rejected this approach. It found that the court in *Pegma* did not properly distinguish between the general concept of an organ of state as defined in the Constitution, and the specific definition of that concept in the Act. The Full Court concluded, correctly, that the reasoning in *Pegma* is inconsistent with the explicit and unambiguous language of the Act. We hold that *Pegma* was wrongly decided and should not be followed.

[38] For all these reasons, Eskom accordingly does not fall within the ambit of s 1(1)(c) of the Act. This conclusion is evident from a plain reading of the language of the section, its context and purpose.

Is Eskom included under s 1(1)(g) of the Act?

[39] In terms of s 1(1)(g) of the Act, an organ of state includes 'any person for whose debt an organ of state contemplated in paragraphs (a) to (e) is liable'. Eskom's argument regarding this issue can be summarised as follows. The term 'liable for' means 'responsible for'; 'having an obligation to do so'; or 'having control over or care for someone as part of one's job'. National Treasury is a national department listed in the first column of Schedule 1 to the Public Service Act 103 of 1994; and is an organ of state as contemplated in s 1(1)(a) of the Act. National Treasury, so it is argued, is thus liable for Eskom's debt as contemplated in s 1(1)(g) of the Act.

¹¹ *Pegma Thirteen Investments (Pty) (Ltd) v Free State Development Corporation* [2008] ZAFSHC 72 (18 September 2008).

[40] Pursuant to that obligation, the Eskom Debt Relief Act 7 of 2023 (the Eskom Debt Relief Act) was assented to on 5 July 2023, to provide a direct charge against the National Revenue Fund for debt relief for Eskom, as provided for in terms of s 213(2)(b) of the Constitution. Eskom further relied on *Cape Gate (Pty) Ltd and Others v Eskom Holdings SOC Limited and Others*¹² – cited with approval by this Court in *Resilient* – for the assertion that there are only two sources of funds on which Eskom can rely for payment in respect of ongoing supply of electricity to municipalities, namely paying customers and National Treasury.

[41] Eskom thus asserts that it is a state-owned entity with a separate corporate identity for whose debt National Treasury is liable. For these reasons, Eskom contends that it falls within the definition in s 1(1)(g) of the Act.

[42] The respondents submitted that were National Treasury held liable for Eskom's debt, individuals harmed by fires caused by Eskom's power lines would be entitled to pursue claims against National Treasury rather than Eskom. However, this is impermissible because National Treasury is not liable for Eskom's debts, although it does provide funding to Eskom. Consequently, the respondents submit that Eskom does not fall within the scope of s 1(1)(g) of the Act.

[43] I agree with the respondents' submission. The Eskom Debt Relief Act does not assign responsibility for Eskom's debt to National Treasury. Rather, it sets out a framework for the provision of various loans to Eskom. These loans are subject to specific conditions, as determined by the Minister of Finance. In particular, the Act stipulates that the Minister of Finance must decide on the terms under which portions of loan amounts to Eskom, allocated for each financial year, may be converted into ordinary shares issued by Eskom. This arrangement does not transfer Eskom's debt liability to National Treasury;

¹² *Cape Gate (Pty) Limited and Others v Emfuleni Local Municipality and Others* (2018/27317) [2019] ZAGPJHC 39 (6 February 2019).

instead, it merely facilitates financial support through loans and potential equity conversion.

[44] The argument that individuals seeking compensation for damages arising from Eskom's negligence could elect to pursue claims against either Eskom or National Treasury, is unsupported by both the Constitution and the Eskom Debt Relief Act. Neither legal instrument provides a basis for holding National Treasury liable for Eskom's debts in such a way that would permit claimants to bring proceedings against Treasury for the acts or omissions of Eskom. Effectively, no statutory nor legal basis exists to establish liability on the part of National Treasury for debts accrued by Eskom. As a result, Eskom cannot invoke s 1(1)(g) of the Act in support of its special plea that it is entitled to notice in terms of s 3 of the Act. Accordingly, the appeal must fail. There is no reason why costs should not follow the result.

[45] The following order is made:

The appeal is dismissed with costs, including the costs of senior counsel.

J E SMITH
JUDGE OF APPEAL

Appearances:

For the appellant: GM Goedhart SC with C Snyman and M Zikalala
Instructed by Phatshoane Henney Attorneys, Bloemfontein

For the respondents: JF Mullins SC
Instructed by: Honey Attorneys, Bloemfontein.