



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 117/2025

In the matter between:

TOPIGS NORSVIN SA (PTY) LTD

APPELLANT

and

ESKOM HOLDINGS SOC LTD

1ST RESPONDENT

ANDRE MARINUS DE RUYTER

2ND RESPONDENT

CALIB CASSIM

3RD RESPONDENT

MALEGAPURU WILLIAM MAKGOBA

4TH RESPONDENT

BANOTHILE CHARITY MAKHUBELA

5TH RESPONDENT

PULANE ELSIE MOLOKWANE

6TH RESPONDENT

BUSISWE MAVUSO

7TH RESPONDENT

RODERICK DE BRASSIC CROMPTON

8TH RESPONDENT

TSHEPO HERBERT TONG-MONGALO

9TH RESPONDENT

MLAWULI MAYOR MAJINGOLO

10TH RESPONDENT

DEIDRE HERBST

11TH RESPONDENT

BONGUMUSA MASHAZI

12TH RESPONDENT

LESIBA KGOBE	13TH RESPONDENT
MINISTER OF WATER AND SANITATION	14TH RESPONDENT
DIRECTOR-GENERAL: DEPARTMENT OF WATER AND SANITATION	15TH RESPONDENT
MINISTER OF FORESTRY, FISHERIES AND ENVIRONMENT	16TH RESPONDENT
DIRECTOR-GENERAL: DEPARTMENT OF FORESTRY, FISHERIES AND ENVIRONMENT	17TH RESPONDENT
MINISTER OF MINERAL RESOURCES AND ENERGY	18TH RESPONDENT
NATIONAL ENERGY REGULATOR OF SOUTH AFRICA	19TH RESPONDENT
CLIVE RAYMOND LE ROUX	20TH RESPONDENT
PAUL MPHO MAKWANA	21ST RESPONDENT
AUSTIN LESLIE MKHABELA	22ND RESPONDENT
BUSISWE VILAKAZI	23RD RESPONDENT
LWAZI LEON GOQWANA	24TH RESPONDENT
FATHIMA BEE BEE ABDUL GANY	25TH RESPONDENT
AYANDA PEARL ZINHLE MAFULEKA	26TH RESPONDENT
TSAKANI LOTTEN MTHOMBENI	27TH RESPONDENT
BEKI ZACHARIA NTSHALINTSHALI	28TH RESPONDENT

NTETO NYATHI**29TH RESPONDENT****TRYPHOSA RAMANO****30TH RESPONDENT****CLAUDELLE VON ECK****31ST RESPONDENT**

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

Coram: MOLEMELA P, MEYER, and KGOELE JJA and DIPPENAAR and GOVINDJEE AJJA

Heard: 18 March 2026

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website, and release to SAFLII. The date and time for the hand-down of the judgment is deemed to be 14 August 2026.

Summary: Civil Law and Procedure – Environmental Law – structural interdict – whether the granting of a structural interdict would infringe on the doctrine of separation of powers – held that, having regard to the subsequent remedial measures and the technical complexity of ongoing compliance, a structural interdict in the form sought was inappropriate; declaratory and mandamus relief, including limited reporting obligations, was nevertheless appropriate and did not offend the doctrine of separation of powers – whether the principle of subsidiarity precluded the appellant from relying on s 24 of the Constitution where legislation had been enacted to give effect to that right – held that the appellant's case was grounded in the National Environmental Management Act 107 of 1998 (NEMA) and related environmental legislation, with s 24 invoked in support of that case, and that such reliance did not offend the principle of subsidiarity – whether the absence of an alternative remedy was required for the grant of a structural interdict and, if so, whether s 28(12) of NEMA provided such an alternative remedy – held that the requirements for interdictory relief were satisfied and the appellant was entitled to relief, albeit not in the exact terms sought; s 28(12) was not an exclusive remedy and its non-invocation did not bar the granting of relief – whether it was permissible to join and seek relief against senior employees – held that the senior employees were misjoined as they had no direct and substantial interest in the proceedings and s 24N(8) of NEMA did not

extend to employees, regardless of seniority – whether the Minister of Energy and the National Energy Regulator of South Africa (NERSA) were under a legal duty to prevent the pollution and degradation of the environment by Eskom through its construction, operation, and management of the Kusile Power Station – held that no such duty was established.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Twala, J) sitting as a court of first instance:

1. The appeal succeeds to the extent set out below.
2. The appeal is dismissed insofar as it concerns the 2nd, 4th, 5th, 7th, 11th, 12th, 13th, 14th, 16th, 18th and 19th respondents. In relation to the 2nd, 4th, 5th, 7th, 14th, 16th, 18th and 19th respondents, each party will bear their own costs in the appeal. In relation to the 11th, 12th and 13th respondents, the appellant is ordered to pay the costs in the appeal.
3. The appeal is upheld with costs insofar as it concerns the 1st, 3rd, 6th, 8th, 9th, 10th, 15th, 17th and 20th to 31st respondents; such costs to include those occasioned by the employment of two counsel.
4. The order granted by the high court is set aside and substituted with the following:

‘1 It is declared that the respondents (excluding the 2nd, 4th, 5th, 7th, 11th, 12th, 13th, 14th, 16th, 18th and 19th respondents) are under a legal duty to ensure that the water resources downstream from the Kusile Power Station comply with the environmental authorisation issued in 2008 under the Environment Conservation Act 73 of 1989, the approved Environmental Management Programme, 2014 as approved under s 24N of National Environmental Management Act 107 of 1998 (NEMA), the Integrated Environmental Authorisation issued in 2015 under the NEMA, the National Environmental Management: Waste Act 59 of 2008 (NEMWA) and the applicable conditions of its Water Use Licences issued under the National Water Act 36 of 1998 (NWA) with references 04/B20F/BCFGIJ/41, 04/B20F/CGI/1836, 06/B11K/G/6921, 06/B20F/CFI/8171 and 06/B20F/CIBG/10792 and to ensure that the water resources downstream from the Kusile Power Station are not polluted by the construction, operation or management of the Kusile Power Station and that no substances are discharged or allowed to escape therefrom so as to pollute or detrimentally affect a water resource, degrade or damage the environment or cause a threat for human life as prescribed in the above instruments.

- 2 It is declared that the respondents (excluding the 2nd, 4th, 5th, 7th, 11th, 12th, 13th, 14th, 16th, 18th and 19th respondents) are in breach of the duties referred to in paragraph 1 above insofar as they have failed to take reasonable legislative and other measures within their respective powers to minimise and rectify pollution by taking measures set out in s 28 of the National Environmental Management Act.
- 3 It is declared that the conduct of the respondents (excluding the 2nd, 4th, 5th, 7th, 11th, 12th, 13th, 14th, 16th, 18th and 19th respondents), in failing to comply with the terms and conditions of the instruments mentioned in paragraph 1 above, is unconstitutional and a breach of the fundamental right enshrined in s 24 of the Constitution.
- 4 The first respondent (Eskom Holdings SOC Limited) and the 3rd, 6th, 8th, 9th, 10th, and 20th to 31st respondents (the current board of Eskom) are directed to take all necessary steps to ensure that the water resources downstream from Kusile Power Station comply with the instruments mentioned in paragraph 1 above. To this end, the respondents named in this paragraph shall, within 30 days of the date of this order, file at this court under oath and provide to the applicant a detailed action plan and programme, which they will implement without delay so as to ensure compliance with the duties and obligations referred to in paragraph 1, so as to address the following matters:
 - 4.1 the steps to be taken to ensure that its officials, staff, employees, agents, consultants or contractors will give effect to and ensure compliance with the obligations emanating from the action plan and programme as contemplated in paragraph 4.
 - 4.2 which officials will be responsible for taking such steps, as well as reporting thereon; and
 - 4.3 when each of such further steps mentioned in the action plan will be taken.
- 5 The first respondent (Eskom Holdings SOC Limited) and the 3rd, 6th, 8th, 9th, 10th, and 20th to 31st respondents (the current board of Eskom) are directed and ordered to file a detailed report to this court under oath and to serve it on the applicant within 60 days of the date of this order, specifically dealing with the following:

- 5.1 the steps taken by them to implement this order;
- 5.2 where the order is not complied with, a comprehensive explanation proffering reasons for non-compliance and outlining the remedial steps to be taken.
- 6 The Applicant is granted leave to file further affidavits in response to any affidavit or report from the first respondent (Eskom Holdings SOC Limited) and the 3rd, 6th, 8th, 9th, 10th, and 20th to 31st respondents (the current board of Eskom Holdings SOC Ltd), and is granted leave to approach the court for appropriate relief, including orders and/or directives regarding compliance with the orders contained in paragraphs 1 - 5 above.
- 7 It is declared that the Director-General of the Department of Water and Sanitation (15th respondent) and the Director-General of the Department of Forestry, Fisheries and the Environment (the 17th respondent) have acted unlawfully by failing to adequately enforce compliance with the applicable environmental and water use regulatory frameworks applicable to the Kusile Power Station.
- 8 The 15th and 17th respondents are directed to take all steps and compliance measures to ensure compliance with the instruments referred to in paragraph 1 and, within 75 days of the date of this order, to file with the Registrar of this Court and serve on the applicant an affidavit confirming that they have considered, assessed and determined, in accordance with s 28 of NEMA and sections 19 and 53 of the National Water Act, whether enforcement directives, compliance notices, or remedial measures should be issued against the 1st respondent (Eskom Holdings SOC Limited) arising from the non-compliance declared in paragraphs 1, 2 and 3 above;
- 9 The 15th and 17th respondents are directed to exercise their statutory powers lawfully and without undue delay and may not decline to act on the basis that enforcement processes are discretionary where a failure of compliance has been established.
- 10 The first respondent (Eskom Holdings SOC Limited) is ordered to pay the applicant's costs, including those occasioned by the employment of two counsel.
- 11 The costs of the 11th, 12th and 13th respondents are to be paid by the applicant.

- 12 The first respondent is ordered to pay the reasonable costs of the investigation and preparation of the matter, including the qualifying fees of the applicant's expert witness, Dr Meyer in terms of s 32(3)(b) of NEMA.'

JUDGMENT

Molemela P (Meyer and Kgoele JJA and Dippenaar and Govindjee AJJA concurring)

Introduction

[1] This appeal highlights the tension between two significant interests: the vital role of industrial activity in national development and economic growth, on the one hand, and the imperative of environmental preservation for the benefit of both present and future generations, as enshrined in South Africa's Constitution, on the other. The dispute between the parties shines a spotlight on the critical importance of the organs of state's duty to ensure that coal-fired construction and operation of power plants adhere to the provisions of the environmental authorisations issued in accordance with environmental regulatory standards for the protection of water resources, and the corresponding duty of regulatory bodies to monitor and rigorously enforce compliance with these environmental authorisations as mandated by legislation. This constitutional imperative remains vital, notwithstanding the recognition of industrialisation's essential role in driving economic growth.

[2] The observation echoed by the Constitutional Court in *Fuel Retailers Association*¹ almost 20 years ago still rings true today. In para 43 of that judgment, the court quoted from the 'Report of the World Commission on Environment and Development: Our Common Future,'² where it is stated:

'[E]nvironmental stresses and patterns of economic development are linked to one another. Thus agricultural policies may lie at the root of land, water, and forest degradation. Energy policies are

¹ *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others* [2007] ZACC 13; 2007 (10) BCLR 1059 (CC); 2007 (6) SA 4 (CC) (*Fuel Retailers Association*).

² United Nations, General Assembly 42nd session *Report of the World Commission on Environment and Development: Our Common Future* (Brundtland Report), https://documents.un.org/symbol-explorer?s=A/42/427&i=A/42/427_0919459, accessed on 24 March 2026, chapter 1 para 42.

associated with the global greenhouse effect, acidification, and deforestation for fuelwood in many developing nations. These stresses all threaten economic development. Thus economics and ecology must be completely integrated in decision making and lawmaking processes not just to protect the environment, but also to protect and promote development. Economy is not just about the production of wealth, and ecology is not just about the protection of nature; they are both equally relevant for improving the lot of humankind.’

Background facts

[3] The appellant is Topigs Norsvin SA (Pty) Limited (Topigs), a duly incorporated private company, and a swine genetics producer responsible for supplying specific pathogen-free breeding material to the South African and Southern African Development Community pork markets. The appellant’s business operations are conducted on a farm adjacent to the Kusile Power Station (Kusile). The first respondent, Eskom Holdings SOC Ltd (Eskom), is a state-owned profit company incorporated in terms of the laws of South Africa. Eskom is a state-owned company with a mandate to generate, transmit, and distribute electricity in the country. In pursuit of its mandate, Eskom is responsible for the construction, operation, and maintenance of Kusile, located in Witbank, Mpumalanga Province.

[4] The 2nd to the 10th respondents were cited in the proceedings in their capacities as directors of Eskom. In contrast, the 11th to 13th respondents are Eskom employees in managerial positions who are tasked with environmental matters. For convenience, these respondents are collectively referred to as Eskom respondents. The 14th respondent is the Minister of Water and Sanitation (the Minister of Water), who is the national executive member responsible for the Department of Water and Sanitation (DWS). The Minister and the Director-General in his department, the 15th respondent, are responsible for the administration, implementation, and enforcement of compliance with the provisions of the National Water Act 36 of 1998 (the NWA).

[5] The 16th respondent is the Minister of Forestry, Fisheries and Environment (the Minister of Environment), who is the national executive member responsible for the Department of Forestry, Fisheries and the Environment (the DFFE). The Minister of Environment and the 17th respondent, the Director-General in his department, are

responsible for the administration, implementation, and enforcement of compliance with the provisions of the National Environmental Management Act 107 of 1998 (NEMA).

[6] The 18th respondent is the Minister of Mineral Resources and Energy (the Minister of Energy), who is the national executive member responsible for the Department of Mineral Resources and Energy (the Energy Department). The Minister and the Director-General in the Energy Department are responsible for the administration, implementation, and enforcement of compliance with the provisions of the National Energy Regulator Act 40 of 2004 (NERA) and the Electricity Regulation Act 4 of 2006 (ERA). The Minister of Energy did not file any opposition to the application filed in the Gauteng Division of the High Court, Pretoria (the high court).

[7] The 19th respondent is the National Energy Regulator of South Africa (NERSA), established in terms of s 3 of NERA as a juristic person with a mandate to regulate the electricity industry. NERSA did not oppose the application filed in the high court but did file an explanatory affidavit. Neither the Minister of Energy nor NERSA (the 18th and 19th respondents) filed any papers in this appeal. The 20th to the 31st respondents are Eskom's current board of directors. For the sake of convenience, where reference is made to 'the respondents' it should be construed as reference to the respondents as a collective, save those against whom an order is not made in this appeal.

Common cause facts

[8] It is common ground that the planning for Kusile started well before 2008. Amongst other legal requirements, Kusile required certain environmental authorisations for activities it would undertake, as contemplated in ss 24-24F of NEMA, and water-use licences, as contemplated in s 21, read with s 22 of the NWA. On 17 March 2008, Eskom was awarded the necessary environmental authorisation (EA) issued under the Environment Conservation Act 73 of 1989. The high court observed that although Topigs was located directly adjacent to the Kusile site, it was never given notice about the construction of the site, nor was any public participation process embarked upon before the construction of Kusile commenced. As a result, Topigs only became aware of the project when construction on the site commenced. The EA granted to Eskom stipulated

specific conditions,³ including that all polluted water be recycled until all pollutants are captured as waste⁴ for disposal with the ash deposition.

[9] In addition to the above, the EA stipulated that a water-use licence was required to address the storage of ash from the ash dump and the disposal of wet waste from the Flue Gas Desulphurisation Process. Eskom also had to establish the Environmental Monitoring Committee (EMC), whose purpose was, among others, to monitor and audit compliance with the conditions of the EA, legislation, and specific mitigation requirements as stipulated in the environmental impact report and the environmental management plan.

[10] On 21 February 2012, Topigs wrote a letter to the Chief Executive Officer of Eskom seeking a guarantee of potable water and acceptable air quality, given the farming work they conducted. Eskom did not furnish such guarantees. With the commencement of the construction of Kusile, the Kusile Power Station EMC was formally established in accordance with the EA granted to Eskom. The EMC was established to oversee the environmental impacts associated with the construction, operation, and management of Kusile. The EMC is constituted by, among others, representatives of the DFFE, DWS, and the Environment Control Officer (ECO), who serves as the secretariat of the EMC, responsible for receiving and maintaining records of monitoring data and reports, and for

³ Clause 3.2 of the EA stipulates that 'authorisation of the activities is subject to the conditions contained in this authorisation, which form part of the authorisation and are binding on the holder of the [EA].' Clause 6.1 stipulates that Eskom must appoint an Environmental Control Officer, whose responsibility will be to ensure that the conditions referred to in the authorisation are implemented and that compliance with the provisions of the Environmental Management Programme is maintained during the construction phase of the development, which includes the development of a dry ash disposal facility required to provide sufficient capacity for the life of Kusile Power Station. Clause 17.5.3 of the EA provides that 'the holder of the authorisation *must* prevent the occurrence of nuisance conditions or health hazards'. (My emphasis). Clause 17.5.5 provided that 'no effluent or wastewater must be discharged into any storm water drain or furrow, whether by commission or by omission'. Clause 17.6 of the EA addresses water quality management and prescribes frequent testing and monitoring to assess water quality. Annexure II to the EA specifies the water quality variables required for monitoring; these include fluoride, manganese, mercury, and sulphate, among others. The Water Use Licences subsequently issued required regular analysis of variables at the groundwater monitoring boreholes and specified the parameters within which activities at Kusile had to be conducted. These licences also specified how stormwater management was to be done. Notably, they provided that 'storm water leaving [Kusile] premises shall in no way be contaminated by any substance, whether such substance is a solid, liquid, vapour or gas or a combination thereof'. In 2022, the Water Use Licence was amended, resulting in the relaxation of specific water quality requirements. Despite these changes, Eskom failed to comply with the established standards, prompting Topigs to initiate legal action against it.

⁴ In terms of s 1 of the NWA, 'waste' includes 'any solid material or material that is suspended, dissolved or transported in water (including sediment) and which is spilled or deposited on land or into a water resource in such volume, composition or manner as to cause, or to be reasonably likely to cause, the water resource to be polluted'.

reporting any non-compliance to the Minister of Environment. Specifically, the EMC had to monitor and audit compliance with the conditions of the EA, legislation, and specific mitigation requirements as stipulated in the environmental impact report and the environmental management plan. In light of concerns regarding the potential impacts on air and water quality related to its business operations, Topigs decided to join the EMC. They appointed Dr JA Meyer (Dr Meyer), the deponent to the appellant's affidavits, as its stakeholder representative on the EMC at Kusile.

[11] It is undisputed that various monitoring data and other reports which Eskom was legally required to prepare and provide regularly or at prescribed intervals to the EMC, were either not done, or were done late, or when done, the delivery and presentation thereof to the EMC was delayed so that the monitoring data became dated or contained glaring deficiencies or scientific flaws. When the EMC began addressing non-compliance issues, the plans Eskom proposed to resolve them over the years were not executed as promised. Most of Eskom's commitments in response to these issues were not fulfilled, and investigations continued without reaching any meaningful conclusions.

[12] In 2014, an Environmental Management Programme (the EMPr) was submitted to the Minister of Environment on behalf of Eskom. On 8 November 2021, Topigs obtained an electronic version of the EMPr for Kusile from the ECO, titled 'Environmental Management Programme for the Co-Disposal of Ash and Gypsum at the Kusile Power Station'. On 17 July 2015, and in terms of the National Environmental Management: Waste Act 59 of 2008 (NEMWA), Eskom was issued with the Integrated Environmental Authorisation (IEA) for the construction of an ash disposal facility and the disposal of the dry ash generated by the combustion of coal in the electricity generation process to the ash disposal facility.

[13] As regards the locations and monitoring of surface water, the IEA stipulated that Eskom shall be responsible for ensuring compliance with the conditions contained therein, and that the EMPr, submitted as part of the application, was approved and must be implemented and adhered to. Further, Eskom was required to keep the EMC in place and functioning for the normal operational lifetime of the site and for at least two years after it had ceased operations at Kusile. It further provided that Eskom obtain a water-use

license from DWS prior to the commencement of the project, should it have any impact on any wetland or water resource.

[14] Eskom was also required, under the IEA, to design and manage storage areas so that contaminants do not escape into the environment, and to prevent all runoff from entering local watercourses, including wetlands. Furthermore, the IEA specifically provided that ‘no effluent or wastewater must be discharged into any stormwater drain or furrow, whether by commission or omission’,⁵ and required Eskom to prevent the occurrence of nuisance conditions or health hazards. Under clause 16.1 of the IEA, if ‘pollution, nuisances or health risks’ were found to be present at Kusile, Eskom was expected to initiate an investigation into the cause of the problem. The investigation had to include monitoring water quality variables in the affected areas, and if the investigation revealed any ‘unacceptable levels of pollution’, Eskom was required to submit mitigation measures to the satisfaction of DFFE. In addition, if any listed water quality variable at a monitoring point showed an increasing trend, Eskom was obliged to initiate a monthly monitoring program for those variables.

[15] Clause 17.4.3 of the IEA provided as follows:

‘(a) [Eskom] must, within 24 hours notify the DFFE of the occurrence or detection of any incident on [Kusile] or incidental to the operation of [Kusile], which has the potential to cause, or has caused pollution of the environment, health risks, nuisance conditions or *water pollution*.

(b) Eskom must, within 14 days inform the DFFE from the occurrence or detection of any incidence referred to in condition 16.1, must within 14 days of [the] time specified by the DFFE submit an action plan, which must –

(i) *Correct the impact* resulting from the incident;

(ii) Prevent the incident from causing any further impact; and

(iii) *Prevent a recurrence* of a similar incident to the satisfaction of the DFFE.

(c) In the event that the measures have not been implemented within 21 days of the incident, or within the time period identified by the DFFE, or the measures which have been implemented are inadequate, the DFFE may implement the necessary measures at the cost and risk of [Eskom].’ (My emphasis).

The importance of Eskom’s prompt communication (within 24 hours) of incidents that have caused or have the potential to cause water pollution could not be clearer. Not only

⁵ Clause 17.5.5 of the Integrated Environmental Authorisation, 2015.

must Eskom inform the DFFE, but it must also produce an action plan (within 14 days) that not only states how it will address the impact of the incident, but it must also ensure that similar incidents do not occur in the future. Equally clear is the imperative for the DFFE to act promptly on the reports it receives, not only to note them but also to intervene if no mitigation measures have been taken or those undertaken are considered inadequate. I pause here to point out that in its answering affidavit, Eskom stated that it 'does not deny that its operations at Kusile have negatively impacted downstream water resources.' I will revert to this point later.

[16] The 2014 EMPr recorded that its purpose is to describe the manner in which activities associated with the construction and operation of the ash/gypsum co-disposal facility and associated dams and the K-3 and spoil areas, which have the potential to cause pollution or degradation of the environment, will be managed and controlled in accordance with the relevant environmental legislation and standards and practices. Furthermore, the EMPr covers the construction, operation, and closure of the ash-gypsum co-disposal facility and associated dams and is applicable throughout the life of the power plant.

[17] In terms of the EMPr, all potentially contaminated water on Kusile is to be managed in a closed system. No potentially contaminated water will be discharged, released, or allowed to escape the Kusile site at all. The EMPr further states that the Kusile site is a zero-liquid effluent discharge site; wastewater from the flue gas desulphurisation process will require specialised treatment before discharge to the environment. *Uncontrolled releases of polluted water from the ash dirty-dam into water resources shall not be permitted, and water quality monitoring must be conducted at regular monthly intervals.*

[18] Under the water-use licence issued to Eskom on 1 April 2011 under the NWA, Eskom is required to investigate all uncontrolled leakages and *must* propose and implement mitigating measures. Further, Eskom shall monitor surface water resources at upstream and downstream points within the drainage line to determine the impact of the facility and other activities on the water quality. *The results of the monitoring shall be compiled and submitted to the DFFE monthly.* With regard to surface water, *the impact of Kusile's activities shall not exceed the in-stream water quality objectives.*

[19] The water-use license issued to Eskom in April 2011 stipulated that storm water *leaving Kusile shall in no way be contaminated by any substance*, whether such substance is a solid, liquid, vapour, or gas dumped or spilled from Kusile. The polluted stormwater captured in stormwater control dams shall be pumped to the settling facilities *for recycling and reuse*. On 20 June 2012, Eskom was issued with another water-use licence in terms of the NWA, which provides for the facility to manage dirty water runoff from the ash dump to a lined storage dam. It requires that wastewater management facilities be operated in such a manner that they are at all times capable of handling the 1:50 year flood event, in addition to their mean operating level, *to achieve zero effluent discharge*. It provides further for the quality of water containing waste to be disposed of into the storage dam, and for monitoring surface water to determine the facility's impact.

[20] On 12 November 2018, Eskom was issued with yet another water-use licence under the NWA, valid for four years. It provided that wastewater was to be used for dust suppression on the haul roads at Kusile. It, inter alia, stipulated that the quality of water containing waste disposed of into the pollution control dam shall not exceed the maximum permissible limits. In terms of that water use license, '*stormwater leaving Kusile shall in no way be contaminated by any substance*', whether such substance is a solid, liquid, vapour, or gas or a combination thereof, which is produced, used, dumped, or spilled on Kusile.

[21] On the same date, another water-use licence was issued to Eskom in terms of the NWA, also valid for four years. It contemplated discharging waste or wastewater into a water resource through a pipe, canal, sewer, or other conduit, allowing Eskom to discharge wastewater into the water resource downstream of Kusile. It was a condition of this water use licence that it would be *subject to all the applicable provisions of the NWA and shall in no way be construed as exempting Eskom from compliance with the provisions of any other applicable legislation*.

[22] The water-use licence further stipulated that '*Eskom shall mitigate potential impacts on surface water quality and shall ensure that the holding recycle dam water containing waste and the station dirty dam water containing waste are not discharged into water resources*'. Eskom was required to monitor water resources at the tributaries of the Wilge River to the south and east of Kusile, which traverse the adjacent properties of the

applicant and other agricultural properties. It further stated that Eskom 'shall establish a monitoring point between the said wetland and the Wilge River to determine the quality of the water from the wetland and assess the impact thereof on the Wilge River.'

[23] Another noteworthy development is that in January 2018, the DWS developed and produced an Integrated Water Quality Management Plan (IWQMP) for the Olifants River System, known as the Upper Olifants Sub-Catchment Plan. The objective of the plan was to manage water resources and to take cognisance of and align with a few studies and initiatives that had already been completed at that time, and to develop measures to maintain and improve the water quality in the Olifants Water Management Area holistically and sustainably, so as to ensure sustainable provision of water to local and international users. The other objective was to clearly define the various impacts on water resources in the Upper Olifants sub-catchment and to propose management options, including an implementation plan, to allow water users, stakeholders, and regulators to implement solutions in a coordinated, participative manner. This was due to the deteriorating quality of the whole catchment, for which the limits imposed in the water-use licences were stricter.

[24] On 23 September 2021, Eskom was issued with a water-use licence in terms of the NWA, defined as the disposal of waste in a manner that may detrimentally impact a water resource. It cautioned that it should not be construed as exempting Eskom from compliance with the provisions of any other applicable legislation. Furthermore, this licence authorised Eskom to dispose of certain maximum quantities of wastewater per annum into waste management facilities and prescribed the design and capacities of those facilities. It further provided that Eskom shall monitor, on a monthly basis, the water resources at surface water monitoring points and groundwater monitoring points, and, on a biannual basis, conduct bio-monitoring to determine the impact of the facilities and other activities on water quality by taking samples at the monitoring points.

[25] It would seem that, with a view to bypassing the stricter conditions initially imposed and to bring itself within the prescribed limits in compliance with the water-use licences, on 25 April 2022, Eskom was issued an amended water-use licence. This was an amendment of the 20 June 2012 water-use licence. The amendment altered the levels to

which pollutants may be deposited into the water resources; it essentially relaxed the maximum permissible limits of pollutants to be released into the dirty dam at Kusile.

[26] Although Topigs indicated that the genesis of the non-compliance problem occurred in 2012, it decided to provide reports only for the period 2022 onwards. The veracity of these reports was not disputed. This means that the failure of the relevant officials to intervene stood uncontroverted. Dissatisfied with what it considered to be an ongoing detrimental impact on the water resources caused or largely contributed to by the upstream construction, operation, and/or management of Kusile, Topigs decided to institute legal proceedings in the high court during August 2022. Thereafter, on 26 January 2023, the DFFE issued Eskom with a compliance notice under s 31L of NEMA alleging, among others, non-compliance with certain conditions in one of the water-use licences. Eskom objected and made certain representations to the Minister. On 4 October 2023, Eskom's objections were upheld, and the compliance notice was cancelled.

Litigation history

[27] On 9 June 2023, Topigs launched an application before the high court seeking several declaratory orders against Eskom and the other respondents. Topigs sought an order: (a) declaring that the respondents are under a constitutional/legal/statutory duty to ensure that the water resources downstream of Kusile are not polluted or likely to be polluted by the construction/operation/management of the Kusile Power Station and/or to ensure that no substances are discharged or allowed to escape so as to pollute or likely pollute or detrimentally affect a water resource, degrade or damage the environment and/or cause or likely cause a threat for human life; (b) declaring that the respondents are in breach of said constitutional/legal/statutory duty, (c) declaring that the conduct of the respondents in failing to prevent and or allowing the pollution of water resources downstream of Kusile is unconstitutional and infringes on several rights in the Bill of Rights, and (d) declaring that the respondents take all necessary steps to ensure that water resources downstream of Kusile are not polluted or likely to be polluted, and that no substances are discharged or allowed to escape from Kusile so as to pollute or detrimentally affect the environment, degrade or damage the environment or cause a threat for human life.

[28] In addition to the aforementioned declaratory orders, Topigs sought a structural interdict which included orders: (a) directing that the respondents file, with the court, the action plan and programme they will implement and that steps are taken to ensure compliance with the action plan and programme; (b) directing that each of the respondents file affidavits with the court in respect of the environmental management of Kusile every 15 days, setting out steps taken to give effect to the order, until the order is discharged by the court; and (c) that the respondents file affidavits with the court of the officials responsible for the oversight over or inspection of the environmental management of Kusile every 15 days, setting out steps taken to give effect to the order, until the order is discharged by the court. In addition to the above, Topigs also sought an order granting it leave to approach the court for further relief, if need be, in relation to the requested orders, and that Eskom pay its costs, including the costs of its expert, Dr Meyer.

[29] Eskom filed its answering affidavit on 7 July 2023. NERSA filed a notice to abide on 14 July 2023. On 21 August 2023, Topigs filed its replying affidavit to Eskom's answering affidavit. On 15 September 2023, DWS filed its answering affidavit. On 3 October 2023, DFFE filed its answering affidavit. On 9 October 2023, Topigs filed a replying affidavit to DWS's answering affidavit. On 18 October 2023, Topigs filed its replying affidavit to DFFE's answering affidavit. On 15 November 2023, DWS conducted a site inspection at Kusile. On 28 November 2023, Eskom filed a supplementary affidavit attaching a document issued on the same day, titled 'Kusile Power Station Updated Action Plan, Nov 2023'.

[30] On 13 December 2023, Topigs filed a supplementary replying affidavit. On 17 February 2023, the DWS had issued Eskom with a notice of intention to issue a directive in terms of s 19(3) of NWA. Following the representations made by Eskom on 17 March 2023, which the DWS considered satisfactory, no further steps were taken. On 19 December 2023, DWS issued a further directive under s 19(3) of NWA stating that the DWS had 'reasonable grounds for believing that [Eskom had] failed to take reasonable measures to prevent the pollution of the water resource and the environment' and requested that Eskom provide it with a detailed action plan with clear time frames to address its non-compliance. On 11 January 2024, Eskom issued a document titled 'Kusile Power Station Updated Action Plan, Jan 2024'. On 20 March 2024, the Minister of Water and DWS filed a supplementary answering affidavit. On 27 March 2024, the

19th respondent, NERSA, filed an explanatory affidavit, and on 4 April 2024, Topigs filed a replying affidavit to DWS's supplementary answering affidavit. The Aquatic Biomonitoring Assessment Report was attached to Topigs' replying affidavit. The 18th respondent did not participate in the proceedings but briefed counsel to attend. The application was heard on the 23rd to the 25th of April 2024, and the judgment was delivered on 19 June 2024.

[31] At the hearing of the application, Eskom raised a point in limine in relation to Topigs' locus standi. The high court dismissed this preliminary point and found that the application brought by Topigs would not only benefit Topigs but also the communities that used water from the downstream water resources of Kusile. Additional points in limine were raised regarding whether it was permissible for Topigs to have joined senior Eskom employees in its application lawsuit, and whether the Minister of Energy and NERSA are under a legal duty to prevent Eskom from polluting and degrading the environment. In relation to the senior Eskom employees, the high court held that the senior management employees were wrongly cited as they stood on a different footing to directors of a company. As regards NERSA, the high court held that the NERA does not empower NERSA to regulate environmental compliance, as this falls outside its mandate. That being the case, no wrongdoing could be attributable to NERSA, nor does it have a duty to protect against pollution and environmental degradation downstream from Kusile. Consequently, NERSA was not a necessary party in those proceedings. NERSA's point in limine was therefore upheld and the application against it dismissed.

[32] On the merits, 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 under such circumstances would amount to a failure to observe the principle of subsidiarity. The high court, inter alia, found as follows:

'It is clear from the monitoring data that the exceedances continue to rise, and the action plan has not been effective. It is only after this application was launched that the State respondents were galvanised into action. [...] [Topigs] seeks a structural interdict against the respondents. The requirements of an interdict have long been established in that [Topigs] should prove that: (a) it has a clear right; (b) injury actually committed or reasonable apprehension of harm; and (c) the

absence of similar protection or remedy in due course. [...] Undoubtedly [Topigs] has met the first two requirements for an interdict in that [Topigs] has a clear right to an environment that is not polluted and harmful to its well-being. Presently, the environment downstream at Kusile has been and continues to be polluted, harmed, and degraded by Eskom, with the state respondents sitting on their hands and failing to enforce compliance with the conditions of licenses and legislation. However, [Topigs] falls short on the third requirement where it is required to prove that it does not have an alternative remedy or would not receive sufficient redress in due course.

[...]

Even if I were to be wrong in saying [Topigs] has not met all the requirements of an interdict, I am still of the view that the failure of [Topigs] to invoke the provision of NEMA and the NWA infringes on the principle of subsidiarity in our law [...] [Topigs] should have based its remedy on the provisions of section 28(12) of NEMA, which the legislature has promulgated to enforce the rights arising out of the provisions of section 24 of the Constitution. It is to this statutory provision that [Topigs] should look in asserting its rights and the obligations owed to it.'

[33] The high court dismissed Topigs' application with no order as to costs. Aggrieved by the dismissal of its application, Topigs sought the high court's leave to appeal to this Court, but was unsuccessful. The appeal before us is with the leave of this Court.

In this Court

Submissions on behalf of Topigs

[34] Topigs articulated several arguments bemoaning the dismissal of its application to the high court. The key arguments made on behalf of Topigs include: (a) the doctrine of separation of powers, (b) the principle of subsidiarity, and (c) the availability of an alternative remedy. Furthermore, Topigs contended that there was no misjoinder related to its citation of and request for relief against employees of Eskom and NERSA.

[35] In relation to the separation of powers doctrine, Topigs submits that the doctrine is not absolute, as no constitutional scheme can fully reflect a complete separation of powers; rather, it is always partial. Topigs contends that the doctrine is not exclusively concerned with the functional independence of the arms of government; it is also, and in balanced measure, concerned with the provision of checks and balances among the arms of government.

[36] As regards the contention that the granting of a structural interdict is not an appropriate relief under the circumstances of this case, Topigs argued that the doctrine of separation of powers does not per se preclude the granting of that relief, as it is well established that courts have the constitutional power to make use of a structural interdict when the State's obligations are not performed diligently, especially when fundamental rights are implicated.⁶ Topigs contended that the power to grant a structural interdict is one of the constitutional 'checks and balances' that courts may use for limited periods of time without the judiciary itself having to exercise or perform the duties set aside for the Executive. Topigs contended that a structural interdict would ensure accountability, given that over the past decade the respondents had repeatedly failed to uphold their constitutional duty to prevent environmental degradation and water pollution without judicial oversight.

[37] As regards the principle of subsidiarity, Topigs asserted that its case has been somewhat misrepresented, as it does not seek to rely directly on rights in the Constitution or to circumvent legislation; rather, its case concerns enforcing the relevant legislation, with the Constitution playing only an indirect, subsidiary, or supporting role. Topigs argued that the principle of subsidiarity is, in any event, subject to an important rider, which, as articulated in *My Vote Counts*,⁷ is that it does not apply as a hard and fast rule because there are decisions in which the Constitutional Court has said that the principle may not apply, and that the court was yet to develop that principle 'to a point where the inner and outer contours of its reach are clearly delineated.'⁸

[38] In relation to Topigs having an alternative remedy available to it in terms of s 28(12) of NEMA, Topigs contended that the absence of an alternative remedy is not necessary for granting a structural interdict. It argued that, in any event, s 28(12) of NEMA does not

⁶ Topigs relied on *Hoërskool Ermelo and Another v Head, Department of Education, Mpumalanga, and Others* [2009] ZASCA 22; 2009 (3) SA 422 (SCA); [2009] 3 All SA 386 (SCA) (*Hoërskool Ermelo SCA*), *Pheko and Others v Ekurhuleni Metropolitan Municipality (No.1)* [2011] ZACC 34; 2012 (2) SA 598 (CC); 2012 (4) BCLR 388 (CC) (*Pheko*), *Kenton-on-Sea Ratepayers Association and Others v Ndlambe Local Municipality and Others* [2016] ZAECHGHC 45; 2017 (2) SA 86 (ECG) (*Kenton-on-Sea Ratepayers*), and *Agri Eastern Cape and Others v MEC, Department of Roads and Public Works and Others* [2017] ZAECHGHC 20; [2017] 2 All SA 406 (ECG); 2017 (3) SA 383 (ECG) (*Agri EC*).

⁷ *My Vote Counts NPC v Speaker of the National Assembly and Others* [2015] ZACC 31; 2016 (1) SA 132 (CC) (*My Vote Counts*).

⁸ *Ibid*, para 182.

provide such an alternative remedy, as the requirement of an alternative remedy is not simply the absence of similar protection or remedy in due course, but is in law the absence of an alternative remedy that is considered an ordinary and reasonable legal remedy that adequately grants similar protection. Topigs argued that, according to s 172(1)(b) of the Constitution, once it has been established that unlawful conduct inconsistent with the Constitution occurred, the primary issue to consider is whether the remedy sought is just and equitable under the circumstances. Topigs contended that no other remedy provides for judicial supervision.

[39] Furthermore, Topigs asserted that the shortcoming of the s 28(12) remedy in this matter was that the case also involved water resources, and the DFFE had stated that water resources do not fall under its jurisdiction. Thus, there was no authorisation for DWS to issue any directives under s 28 of NEMA, so it was contended. As regards its inclusion of certain Eskom employees in the proceedings, Topigs argued that those employees have a direct and significant interest in the case due to the relief Topigs seeks. Topigs argued that if it were to be successful in the litigation, the relief sought would not be implementable without the involvement of the cited employees.

[40] In relation to the obligations of the Minister of Energy and NERSA, Topigs argued that both the Minister and NERSA are under a legal duty to prevent pollution and environmental degradation by Eskom through its construction, operation, and management of Kusile. Topigs argues that this duty arises from legislation within NERSA's scope of powers to investigate any transgression. Additionally, Topigs argued that, in any event, as organs of state, the Minister of Energy and NERSA have an obligation to protect the environment.

[41] As regards costs, Topigs persisted in seeking a punitive costs order on the basis that the serious dereliction of constitutional duties and obligations over a prolonged period of time justified it. It was of the view that even if it had not succeeded in proving its case, the application should not have been dismissed on the basis that each party should pay its own costs; rather, the *Biowatch* principle should have been applied. Topigs further submitted that such an order was, in any event, warranted on a proper exercise of the court's discretion on the issue of costs.

Salient submissions on behalf of the Eskom Respondents

[42] The Eskom respondents acknowledge that their operations at Kusile have affected downstream water resources and that they have not fully complied with all the conditions of the various EAs and licenses granted to them. However, they argue that this does not justify the extensive relief sought by Topigs, primarily because it is unnecessary and inappropriate for six key reasons. First, because Eskom's Updated Action Plan, issued in 2024, addresses the pollution concerns raised by Topigs and also constitutes compliance, or at least substantial compliance. Second, the granting of the relief Topigs seeks would restrain the State respondents from exercising their statutorily authorised powers, thereby infringing the doctrine of separation of powers and the principle of deference. Third, that there is an alternative remedy available in s 28(12) of NEMA which Topigs seeks to bypass.

[43] Fourth, the relief that Topigs is seeking is based on the incorrect assumption that Kusile is prohibited from discharging or allowing the escape of any substance that could negatively impact a water source. Fifth, Topigs does not have the right to seek relief against the 11th to 13th respondents, who are Eskom employees. Lastly, Topigs is not entitled to claim costs from Eskom.

[44] In relation to the separation of powers doctrine, Eskom argued that the Constitutional Court has stated that the doctrine would usually be infringed if 'a state functionary is restrained from exercising statutory or constitutionally authorised power.'⁹ Eskom, DWS, and the DFFE posited that, should Topigs be granted the relief it seeks, that would impede their ability to regulate and exercise control over the functional areas in respect of which they are statutorily ordained as the responsible authorities. They further contended that such relief would arbitrarily truncate or bypass the processes prescribed by legislation for the management of activities that have or may cause environmental harm. Relying on *Phambili Fisheries*,¹⁰ Eskom further contended that the

⁹ *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC) (OUTA), para 71.

¹⁰ *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd* [2003] ZASCA 46; [2003] 2 All SA 616 (SCA); 2003 (6) SA 407 (SCA), (*Phambili Fisheries*), para 53.

effect of the orders, were they to be granted, would place the court in the position of having to adjudicate on technical issues that are clearly beyond the judicial function.

[45] Eskom contended that Topigs did not adhere to the principle of subsidiarity. It maintained that it was inappropriate for Topigs to invoke fundamental constitutional rights in seeking relief. According to Eskom, Topigs should have based its application on the statutory duties and obligations established by legislation, demonstrating how the State respondents had failed to meet their constitutional responsibilities through a lack of compliance with the relevant legislation designed to uphold these rights. In an effort to demonstrate the validity of respecting the principle of subsidiarity by following the mechanisms outlined in s 28(12) of NEMA, Eskom argued that such an approach would not absolve the various respondents of their constitutional obligations.

[46] Eskom dismissed Topigs' reliance on *Kenton-on-Sea Ratepayers*¹¹ regarding a structural interdict, asserting that the five elements referenced for a structural interdict pertain solely to the procedural steps and did not address the substantive requirements that must be met for such relief to be granted. Eskom acknowledged that the common law requirements for obtaining an interdict, as interpreted in conformity with the objects, spirit, and purport of the Constitution, remain relevant. However, Eskom maintained that Topigs had not sufficiently demonstrated the requirement pertaining to the absence of a suitable remedy.

[47] Eskom asserted that s 28(12) of NEMA is an adequate remedy for compelling state action against polluters. Eskom contended that Topigs failed to pay sufficient regard to the directives that the State may issue under ss 28(12), 28(4), and 28(1) of NEMA, thus rendering the granting of a court order unnecessary. Eskom contended that Topigs' claim regarding the inadequacy of s 28(12) of NEMA is unfounded for several reasons. Eskom posited that a court order directing a department to act against a polluter is distinct from a private request for action, and that the previous lack of response to such a request does not imply that the department in question will not respond to a directive under s 28(12).

¹¹ *Kenton-on-Sea Ratepayers Association v Ndlambe Local Municipality* note 6 above.

[48] As regards the issue of misjoinder, Eskom argued that for Topigs to assert that the joinder of Eskom employees is necessary because relief is sought directly against them is circular reasoning since Topigs is not entitled to join the Eskom employees in the first place. It is impermissible to use that premise to justify seeking relief against them. Eskom further contended that, while Eskom employees may be responsible for implementing any order granted against Eskom, it was difficult to see how they would be prejudiced if they were not joined to the proceedings. The proposition that Eskom employees must be cited to give practical effect to the order is fallacious, as if they were to vacate their positions, the court order would not become unenforceable, but their successors would be required to implement the order, given that it is Eskom, and not its employees, that would be required to implement the order.

Salient submissions of the State Respondents

[49] The Ministers and their respective departments (the State respondents) asserted that this matter primarily concerns the adequacy, or perceived inadequacy, of the measures already implemented by the State respondents in line with their empowering legislation, as well as the various remedies outlined in that legislation.

[50] Furthermore, the State respondents contended that the NEMWA provides additional protection for water resources. They also referenced specific measures taken by the DWS and the DFFE to protect the environment at Kusile. In discussing the principle of subsidiarity, the State respondents supported the high court's finding, stating that cases should avoid constitutional issues when possible, and that litigants must follow existing legislation to assert their rights, as direct constitutional claims are not permissible in the presence of such legislation.

[51] The State respondents submitted that Topigs' failure to challenge the constitutionality of the empowering legislation or to seek to enforce its compliance ought to be the fatal flaw in its case. They further argue that Topigs' reliance on rights in the Constitution is not only unnecessary but also amounts to judicial overreach. They argued that the principle of subsidiarity prohibits direct reliance on s 24 of the Constitution for relief and, consequently, precludes this Court from determining or finding that there was constitutional non-compliance. They contended that Topigs' assertion of a constitutional, legal, or statutory duty to ensure that water resources downstream of Kusile are not

polluted does not exist in the context of this case, and that neither the Constitution nor the empowering legislation impose a duty on the State respondents to ensure that the water resources downstream of Kusile are free from all pollution. They pointed out that Topigs never challenged the issuance of the environmental authorisation or the various water-use licenses issued to Eskom.

[52] Regarding the structural interdict, the State respondents argued that case law on structural interdicts clearly establishes that: (a) in most cases, such interdicts are only applied for if a previous court order has been ignored; and (b) they should not be granted unless it is necessary, as they infringe the separation of powers doctrine. They pointed out that there is uncertainty as to whether such interdicts constitute final or interim interdicts, and whether they meet the common law requirements for interdicts. The State respondents thus argued that the availability of an alternative remedy concerned only the analysis of the remedies provided, not the introduction of a further requirement for securing a structural interdict.

[53] Lastly, the State respondents submitted that for Topigs to be able to rely on s 172(1)(b) of the Constitution, this Court would first need to make a finding that the State respondents' conduct is unconstitutional in terms of s 172(1)(a), a finding they submitted is not possible because Topigs does not have a right to a pollution-free environment. The State respondents contended that the operational challenges of government need to be considered before an order in terms of s 172(1)(b) is made. Granting such relief could constitute judicial overreach and ignore the principle of deference. On costs, the State respondents submitted that no order as to costs should be made.

[54] During the exchange with the bench, Eskom's counsel emphasised that the relief sought by Topigs was no longer necessary, given the 2024 Updated Action Plan adopted by Eskom, which was already in the process of implementation. He argued that Topigs had not sought a *mandamus* and had only sought a structural interdict, which offended the principle of separation of powers. He conceded that granting declaratory orders that are aligned with the conditions set out in the EA would fall within the range of relief that this Court could grant within its discretion under the banner of 'further or alternative relief' but maintained that declaratory orders could not be accompanied by a *mandamus* because Topigs had not asked for such relief in its notice of motion.

Issues to be decided

[55] Several intertwined issues arise for determination in this appeal. However, there are two issues central to this case, the first being non-compliance by Eskom with the conditions of the EA under NEMA and the water-use licences issued to it in terms of s 40 of NWA, and 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 is whether granting relief to Topigs would, in the circumstances of this case, infringe on the doctrine of separation of powers. The ancillary issues to this are:

- (a) whether the principle of subsidiarity precludes Topigs from relying on a right under Chapter 2 of the Constitution in circumstances where NEMA has been enacted to give effect to that right?
- (b) whether the lack of an alternative remedy is a requirement for a structural interdict, if so, whether s 28(12) of NEMA constitutes such an alternative remedy in the circumstances?
- (c) whether it was permissible for Topigs to have joined senior Eskom employees in its application?
- (d) whether the Minister of Energy and NERSA are under a legal duty to prevent the pollution and degradation of the environment by Eskom through its construction, operation, and management of Kusile?

The applicable law

[56] It is apposite to outline the relevant legislative framework at this stage for a clearer understanding of the ensuing discussion in this judgment. Topigs contended that this matter implicates several provisions of the Bill of Rights, including the right to life,¹² the right to human dignity,¹³ the right to freedom and security of the person,¹⁴ the right to health care, food, water, and social security,¹⁵ as well as the property right.¹⁶ Topigs also asserted that the rights enshrined in s 24 of the Constitution are implicated. Section 24 provides:

¹² See s 11 of the Constitution of the Republic of South Africa, 1996.

¹³ See s 10 of the Constitution of the Republic of South Africa, 1996.

¹⁴ See s 12 of the Constitution of the Republic of South Africa, 1996.

¹⁵ See s 27 of the Constitution of the Republic of South Africa, 1996.

¹⁶ See s 25 of the Constitution of the Republic of South Africa, 1996.

‘Environment

Everyone has the right—

- (a) to an environment that is not harmful to their health or wellbeing; and
- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that—
 - (i) prevent pollution and ecological degradation;
 - (ii) promote conservation; and
 - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.’

[57] In terms of s 1 of National Environmental Management Act 107 of 1998, the term ‘pollution’ means any change in the environment caused by substances emitted from any activity, including the storage or treatment of waste or substances, construction and the provision of services, whether engaged in by any person or an organ of state, where that change has an adverse effect on human health or well-being or on the composition, resilience and productivity of natural or managed ecosystems, or on materials useful to people, or will have such an effect in the future.

[58] Section 28 of NEMA provides, in relevant parts:

‘(1) Every person who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring, or, in so far as such harm to the environment is authorised by law or cannot reasonably be avoided or stopped, to minimise and rectify such pollution or degradation of the environment.

(2) Without limiting the generality of the duty in subsection (1), the persons on whom subsection (1) imposes an obligation to take reasonable measures include an owner of land or premises, a person in control of land or premises or a person who has a right to use the land or premises on which or in which—

- (a) any activity or process is or was performed or undertaken; or
- (b) any other situation exists,

which causes, has caused or is likely to cause significant pollution or degradation of the environment.

(3) The measures required in terms of subsection (1) may include measures to

- (a) investigate, assess and evaluate the impact on the environment;

- (b) inform and educate employees about the environmental risks of their work and the manner in which their tasks must be performed in order to avoid causing significant pollution or degradation of the environment;
- (c) cease, modify or control any act, activity or process causing the pollution or degradation;
- (d) contain or prevent the movement of pollutants or the cause of degradation;
- (e) eliminate any source of the pollution or degradation; or
- (f) remedy the effects of the pollution or degradation.

(4) The Director-General, the Director-General of the department responsible for mineral resources, a provincial head of department or a municipal manager of a municipality may direct any person referred to in subsection (2) to-

- (a) cease any activity, operation or undertaking;
- (b) investigate, evaluate and assess the impact of specific activities and report thereon;
- (c) commence taking specific measures before a given date;
- (d) diligently continue with those measures; and
- (e) complete those measures before a specified reasonable date.

[...]

(7) Should a person fail to comply, or inadequately comply, with a directive issued under subsection (4), the Director-General, the Director-General of the department responsible for mineral resources, a provincial head of department or a municipal manager of a municipality may take reasonable measures to remedy the situation or apply to a competent court for appropriate relief.

[...]

(12) Any person may, after giving the Director-General, the Director-General of the department responsible for mineral resources, a provincial head of department or a municipal manager of a municipality, 30 days' notice, apply to a competent court for an order directing the Director-General, the Director-General of the department responsible for mineral resources, any provincial head of department or a municipal manager of a municipality, to take any of the steps listed in subsection (4) if the Director-General, the Director-General of the department responsible for mineral resources, provincial head of department or a municipal manager of a municipality, fails to inform such person in writing that he or she has directed a person contemplated in subsection (4) to take one of those steps, and the provisions of section 32 (2) and (3) shall apply to such proceedings, with the necessary changes.'

[59] The provisions of s 24(N) of NEMA are also relevant. Section 24N(7), inter alia, provides that any person issued with an EA (such as Eskom in respect of its listed

activities at Kusile) must manage all environmental impacts in accordance with the approved environmental management programme and monitor and audit compliance with its requirements. It also states that a person issued with an EA is responsible for any environmental damage, pollution, pumping and treatment of polluted or extraneous water, or ecological degradation resulting from his or her operations to which such EA relates.

[60] Section 32 of NEMA provides:

‘(1) Any person or group of persons may seek appropriate relief in respect of any breach or threatened breach of any provision of this Act, including a principle contained in Chapter 1, or of any provision of a specific environmental management Act, or of any other statutory provision concerned with the protection of the environment or the use of natural resources-

- (a) in that person's or group of person's own interest;
- (b) in the interest of, or on behalf of, a person who is, for practical reasons, unable to institute such proceedings;
- (c) in the interest of or on behalf of a group or class of persons whose interests are affected;
- (d) in the public interest; and
- (e) in the interest of protecting the environment.’

[61] In terms of s 49A(1)(c) of NEMA, a person is guilty of an offence if that person fails to comply with or contravenes the condition of an EA granted for a listed activity or a specified activity, or a condition of an approved environmental management programme. Various provisions of the National Water Act 36 of 1998 (NWA) are applicable to the discussion in this case. The purpose of the NWA is, inter alia, to protect aquatic and associated ecosystems and their biological diversity, and to reduce and prevent pollution and degradation of water resources.¹⁷ It further sets out, as one of its purposes:

‘[T]o ensure that the nation's water resources are protected, used, developed, conserved, managed and controlled in ways which take into account amongst other factors—

- (a) meeting the basic human needs of present and future generations.’

[62] In terms of s 1 of the NWA, the term ‘waste’ includes ‘any solid material or material that is suspended, dissolved or transported in water (including sediment) and which is

¹⁷ See s 2(g)-(h) of the National Water Act.

spilled or deposited on land or into a water resource in such volume, composition or manner as to cause, or to be reasonably likely to cause, the water resource to be polluted’.

In terms of the same provision, ‘pollution’ means:

‘[T]he direct or indirect alteration of the physical, chemical, or biological properties of a water resource so as to make it–

- (a) less fit for any beneficial purpose for which it may reasonably be expected to be used;
- (b) harmful or potentially harmful–
 - (aa) to the welfare, health, or safety of human beings;
 - (bb) to any aquatic or non-aquatic organisms;
 - (cc) to the resource quality; or
 - (dd) to property.’

Section 3(1) provides:

‘(1) As the public trustee of the nation’s water resources the National Government, acting through the Minister, must ensure that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefit of all persons and in accordance with its constitutional mandate.’

[63] Section 7 states:

‘The Minister, the Director-General, an organ of state and a water management institution must give effect to the national water resource strategy when exercising any power or performing any duty in terms of this Act.’

Section 19 provides that:

(1) An owner of land, a person in control of land, or a person who occupies or uses the land on which–

- (a) any activity or process is or was performed or undertaken; or
- (b) any other situation exists,

which causes, has caused or is likely to cause pollution of a water resource, must take all reasonable measures to prevent any such pollution from occurring, continuing or recurring.

(2) The measures referred to in subsection (1) may include measures to–

- (a) cease, modify or control any act or process causing the pollution;
- (b) comply with any prescribed waste standard or management practice;
- (c) *contain or prevent the movement of pollutants;*
- (d) *eliminate any source of the pollution;*
- (e) remedy the effects of the pollution; and

(f) remedy the effects of any disturbance to the bed and banks of a watercourse.’ (My emphasis).

[64] The provisions of s 53 are equally important. It states:

(1) *A responsible authority*¹⁸ may, by notice in writing to a person who contravenes-

- (a) any provision of this Chapter;
- (b) a requirement set or directive given by the responsible authority under this Chapter; or
- (c) a condition which applies to any authority to use water,

direct that person, or the owner of the property in relation to which the contravention occurs, to take any action specified in the notice to rectify the contravention, within the time (being not less than two working days) specified in the notice or any other longer time allowed by the responsible authority.

(2) If the action is not taken within the time specified in the notice, or any longer time allowed, the responsible authority may-

- (a) carry out any works and take any other action necessary to rectify the contravention and recover its reasonable costs from the person on whom the notice was served; or
- (b) apply to a competent court for appropriate relief.’ (My emphasis).

[65] The provisions of the Environmental Conservation Act 73 of 1989 are also equally relevant. Section 31A provides:

‘(1) If, in the opinion of the Minister or the competent authority, local authority or government institution concerned, any person performs any activity or fails to perform any activity as a result of which the environment is or may be seriously damaged, endangered or detrimentally affected, the Minister, competent authority, local authority or government institution, as the case may be, may in writing direct such person-

- (a) to cease such activity; or
- (b) to take such steps as the Minister, competent authority, local authority or government institution, as the case may be, may deem fit,

within a period specified in the direction, with a view to eliminating, reducing or preventing the damage, danger or detrimental effect.

¹⁸ In terms of the Act, a ‘responsible authority’, in relation to a specific power or duty in respect of water uses, means—

- (a) if that power or duty has been assigned by the Minister to a catchment management agency, that catchment management agency; or
- (b) if that power or duty has not been so assigned, the Minister’.

(2) The Minister or the competent authority, local authority or government institution concerned may direct the person referred to in subsection (1) to perform any activity or function at the expense of such person with a view to rehabilitating any damage caused to the environment as a result of the activity or failure referred to in subsection (1), to the satisfaction of the Minister, competent authority, local authority or government institution, as the case may be.

(3) If the person referred to in subsection (2) fails to perform the activity or function, the Minister, competent authority, local authority or government institution, depending on who or which issued the direction, may perform such activity or function as if he or it were that person and may authorize any person to take all steps required for that purpose.

(4) Any expenditure incurred by the Minister, a competent authority, a local authority or a government institution in the performance of any function by virtue of the provisions of subsection (3), may be recovered from the person concerned.'

Discussion

Misjoinder; whether the 11th -13th respondents (senior Eskom employees) ought to have been joined as parties in the litigation

[66] A point in limine of misjoinder was raised in respect of the citation of the senior management employees of Eskom, namely the 11th, 12th, and 13th respondents. It is well-established in our law that the joinder of a party is only required as a matter of necessity, as opposed to a matter of convenience, if a party has a direct and substantial interest in the case. Thus, it is necessary to join a party to the proceedings if his or her interest will be prejudicially affected by the judgment of the court in the proceedings concerned. In *Absa Bank Ltd v Naude NO and Others*,¹⁹ this Court stated the following: 'The test whether there has been non-joinder is whether a party has a direct and substantial interest in the subject matter of the litigation which may prejudice the party that has not been joined. In *Gordon v Department of Health, KwaZulu-Natal* it was held that if an order or judgment cannot be sustained without necessarily prejudicing the interest of third parties that had not been joined, then those third parties have a legal interest in the matter and must be joined. That is the position here.'²⁰

[67] The inclusion of directors as parties in an environmental law claim in which a company or close corporation is cited is governed by s 24N(8) of NEMA. This means that, notwithstanding the provisions of the Companies Act 71 of 2008, the directors of a

¹⁹ *Absa Bank Ltd v Naude NO and Others* [2015] ZASCA 97; 2016 (6) SA 540 (SCA).

²⁰ *Ibid*, para 10.

company and members of a close corporation can be held jointly and severally liable for any environmental harm caused by the entity they represent, whether intentionally or unintentionally, including damage, degradation, or pollution. The rationale for including directors of companies in that provision is that they should be held accountable, as they are the controlling mind of a company and have the duty and power to oversee and control it. The potential for a cost order against such directors justifies their citation as respondents in this matter and cannot be impugned.

[68] However, the citation of the three employees in senior management posts is on a different footing. The Eskom employees working at Kusile are executing their duties in accordance with Eskom's instructions and directions, as well as the terms and conditions of their employment. They therefore do not have a substantial and direct interest in the case. Topigs correctly argues that the water-use licenses require Eskom, as the licensee, to inform its employees about the license conditions and ensure compliance, but this does not make the employees personally responsible for any non-compliance. Eskom remains liable for non-compliance if its employees fail to comply with the licence conditions. On a purposive interpretation of s 24N(8) of NEMA, nothing justifies an interpretation that would include ordinary employees in the ambit of that provision, regardless of their seniority. The inclusion of these employees, therefore, constitutes misjoinder. The high court correctly upheld this point in limine. It follows that the appeal directed at this order ought to fail. I turn now to consider the merits of Topigs' case.

The public interest debate

[69] Although Topigs' standing as acting in the interests of itself and third parties was challenged in the high court, it was dismissed, quite correctly, by that court on the basis that the primary purpose of s 38 of the Constitution is to broaden the standing in constitutional litigation – hence it permits anyone to act in his personal interests, the interest of others or public interest to approach the court for the relief where there is an infringement of a constitutional right. In any event, s 32 of NEMA also allows standing for those who wish to act in their own interests or on behalf of others. During counsel's exchange with the bench on the date of the hearing, counsel for the respondents stated that the issues that are the subject of this appeal do not have a public interest element, as the dispute is confined to a disagreement between neighbours, ie Eskom as the owner

of the Kusile power plant, on the one hand, and Topigs as the owner of the neighboring farm, on the other hand. I disagree.

[70] The concept of public interest comprises various aspects. From my point of view, the lawful exercise of power by Eskom as an organ of state and the protection of natural resources are both vital aspects of public interest in this matter. Public interest ought to be defined by the nature of the right, not the number of victims affected by an impermissibly polluted environment. It is undisputed that Topigs provides direct employment to about 144 people, some of whom live on the farm. The respondents' argument fails to consider the context of environmental law and discounts the far-reaching impact of polluted water on human and animal health. Rivers flow beyond the boundaries of the properties outlined in the title deeds.

[71] Whether a matter is of public interest is typically determined by the nature of the harm, not just the headcount of those immediately affected. Crucially, Topigs asserted in its founding affidavit that it was bringing the application 'in its own interest, in the interest of its directors and employees and/or in the interest of the group of water users using water from water resources downstream of the Kusile Power Station litigating on its own account and on behalf of the inhabitants and employees of the farm on which Topigs' operations are conducted.' This assertion was not disputed.

[72] The water use licence granted on 12 November 2018 was on condition that there be a monitoring point for water resources at the tributaries of the Wilge River to the south and west of Kusile, which traverse the adjacent properties of Topigs and other agricultural properties between the wetland and the Wilge River to determine the quality of the water from the wetland and assess the impact thereof on the Wilge River. Consequently, the risk that farmers farther downstream would encounter contaminated water if no monitoring were conducted, negatively affecting their livestock's health, is not inconceivable. Topigs' concern about the impact of this contamination on its farm operations is understandable.

[73] It can hardly be disputed that the burden of access to drinkable water for marginalised communities, such as farmworkers living near plants that discharge contaminated water, would fall heavily on them due to a lack of financial resources to buy

safe bottled or prepared water or to seek specialised medical care if they become ill due to constant exposure to contaminated water. Given the Constitutional Court's apt observation that environmental protection is a matter of intergenerational justice, the harsh socio-economic consequences faced by communities living or working in polluted neighbourhoods should never be ignored.²¹

[74] If Eskom, an organ of state,²² is allowed to ignore the conditions set out in the very EA that gives conditional permission to undertake listed activities of a power plant near properties occupied by a small community, and the relevant state authorities fail to fulfill monitoring responsibilities, this would significantly undermine the integrity of the regulatory system. This could have a cumulative impact on many other people who live near other polluted sites. Without monitoring as a preventive tool, the domino effect would be that the 144 people living at Topigs' farm would be the first point of impact, with the potential for downstream contamination reaching other rivers that serve larger communities. As aptly observed by the Constitutional Court in *Fuel Retailers Association*, the failure to monitor pollution jeopardises the natural resource base for future generations.

[75] Surely, the public has an interest in knowing whether state agencies are adhering to the law and, if not, whether they are being held accountable. I consider this an inherently public interest issue regardless of the number of victims living and/or employed at Topigs' farm. The Constitutional Court has held that, to ensure constitutional rights receive the full extent of the protection to which they are entitled, courts should adopt a broad rather than a restrictive approach to standing. The Constitutional Court in *Lawyers for Human Rights*,²³ endorsed the minority judgment's approach in *Ferreira*,²⁴ wherein it held that:

'In her judgment in *Ferreira v Levin* O'Regan J advocated the following approach to determine the reach of the provision in the interim Constitution equivalent to section 38(d) of the Constitution

²¹ *Fuel Retailers Association*, note 1 para 75.

²² Eskom falls within the classification of an organ of state as stipulated in s 237 of the Constitution. See further *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and Others* [2022] ZACC 44; 2023 (5) BCLR 527 (CC); 2023 (4) SA 325 (CC) (*Eskom Holdings SOC*), para 86.

²³ *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* [2004] ZACC 12; 2004 (4) SA 125 (CC); 2004 (7) BCLR 775 (CC) (*Lawyers for Human Rights*).

²⁴ *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) (*Ferreira*).

as well as whether and when a person or organisation could be said to have been acting in the public interest in a particular case:

“This Court will be circumspect in affording applicants standing by way of s 7(4)(b)(v) and will require an applicant to show that he or she is genuinely acting in the public interest. Factors relevant to determining whether a person is genuinely acting in the public interest will include considerations such as: whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought, and the extent to which it is of general and prospective application; and the range of persons or groups who may be directly or indirectly affected by any order made by the Court and the opportunity that those persons or groups have had to present evidence and argument to the Court. These factors will need to be considered in the light of the facts and circumstances of each case.”

I agree in substance with this approach.²⁵

Unlawfulness and breach

[76] The unlawfulness of the respondents’ conduct can be gleaned from their failure to comply with applicable prescripts. It is imperative to state at the outset that as regards the enforcement processes aimed at compliance with the provisions of s 28(1) – (3) of NEMA, the word ‘may’ in s 28(4) of NEMA must not be interpreted to mean that the powers of the relevant government officials are discretionary where a failure of compliance has been established. A sensible interpretation demands that the provision in question be read in the context of the other subsections and the statute as a whole. It follows that, properly interpreted, the enforcement measures set out in s 28(4) should be deemed as compulsory where a failure of compliance has been established.

Overarching principles of environmental development

[77] NEMA serves as the foundational legislation governing environmental protection in South Africa. It is imperative to acknowledge that despite its extensive reach, NEMA allows for the execution of activities classified as ‘listed’, which may cause pollution and be detrimental to the environment. To mitigate the possible adverse consequences arising from conducting listed activities, NEMA provides for the issuance of environmental authorisations (EAs).

²⁵ *Lawyers for Human Rights*, note 23 above, paras 16-17.

[78] The EAs are issued under conditions that outline the parameters within which such activities may be conducted. Correspondingly, NEMA bestows a comprehensive array of powers on the relevant State functionaries for the effective enforcement of its provisions. Before delving into the specifics of NEMA and related legislation, it is crucial to delineate the overarching environmental principles that underpin the execution of functions that impact the environment.

[79] Section 2(1) of NEMA sets out the guiding principles applicable to all state organs in South Africa, and exists alongside other important considerations, including the State's duty to uphold social and economic rights as outlined in Chapter 2 of the Constitution. NEMA recognises in s 2(3) that '[d]evelopment must be socially, environmentally and economically sustainable'. These are the principles that should guide the interpretation, administration, and implementation of NEMA and any other law concerned with the protection or management of the environment. Under NEMA, sustainable development is one of the central guiding principles for protecting and using water resources. Section 2(4)(a)(i) emphasises that disruptions to ecosystems and the loss of biodiversity should 'be avoided, or, where they cannot be altogether avoided, [should be] minimised and remedied'.

[80] Section 2(4)(i) of NEMA provides that when making decisions on development activities, the social, economic, and environmental impacts, including both disadvantages and benefits, must be considered, assessed, and evaluated. Decisions must also be appropriate in light of such considerations and assessments. It is therefore noteworthy that in the process of deciding to grant the authorisation to Eskom, the Minister of Environment did take heed of the NEMA guidelines embodied in s 2 thereof.²⁶ It is for that reason that the conditions governing the authorised activities should be carefully examined to ensure compliance.

[81] The development of Kusile was approved subject to some conditions, some of which were specifically intended to address the quality of the water. Of significance is that none of the conditions set out in the EA or Integrated Environmental Authorisation (IEA)

²⁶ See clause 4.3(g) of the Environmental Authorisation.

were ever amended. The Environmental Management Programme was approved in 2014 on the same terms. This means that Eskom remains bound by these conditions. At the risk of stating the obvious, it is important to emphasise that despite a power station being critical in the provision of much-needed power generation, Eskom was not given carte blanche to pollute the environment at will; conditions were imposed for its undertaking of listed activities at Kusile, and some of these conditions were phrased in peremptory terms.²⁷ It inter alia stipulated that the set conditions would be applicable to the listed activities at Kusile during the construction, erection, or upgrading phases of the 'schemes for the abstraction or utilisation of ground or surface water for bulk supply purposes'.

[82] In the record of decision (ROD) issued by the erstwhile Minister of Environmental Affairs, she inter alia explained that she was content that 'the potential impacts on human and animal health from the [Kusile] ash dump can be mitigated to acceptable levels through the conditions set by the authorisation and other measures...'. The same Minister further stated that 'by implementing the mitigation measures contained in this revised ROD, the principles contained in s 2 of [NEMA] can be substantially complied with'. These statements serve to affirm that the conditions under which EAs are issued are aimed at alleviating any harm that may ensue from conducting listed activities.

[83] Bearing in mind that the interpretation of a statute is a unitary exercise of considering its wording, context, and purpose, as reaffirmed in many judgments of this Court and the Constitutional Court,²⁸ no provision of a statute is to be considered in isolation. It is important to consider that s 2 of NEMA cautions that NEMA guiding principles exist alongside the State's duty to uphold social and economic rights as outlined in Chapter 2 of the Constitution. In my opinion, those guiding principles serve as the backdrop against which NEMA's provisions should be interpreted.

²⁷ Clause 3.1.5; clause 3.1.11; clause 3.1.12; clause 3.14 of the Record of Decision (ROD).

²⁸ See *Jooste NO and Another v Pretorius and Others* [2024] ZASCA 130; [2024] 4 All SA 659 (SCA); 2025 (3) SA 95 (SCA); *Commissioner, South African Revenue Service v United Manganese of Kalahari (Pty) Ltd* [2020] ZASCA 16; 2020 (4) SA 428 (SCA); 82 SATC 444; *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2013] ZASCA 176; [2014] 1 All SA 517 (SCA); 2014 (2) SA 494 (SCA); *Independent Institute of Education (Pty) Ltd v Kwazulu-Natal Law Society and Others* [2019] ZACC 47; 2020 (2) SA 325 (CC); 2020 (4) BCLR 495 (CC); *Road Traffic Management Corporation v Waymark Infotech (Pty) Ltd* [2019] ZACC 12; 2019 (6) BCLR 749 (CC); 2019 (5) SA 29 (CC); *University of Johannesburg v Auckland Park Theological Seminary and Another* [2021] ZACC 132021 (8) BCLR 807 (CC); 2021 (6) SA 1 (CC).

Principle of subsidiarity

[84] As mentioned before, the respondents submitted that the high court was correct in finding that ‘the failure of the applicant to invoke the provision[s] of NEMA and the NWA infringes on the principle of subsidiarity’. I disagree and am fortified in this opinion by the principles laid down in a plethora of judgments that have addressed the principle of subsidiarity.²⁹ In *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku*,³⁰ the Constitutional Court held that the principle of subsidiarity is a key tenet upholding the separation of powers. The court held that the effect of the principle is that it operates to ensure that disputes are determined using the specific, often more comprehensive, legislation enacted to give effect to a constitutional right, preventing them from being determined by invoking the Constitution and relying on the right directly, to the exclusion of that legislation.

[85] In *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and Others*,³¹ the majority judgment quoted the following dictum of Masuku with approval:

‘In *Masuku*, Khampepe J held, quoting the minority in *My Vote Counts I*:

“Broadly, the principle of subsidiarity is the judicial theory whereby the adjudication of substantive issues is determined with reference to more particular, rather than more general, constitutional norms. The principle is based on the understanding that, although the Constitution enjoys superiority over other legal sources, its existence does not threaten or displace ordinary legal principles and its superiority cannot oust legislative provisions enacted to give life and content to rights introduced by the Constitution. In simple terms, the principle can be summarised thus:

‘Once legislation to fulfil a constitutional right exists, the Constitution’s embodiment of that right is no longer the prime mechanism for its enforcement. The legislation is primary. The right in the Constitution plays only a subsidiary or supporting role.’

Ultimately, the effect of the principle is that it operates to ensure that disputes are determined using the specific, often more comprehensive, legislation enacted to give effect to a constitutional right, preventing them from being determined by invoking the Constitution and relying on the right directly, **to the exclusion of that legislation.**’ (Emphasis added).

²⁹ *My Vote Counts*, paras 160-161; *Mbatha v University of Zululand* [2013] ZACC 43; 2014 (2) BCLR 123 (CC); (2014) 35 ILJ 349 (CC), para 173; and *Mazibuko and Others v City of Johannesburg and Others* [2009] ZACC 28; 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC), para 73 (*Mazibuko*).

³⁰ *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku* [2022] ZACC 5; 2022 (4) SA 1 (CC); 2022 (7) BCLR 850 (CC), para 108 (*Masuku*).

³¹ *Eskom Holdings SOC*, note 22 above, para 236.

[86] In *Esofranki Pipelines (Pty) Ltd v Mopani District Municipality*³² the Constitutional Court described this principle as follows:

‘This Court has on various occasions endorsed the principle of subsidiarity. This principle provides that where legislation is enacted in order to give effect to a constitutional right comprehensively, a litigant cannot *bypass* the relevant legislation and rely directly on the Constitution or on the common law, without challenging the constitutional validity of that legislation. The principle has two foundational justifications: to mitigate against the development of “two parallel systems of law”, one judge-made and the other crafted by Parliament, and to ensure “comity between the arms of government” by maintaining “a cooperative partnership between the various institutions and arms tasked with fulfilling constitutional rights”.’³³ (My emphasis).

[87] In *Adonisi and Others v Minister for Transport and Public Works, Western Cape and Others*.³⁴

‘This Court has held that “a litigant cannot directly invoke the Constitution to extract a right he or she seeks to enforce without first relying on, or attacking the constitutionality of, legislation enacted to give effect to that right”. The rights in the Bill of Rights are not all cast in the same terms, nor do they operate in the same manner. The distinctions emerge when one identifies their corresponding obligations and duty-bearers as well as the content of the duty to be discharged. When these elements are examined across the Bill of Rights, a textual distinction emerges that may determine the reach of the principle of constitutional subsidiarity. For instance, in certain sections of the Bill of Rights, the Constitution prescribes that “national legislation must be enacted” to give effect to a particular right: sections 9(4), 25(9), 32(2) and 25(9). These provisions mandate the enactment of legislation as an express minimum and identify the subject matter that the required legislation must address. It is in relation to these rights that the principle of constitutional subsidiarity operates with its fullest force, because the Constitution itself designates national legislation as the primary vehicle through which the right is to be given effect.’³⁵

With all the principles mentioned in the aforementioned cases in mind, I turn now to the facts of this case to determine whether Topigs can be said to have bypassed NEMA and related environmental legislation.

³² *Esofranki Pipelines (Pty) Ltd v Mopani District Municipality* [2022] ZACC 41; 2023 (2) BCLR 149 (CC); 2023 (2) SA 31 (CC) (*Esofranki*).

³³ *Ibid*, para 45.

³⁴ *Adonisi and Others v Minister for Transport and Public Works, Western Cape and Others* [2026] ZACC 29 (2 July 2026); 2026 JDR 3211 (CC).

³⁵ *Ibid*, para 65-66.

[88] The environmental right in s 24 of the Constitution is given effect through detailed legislative schemes, in particular NEMA and the NWA. Those statutes empower regulators to issue directives, compliance notices and remedial measures where pollution and degradation occur. Section 28(12) of NEMA expressly empowers aggrieved persons to approach a court to enforce a duty of care when authorities fail to act. Indeed, the principle of subsidiarity requires that these statutory mechanisms be utilised as the primary means of enforcement. The question is whether Topigs has done so.

[89] The relevant provisions of NEMA and NWA have already been canvassed in paragraphs 57-61 of this judgment. A perusal of the founding affidavit, especially paragraphs 39 to 59 thereof, reveals that Topigs' cause of action was substantively grounded in Eskom's alleged non-compliance with the conditions stipulated in the statutory authorisations (the EA and the IEA) granted in terms of NEMA and NEMWA. It is also plain that Topigs also founded its case on the State respondents' failure to comply with the obligations set out in the NEMA, NEMWA, and NWA. In this regard, there can 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. In this sense, the litigation is properly rooted in the statutory framework of both NEMA and NWA.

[90] Topigs' assertion that Eskom had a duty to put measures in place for containing, preventing, eliminating pollutants and remedying the effects of pollution was premised on the provisions of clause 3.1.5 of the EA, which is aligned to the provisions of s 28(1), (2) and (3) of NEMA and several water-use licences issued under the NWA. Having predicated its case on the authorisations issued in terms of NEMA, and non-compliance with the provisions of NEMA, there was no basis for Topigs to challenge the constitutionality of NEMA. Topigs is seeking to enforce the legal standards envisioned by both NEMA and the Constitution. Our jurisprudence does not prevent a litigant from claiming that an act or omissions is both a statutory and a constitutional violation. In the circumstances of this case, the principle of subsidiarity would have been triggered if there

was exclusive reliance on the Constitution.³⁶ Topigs' side-by-side reliance on NEMA and the Constitution does not offend the principle of subsidiarity. On the contrary, its cause of action and the relief it sought fully align with that principle. It would have been a different case altogether if Topigs had predicated its case solely on the Constitution without invoking NEMA. Based on a reading of the founding affidavit, it cannot be said that Topigs sought to rely on the Constitution **to the exclusion of NEMA** when it is clear that it premised its case on the various breaches of environmental authorisations granted in terms of NEMA, which litigation is permissible in terms of s 32(1)(a) of NEMA.

[91] The fact that legislation, specifically NEMA, has been promulgated to give effect to constitutional rights does not preclude a litigant from pointing out constitutional violations in the course of filing a complaint about NEMA breaches. Under such circumstances, the court's interpretation of environmental statutes in light of constitutional obligations cannot offend the principle of subsidiarity. Asserting that such an approach infringes the principle of subsidiarity would signify a failure to acknowledge the need for a human rights-based perspective that recognises both the right in question and its violation. Moreover, it would overlook the importance of promoting accountability through declarations of unlawfulness and granting effective remedies where necessary.³⁷

[92] Regarding the relief sought in the Notice of Motion, such relief, properly characterised, included declarators and mandatory orders compelling the exercise of enforcement powers conferred by statute. As regards the declarators sought against Eskom, it bears emphasis that s 21(1)(c) of the Superior Courts Act 10 of 2013 grants the high courts the discretion to enquire into and determine existing, future, or contingent rights, notwithstanding that such a person cannot claim consequential relief.³⁸ Given the extent and the serious consequences of the respondents' non-compliances, the existence of and the exercise of that discretion in this matter is beyond question. The question is whether it was open to the high court to grant additional remedies aimed at addressing these non-compliances.

³⁶ See *Eskom Holdings SOC* note 22 above.

³⁷ See *Minister of Environmental Affairs v Trustees, Groundwork Trust and Others* 2025 (4) SA 98 (SCA); 2025 (4) SA 98 (SCA) (*Groundwork Trust and Others*).

³⁸ *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* [2005] ZASCA 50; [2006] 1 All SA 103 (SCA); 2005 (6) SA 205 (SCA) paras 15-18.

[93] Moreover, it cannot be gainsaid that the declarators and mandamus sought in prayers 1 to 4 fall squarely within the ambit of s 28(1) and (2) of NEMA. Section 28(1) of NEMA stipulates that every person who causes or has caused or may cause significant pollution must take reasonable measures to prevent it from occurring, continuing or recurring. Eskom falls within the category of potential wrongdoers obliged to take the reasonable steps envisaged in s 28(1) of NEMA. The mandamus sought is permissible when consideration is paid to subsecs 28(1), (2), (3), (4), and (7) of NEMA. Given the fact that the remedial outcome sought by Topigs falls within NEMA's statutory boundary, the respondents' contention that the principle of subsidiarity precludes this Court from providing Topigs with relief is therefore misplaced. Notwithstanding that Topigs did not expressly invoke s 28(12) of NEMA by name, the substance of the relief sought corresponds with the powers that NEMA and the NWA authorise and falls squarely within the framework of these statutes. Far from bypassing NEMA, Topigs utilises NEMA's core substantive obligations as laid down in s 28 via NEMA's procedural gateway, namely s 32(1).

[94] As I see it, subsidiarity does not require the formal invocation of statutory provisions when (i) the pleaded case and (ii) the relief sought are firmly established within the statutory framework. Having considered the conspectus of the record, I am satisfied that Topigs' contention that it sourced its remedy in NEMA and merely supported it by referencing the relevant constitutional provisions, specifically s 24, is borne out by its averments in its affidavits, albeit that no proper case was made out for its reliance on ss 9, 10, 11, 12, 22 and 25 of the Constitution. The fact that Topigs did not specifically refer to s 28(12) in its letter of demand or the founding papers is therefore not decisive. Therefore, it cannot operate as a bar to the present proceedings. Section 28(12) creates a statutory mechanism to compel administrative enforcement; however, it is not delineated as an exclusive remedy available.³⁹ That this must be so is reinforced by s 32(1) of NEMA, which expressly grants an aggrieved person the right to 'seek appropriate relief in respect of any breach or threatened breach' of any provision of NEMA. The significance of section 28(12) primarily lies in guiding the remedial inquiry into what constitutes just and equitable relief under the given circumstances. It follows that Topigs did not offend the principle of subsidiarity. Insofar as the high court concluded otherwise,

³⁹ See *Madrassa Anjuman Islamia v Johannesburg Municipality* 1917 AD 718 at 725. Special statutory remedies do not lightly exclude the court's power to grant an interdict; clear legislative intention is required.

it erred. In the same vein, it also erred in concluding that Topigs had bypassed NEMA and relied directly on the Constitution without challenging NEMA.

[95] Given that the high court dismissed Topigs' application on the basis that it had not proven the third requirement for an interdict (absence of an alternative remedy), a brief discussion of the requirements of an interdict is necessary. The questions as to whether Topigs had a clear right, showed a reasonable apprehension of harm, and demonstrated that there was no other similar protection that could address the issues can be answered by juxtaposing the relief sought by Topigs with the conditions set out in the EA, IEA, and permissions granted under the water-use licences. It is to that aspect that I now turn.

Were the requirements of an interdict satisfied?

The conditions under which the environmental authorization for Kusile was issued

[96] Clause 3.1 of the EA deals with water quality management. The efforts to prevent water contamination are evident from clauses 3.1.2, 3.1.3, and 3.1.4, which prescribe steps to be taken, including lining certain areas, to prevent the leaching of pollutants into groundwater. The intention to prevent the discharge of harmful substances is clear; clause 3.1.5 stipulates that '[a]ll polluted water must be recycled until all pollutants are captured as waste for disposal with the ash deposition'. Properly interpreted, this means that all polluting substances must be extracted from the water and disposed of as on-site solid waste at the ash dump. Under this interpretation, no water pollutants are permitted to leave the Kusile site.

[97] The EA further required Eskom to continuously monitor groundwater quality and implement measures to prevent pollution of the resource.⁴⁰ A monitoring programme for ground water quality had to be prepared, and measures to control and *prevent pollution* of the ground water resource were to be included in the environmental management plan.⁴¹ As per the EA, Eskom had to obtain a water use licence in terms of s 32(g) of the NWA 'to adequately deal with the storage of ash from the ash dump and the disposal of wet waste' from the Flue Gas Desulphurisation process.⁴²

⁴⁰ See clause 3.1.11 of the EA.

⁴¹ Ibid.

⁴² See clause 3.1.12 of the EA. The EA incorrectly refers to s 32(g) instead of s 21(g) of the NWA.

[98] Eskom is enjoined to comply with *all* provisions of the NWA.⁴³ On this score, it is crucial to note that under s 151 of the NWA, non-compliance with any condition attached to the permitted water use is considered so serious as to constitute a criminal offence. The fact that the EA expressly provides that Eskom must comply with all provisions of the NWA means that, under s 19(1) of the NWA, Eskom had to take all reasonable steps to prevent the pollution of the water resources downstream of Kusile from occurring, continuing, or recurring. Strikingly, Eskom has admitted that its operations at Kusile have negatively impacted downstream water resources. Surely, the declaratory orders sought in prayer 1 of Topigs' amended notice of motion must be seen against the backdrop of the factors mentioned in this paragraph.

[99] The EA further stipulated that records relating to monitoring and auditing had to be kept and made available for inspection to the relevant authorities.⁴⁴ Eskom had to establish an EMC.⁴⁵ The EMC was expected to report to the DFFE bi-monthly and make recommendations on issues related to the project's monitoring and auditing.⁴⁶ The DFFE was obliged to receive the EMC's reports and, through a reservation of rights, was obliged to monitor and audit the Kusile development to ensure implementation of all the mitigation measures contained in the final environmental impact report dated February 2007.⁴⁷

[100] Furthermore, clause 3.14 of the ROD requires the keeping of records relating to monitoring and the inspection that must be conducted by 'any relevant authority' in respect of the development. It also mentions that the DFFE reserves the right to monitor and audit the development throughout its full life cycle to ensure compliance with the EA.

[101] Moreover, clause 3.18.17 provides that 'if any condition imposed in terms of this authorisation is not complied with, the authorisation may be withdrawn after 30 days' written notice to the applicant in terms of s 22(4) of [NEMA]'. In terms of s 49A(1)(c) of the NEMA, a person is guilty of an offence if that person fails to comply with or contravenes a condition of an EA. Clause 3.18.18 of the EA provides that '[f]ailure to comply with any of these conditions shall also be regarded as an offence and may be

⁴³ Clause 3.17.3 of the EA.

⁴⁴ Clause 3.14 of the EA.

⁴⁵ Clause 3.11.1 of the EA.

⁴⁶ Clause 3.11.5 of the EA.

⁴⁷ Clause 3.14.2 of the EA.

dealt with in terms of sections 29, 30 and 31 of [NEMA] as well as in terms of any other appropriate legislation'. Clause 3.18.21 stipulates that DFFE officials shall be allowed access to Kusile for purposes of assessing and/or monitoring compliance with the conditions contained in the environmental assessment.

[102] The provisions of the IEA are equally important. They have already been mentioned earlier in the judgment under the heading 'common cause facts' and need not be repeated in the same detail here. The applicability of the IEA to the issues raised in this matter is uncontroverted. It bears noting that the IEA states that the authorisation granted to Eskom does not negate Eskom's responsibility to comply with any other statutory requirements applicable to the undertaking of its activity. Under clause 3.5 of the IEA, Eskom shall be responsible for ensuring compliance with the conditions set out therein.

[103] Under clause 17.3.6 of the IEA, Eskom must design and manage storage areas to prevent contaminants from escaping into the environment. Furthermore, all runoffs must be prevented from entering local watercourses, including wetlands. Clause 17.5.5 of the IEA provides that no effluent or wastewater must be discharged into any stormwater drain or furrow, whether by commission or omission. Under clause 17.5.3, Eskom must prevent the occurrence of health hazards.

Eskom and the State Departments' non-compliance

[104] It is self-evident from the various provisions of the EA and IEA referred to in the preceding paragraphs that, on the one hand, 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 aspect is common ground and was decried by the high court. It bears emphasis that, based on the provisions of clause 5 of the EA, Eskom's failure to comply with the stipulated conditions thereof could result in the withdrawal of the EA and IEA, or the issuance of directives to address non-compliance, or the institution of criminal or civil proceedings to enforce compliance.

[105] The option of civil proceedings has not been qualified in any way. This is a weighty consideration. Since the nature of such civil proceedings has not been prescribed, and

bearing in mind the applicable guiding principles set out in NEMA, and as discussed above, I am of the view that the declaratory relief and the mandamus sought by Topigs are permissible.

[106] Notably, there were no proper interventions by DFFE and DWS officials in respect of the exceedances before or after the launch of Topigs' application. It is inexcusable that a breach of the constitutional imperative to diligently and timeously perform all constitutional obligations persisted for years unabated. Under these circumstances, there can be no question that granting a declaratory order and a mandamus would be appropriate if all the applicable requirements were met.

[107] To my mind, on the facts of this case, the first requirement of a clear right emanates from s 24 of the Constitution. It is given effect to in the suite of environmental legislation, including NEMA, which is the foundational framework legislation for environmental governance, and trickles down into the provisions of the EA authorisation and the water-use licences.

[108] In *Groundwork Trust and Others*, this Court, having found that the Minister had a duty to promulgate regulations in light of the flagrant disregard of the Highveld Priority Plan, found that the environmental rights enshrined in s 24 of the Constitution had been violated. In this matter, given Eskom's and the State respondents' ongoing non-compliance with the conditions imposed by EA, IEA and water-use licences applicable to Kusile, the State respondents' failure to take the steps set out in the EA, IEA, NEMA and NWA violates the fundamental right to an environment that is not harmful to health or well-being and to have the environment protected for the benefit of the present and future generations as enshrined in s 24 of the Constitution. Given this finding, any argument that the declaratory orders sought by Topigs cannot be granted for fear of offending the principle of subsidiarity amounts to putting form over substance and is therefore misplaced.

[109] As stated before, Eskom is an organ of the State. It has been noted earlier on in this judgment that in 2014, the EMPr was submitted to the Minister of Environment on behalf of Eskom. The Minister and the Director-General would therefore have been aware of the nature of the monitoring required. The Minister and the Director-General would also

have been aware of the IEA issued in terms of NEMWA. Section 2(a) read with s 2(c) of NEMWA is designed to put measures in place to minimise the consumption of national resources, to avoid and minimise the generation of waste and to provide statutory tools to ensure compliance. Section 2(d) indicates that the general object of the Act is to give effect to s 24 of the Constitution in order to secure an environment that is not harmful to health and well-being.

[110] Significantly, s 7 of NWA enjoins the Minister, the Director-General, and organs of state to give effect to the national water resource strategy when exercising any power or performing any duty in terms of that Act. Ordinarily, they should not be absolved from these responsibilities. Section 172(1)(a) of the Constitution enjoins a court to declare conduct that is inconsistent with the Constitution to be unlawful.

[111] Furthermore, the IEA obliged Eskom to comply with the NWA's provisions, and the EA obliged Eskom to obtain water-use licences. The extent of Eskom's egregious non-compliance with the EA and water-use licences and the DFFE's failure to intervene has already been chronicled in the preceding paragraphs of this judgment. Unquestionably, these non-compliances constitute contraventions of the national environmental regulatory scheme, and, in turn, the environmental rights embodied in s 24 of the Constitution.

[112] It is of significance that, on Eskom's own version, as pointed out by Topigs in the replying affidavit, the summary table of water quality results attached to Topigs' replying affidavit to the Minister of Water and DWS indicated that exceedances in contaminants increased in severity from October 2022 to January 2024. This state of affairs persisted unabated despite the relaxed limits established by the 2022 water-use licence amendment. I can do no better to illustrate the abovementioned state of affairs than by tabulating the exceedances for the Ash Dump Dirty Dam (ADDD) and the Station Dirty Dam (SDD) as set out in the papers:

Values exceeding stipulated limits in the 20 June 2012 Water-Use Licence		
	Amendment Granted on 25 April 2022 to Appendix III, Condition 3.1	
	Table 7	

[113] The table above speaks for itself. Topigs stressed that manganese levels exceeded the permitted limits, indicating ongoing non-compliance with the conditions set out in the water use license. According to Topigs, research has shown that manganese levels above 20mg.l in water have an adverse acute toxicity, rendering it unacceptable for human consumption. The concentrations in January 2021 and April 2021 exceeded that concentration. What can be observed from the Kusile Water Management Action Plan signed in November 2021 is that one of its objectives was to achieve 'a zero liquid effluent discharge'. Also evident from that action plan is that Eskom intended to request the amendment of the conditions applicable to the water use license that was applicable at the time. Eskom did not deny that, six months after the implementation of that 2021 action plan, the weekly water quality results showed no improvement in compliance with the set thresholds.

[114] According to Topigs, the regular non-compliance with the water quality requirements set out in the various water-use licenses for Kusile, when measured against the South African Water Quality Guidelines, was of such a bad quality that it was no longer fit for aquatic ecosystems, domestic use, irrigation use, or use for livestock watering. Topigs further asserted that an international body of science, for which the World Health Organisation is the main exponent, accepts that the exceedances of water quality requirements cause the pollution or likely pollution of the downstream water resources, cause or are likely to have a detrimental effect, result in the degradation of the environment and result or are likely to cause a threat for human health. Eskom did not deny the sub-standard quality of the water resources or the associated health risks. The deponent to its affidavit stated that 'Eskom does not deny that its operations at Kusile have negatively impacted downstream water resources'. Eskom, however, denied that the potential health risks identified by Topigs had already materialised. The deponent to its answering affidavit said:

'While I do not deny that the high concentrations of manganese, chromium and fluoride can adversely affect human health, I emphasise that [Topigs] has presented no evidence that such harm has occurred to any person as a direct result of Kusile's operations. I accordingly deny that the extent of that impact is as suggested by [Topigs]... Eskom is taking measures to address the pollution it is causing on downstream water resources, I refer to the updated action plan ... which is patently a significantly more comprehensive and concerted effort to address the environmental challenges faced by Kusile.'

[115] Eskom was indeed able to achieve the water use amendment that it had desired, as the water use licence was amended in 2022. The amendment resulted in the relaxation of certain water quality requirements. Weighing heavily is the common cause fact that, notwithstanding Eskom's adoption of an updated action plan in 2024, months after the application was filed, its implementation proved ineffective because water downstream of Kusile still failed to meet the relaxed requirements for months.

[116] The averments by Dr Meyer in his supplementary replying affidavit are relevant to the events that unfolded after Eskom had adopted its 2023 updated action plan; they also explain Topigs' persistence in seeking the relief sought notwithstanding the adoption of that action plan. Dr Meyer said:

'From the outset, I wish to point out that the serious and significant pollution of the downstream water resources has been persistent and ongoing and has been further exacerbated by [Eskom's] recent failure to yet again report on inter alia significant pollution incidents and priority pollutants.

[Eskom] has failed yet again to contain extremely toxic wastewater leaking into the receiving downstream water resources, resulting in these water resources being classed as Completely Unfit for recognised uses with acute toxicity indicated. The October 2023 weekly monitoring data clearly present evidence of yet another toxic discharge from [Kusile] Pollution Control Dams which occurred during the last two weeks of October 2023. In this regard, I attach hereto the most recent weekly water quality reports for October 2023, as annexure 'JM 131', demonstrating a further worsening trend and clear evidence of an alarming increase in key pollutants. Despite having the latest data and the opportunity to do so, [Eskom] fail to make any mention thereof in the supplementary answering affidavit. *This data shows consistent ongoing pollution*, and critically, an October 2023 pollution event of a dramatic and significant nature which occurred after [Eskom] claimed to have de-slugged the SDD (both upper and lower cells) and despite this being visibly evident on the site, this was neither reported to the authorities, nor the EMC.[. . .] *Pollution from other sources is still evident in all the monitoring data showing again the failure to prevent pollution from inter alia the radial stacker, the overland conveyor and stormwater, into the receiving wetland and surface water resource.*

[. . .]

It is extremely alarming that the main 'solution' to [Eskom's] failure to comply with its Water Use Licence limits is to seek a further relaxation thereof through an application for another

amendment. As detailed in the founding affidavit, [Eskom] obtained the relevant Water Use License in 2012 and, for all the years until March 2022, [Eskom] failed to comply with the prescribed limits stipulated therein and only saw it fit to seek a relaxation of these limits in March 2022. [. . .] Despite having obtained the relaxed limits which they applied for [Eskom] has for every monitoring point thereon failed to comply therewith [. . .]. The distinct pattern emerges [in which Eskom] seeks to accommodate their failings by seeking further relaxations thereto. [. . .] *On the admission of [Eskom], seepage is as a fact occurring and has polluted the groundwater.* The only effective remedy for the ongoing and increasing water pollution, which has now been ongoing and increasing persistently for longer than a decade, is to put those activities under judicial supervision by way of a structural interdict.’ (Own emphasis.)

[117] When examining Eskom's actions from the issuance of the EA and IEA up to the hearing of the application, it is evident that it has consistently failed to meet the conditions thereof. The same applies to the water-use licences. As mentioned before, the DFFE and DWS have not taken any steps against Eskom despite the EA and NEMA imperatives. This unacceptable state of affairs is attested to by the high court's bemoaning of Eskom and the DFFE's conduct regarding Kusile. It said:

‘[Topigs] has not sat on its hands when it became aware of the Kusile project in 2008, as it immediately appointed Dr Meyer to represent it on the EMC of Kusile. It is on record that Dr Meyer has been a thorn in the flesh on the EMC about Eskom's monitoring processes and non-compliance with the authorisations and water use licenses, and the lax attitude of the State respondents in holding Eskom accountable and enforcing compliance with the conditions of its authorisations and water use licenses.’

I agree with that assessment and would add that a finding of unlawfulness is inevitable in the circumstances.

[118] Considering all the circumstances referred to in this judgment, it is astonishing that Eskom asserted that Topigs launched its application prematurely. The high court correctly rejected this contention. The record before us leaves no room for any doubt that Eskom has, over a sustained period, failed to comply with material conditions of its environmental authorisations issued under NEMA, the NEMWA, and its water-use licences issued under the NWA. Those conditions constitute binding legal instruments issued pursuant to statute. Non-compliance, therefore, amounts to a breach of statutory duty and renders the conduct of the Eskom respondents unlawful.

[119] With respect to the State respondents, it can hardly be disputed that the designated Director Generals have, for an extended period, failed to undertake reasonable and effective measures within their statutory authority to ensure compliance with the applicable instruments. That failure constitutes a breach of their obligations under NEMA, NEMWA, and the NWA, as well as of the duty imposed by s 7(2) of the Constitution for the State to respect, protect, promote, and fulfill the rights in the Bill of Rights. It also amounts to a failure to protect, promote, and fulfill the environmental rights guaranteed in s 24 of the Constitution. That being the case, a finding of a constitutional duty violation is inevitable. It is indeed so that a finding of unlawfulness does not automatically entail entitlement to every form of relief sought. Courts are required by s 172(1)(b) of the Constitution to fashion relief that is just and equitable in the circumstances of each case.

[120] But quite apart from the context of s 172(1)(b), Courts possess an inherent discretion to determine appropriate relief. Thus, in instances where unlawfulness has been established, a decision to deny a structural interdict due to its perceived inappropriateness should not, by itself, indicate a complete limitation of the court's remedial capabilities to the point of dismissing the application. Where a court finds established non-compliance with environmental authorisations and a failure by regulators to act, a complete refusal of relief would create a remedial vacuum inconsistent with the rule of law. In my view, there ought to be due consideration of whether the relief sought in other prayers may still be granted, notwithstanding a structural interdict being considered inappropriate. It is to that aspect that I now turn.

Relief sought by Topigs

[121] The State respondents' argument focused on how the structural interdict implicated the principle of the separation of powers. However, careful scrutiny of the relief⁴⁸ sought by Topigs in its amended notice of motion reveals that several components

⁴⁸ The relief sought by Topigs in its application was couched as follows in the amended Notice of Motion: '1. declaring that the respondents (excluding the second, fourth, fifth and seventh respondents) are under a constitutional duty and or legal duty and or statutory duty to ensure that the water resources downstream from the Kusile Power Station are not polluted or are likely to be polluted by the construction and or operation and or management of the Kusile Power Station and or to ensure that no substances are discharged or allowed to escape from the Kusile Power Station so as to:

- Pollute or likely pollute a water resource; and or
- Detrimentially affect or likely affect a water resource; and or
- Degrade or damage the environment; and or

- Cause or likely cause a threat to human health;
- 2. declaring that the respondents (excluding the second, fourth, fifth and seventh respondents) are in breach of the duty or duties referred to in prayer 1 above;
- 3. declaring that the conduct of the respondents (excluding the second, fourth, fifth and seventh respondents), in failing to prevent and or allowing and or causing directly or indirectly and by act or omission the discharge or escape of substances from the Kusile Power Station which:

- Pollutes or likely to pollute a water resource; and or
- Detrimentially affects or is likely to affect a water resource; and or
- Degrade or damage the environment; and or
- Cause or likely cause a threat for human health;

is unconstitutional and a breach of the following fundamental rights of the applicant, its directors, and its employees and or the potential water users downstream of the Kusile Power Station, namely:

- 3.1 the right to equality in section 9 of the Constitution of the Republic of South Africa, 1996 (hereinafter "the 1996 Constitution");
- 3.2 the right to human dignity in section 10 of the 1996 Constitution;
- 3.3 the right to life in section 11 of the 1996 Constitution;
- 3.4 the right to freedom and security of the person in section 12(1)(c) of the 1996 Constitution;
- 3.5 the right to freedom and security of the person in section 12(2) of the 1996 Constitution;
- 3.6 the right to freedom of trade, occupation and profession in section 22 of the 1996 Constitution;
- the environmental right in section 24(a) of the Constitution;
- 3.7 the environmental right in section 24(a) of the Constitution;
- 3.8 the environmental right in section 24(b) of the Constitution; and or
- 3.9 the right to property in section 25 of the Constitution;
- 4. that the first respondent (Eskom Holdings) and the third, sixth, eighth to tenth and twenty to thirty-first respondents (the current Board of Directors of Eskom Holdings) take all necessary steps within thirty (30) days of the date of this order:

4.1 to ensure that the water resources downstream from the Kusile Power Station are not polluted or are likely to be polluted by the construction and or operation and or management of the Kusile Power Station;

4.2 to ensure that no substances are discharged or allowed to escape from the Kusile Power Station so as to:

- Pollutes or likely to pollute a water resource; and or
- Detrimentially affects or is likely to affect a water resource; and or
- Degrade or damage the environment; and or
- Cause or likely cause a threat for human health;

4.3 to ensure that the Kusile Power Station is properly constructed and or operated and or managed fully in accordance with the terms and conditions of:

- the approved Environmental Management Programme (2014) for the Kusile Power Station, as approved in terms of section 24N of the National Environmental Management Act, 107 of 1998 (hereinafter "*the NEMA*");
- Water Use Licence with reference [...] as amended, granted to the first respondent in terms of the provisions of chapter 4 of the National Water Act 36 of 1998 (hereinafter "*the NWA*");
- Water Use Licence with reference [...] as amended, granted to the first respondent in terms of the provisions of chapter 4 of the NWA;
- Water Use Licence with reference [...], granted to the first respondent in terms of the provisions of chapter 4 of the NWA;
- Water Use Licence with reference [...] granted to the first respondent in terms of the provisions of chapter 4 of the NWA;
- Water Use Licence with reference [...], granted to the first respondent in terms of the provisions of chapter 4 of the NWA; and
- Any other legislative instrument pertaining to the environmental governance of the construction, operation and or management of the Kusile power Station;

4.4 to refrain from threatening and or infringing and or breaching the fundamental rights of the applicant, its directors, and its employees and or the potential water users downstream of the Kusile Power Station as contemplated in prayer 3 above.

- 5. that the first respondent (Eskom Holdings) and the third, sixth, eighth to tenth and twenty to thirty-first respondents (the current Board of Directors of Eskom Holdings) and the eleventh to thirteenth respondents within ten (10) days of this order each file at this Court under oath, and provide to the applicant, the action

plan and programme which they will implement without delay so as to ensure that the duties and obligations referred to in prayer 3 – 4 above are performed or carried out and which address the following matters:

- 5.1 the steps taken to ensure that the officials, staff, employees, agents, consultants or contractors of the first respondent will give effect to the duties and obligation referred to in prayer 3 – 4 above;
 - 5.2 what further steps will be taken in this regard;
 - 5.3 who will be responsible for taking each step, as well as reporting thereon; and
 - 5.4 when each of such further steps will be taken;
6. that the first respondent (Eskom Holdings) and the third, sixth, eighth to tenth and twenty to thirty-first respondent (the current Board of Directors of Eskom Holdings) and the eleventh respondent to the thirteenth respondent take all necessary steps to ensure compliance with the obligations emanating from the action plan and programme as contemplated in prayer 5 above within thirty (30) days of this order;
7. that the first respondent (Eskom Holdings) and the third, sixth, eighth to tenth and twenty to thirty-first respondents (the current Board of Directors of Eskom Holdings) and the eleventh to the thirteenth respondents each file affidavits with this court, supported by technical reports compiled by or on behalf of the first respondent in respect of the environmental management of the Kusile Power Station, and provide copies to the applicant, every fifteen (15) days calculated from the expiry of the date contemplated in prayer 6 above, until the order is discharged by this court, setting out or specifying the steps taken to give effect to this order, when such steps were taken, what the results of those steps have been, what further steps will be taken, who will be responsible for taking such further steps, and the time-frame within which each such step will be taken;
8. that the applicant is granted leave to file further affidavits in response to any affidavit or report from the first respondent (Eskom Holdings) and the third, sixth, eighth to tenth and twenty to thirty-first respondents (the current Board of Directors of Eskom Holdings) and the eleventh to thirteenth respondents as contemplated in this order and is granted leave to approach the court for such further orders and or directives and or relief as need be, regarding compliance with the orders contained in 4 – 7 above (including an order for contempt of court);
9. that the fourteenth to nineteenth respondents within ten (10) days of this order file at this court under oath, and provide to the applicant, the action plan and programme which they will implement without delay so as to ensure that the duties and obligation referred to in prayer 4 – 7 above are performed or carried out and which address the following matters:
- 9.1 the steps taken to ensure that the officials, staff, employees, agents, consultants or contractors of the first respondent will give effect to the duties and obligations referred to in prayer 4 – 7 above;
 - 9.2 what further steps will be taken in this regard;
 - 9.3 who will be responsible for taken each step, as well as reporting thereon; and
 - 9.4 when each of such steps will be taken;
10. that the fourteenth to nineteenth respondent take all necessary steps to ensure that compliance with the obligations emanating from the action plan and program as contemplated in prayer 9 above within thirty (30) days of this order;
11. that the fourteenth to nineteenth respondents file affidavits with this court, supported by technical reports compiled by their officials responsible for oversight over or inspection of the environmental management of Kusile Power Station, and provide copies to the applicant, every fifteen (15) days calculated form the expiry of the date contemplated in prayer 10 above, until the order is discharged by this court, setting out or specifying the steps taken to give effect to this order, when such steps were taken, what the results of those steps have been, what further steps will be taken, who will be responsible for taking such steps, and time-frame within which each such step will be taken;
12. that the applicant is granted leave to file further affidavits in response to any affidavit or report from the fourteenth to twenty-first respondents as contemplated in this order and is granted leave to approach the court for such further orders and or directives and or relief as need be, regarding compliance with the orders contained in prayer 9 to 11 above (including an order for contempt of court);
13. that the first respondent, in terms of section 32(3)(b) of the NEMA, pay the reasonable costs incurred by the applicant in the investigation of this matter and its preparation for these proceedings (including the reservation fees as well as the qualifying costs and expenses of the expert witness Dr James Andries Meyer);
14. that the costs of this application be paid by the respondents (excluding the second, fourth, fifth and seventh respondents) jointly and severally, the one respondent to pay the other respondents to be absolved, and on a punitive scale as between attorney and client;
15. that such further and or alternative relief be granted as the court deems fit and or appropriate and or just and equitable and or in the public interest.'

were severable. The structural interdict was just but a part of the relief sought by Topigs; the other relief sought was in the form of a declaratory order and a mandamus. In *Minister of Health v Treatment Action Campaign and Others*,⁴⁹ the Constitutional Court said:

‘This Court has said on other occasions that it is also within the power of courts to make a mandatory order against an organ of state and has done so itself. For instance, in the Dawood case, a mandamus was issued directing the Director-General of Home Affairs and immigration officials to exercise the discretion conferred upon them in a manner that took account of the constitutional rights involved. In the *August* case a mandatory order, coupled with an injunction to submit a detailed plan for public scrutiny, was issued by this Court against an organ of state – the Electoral Commission.

We thus reject the argument that the only power that this Court has in the present case is to issue a declaratory order. Where a breach of any right has taken place, including a socio-economic right, a court is under a duty to ensure that effective relief is granted. The nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in a particular case. Where necessary, this may include both the issuing of a mandamus and the exercise of supervisory jurisdiction.’

[122] In my view, the passage above is equally apposite in the circumstances of the present case. What remains is to evaluate the appropriateness of granting (i) declaratory orders affirming the existence of legal duties and violations of NEMA, NWA, and s 24 of the Constitution; (ii) a mandamus compelling Eskom to comply with the EA, IEA, NEMA, NWA and all water use licenses, as well as ensuring that the relevant State respondents, as regulatory bodies, enforce these regulations; and (iii) whether it is also necessary to consider granting a structural interdict with supervisory orders in addition to the declaratory orders and mandamus.

[123] What can be observed from the prayers in the notice of motion is that prayers 1-3 are directed at all respondents except the 2nd, 4th, 5th, and 7th respondents, who are the erstwhile directors of Eskom. Prayers 4-8 are directed at the Eskom respondents,⁵⁰ including a structural interdict in prayers 5 -8, while prayers 9-11 are a structural interdict directed at the State respondents. Prayer 12 is ancillary to the structural interdict.

⁴⁹ *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) paras 105-106.

⁵⁰ Eskom and the 3rd, 6th, 8th to 10th and 20th to 31st respondents, given that the misjoinder point against the 11th to 13th respondents succeeds.

Prayer 13, in relation to the fees payable to Topigs' expert, is directed at Eskom. In contrast, prayer 14, in relation to the costs order, is directed at all the respondents except the 2nd, 4th, 5th and 7th respondents. The declarator sought in prayer 1 of the notice of motion is one declaring that the Eskom respondents are under a constitutional and/or legal and/or statutory duty to ensure that the water downstream from Kusile is not polluted or likely to be polluted by the construction and/or operation and/or management of Kusile and explains the extent of non-pollution that is envisaged by referring to specific manners of pollution that are proscribed by the environmental authorisations and NEMA.

[124] During the exchange with the bench, Eskom's counsel conceded that, given Eskom's admission of causing pollution in water resources downstream of Kusile, there can be no bar to the granting of the declarators sought against the Eskom respondents in prayers 1 and 2. However, counsel for the State respondents submitted that the declarators were inappropriate as Topigs sought to secure 'a pollution free, zero liquid effluent result downstream of Kusile', both NEMA and the NWA authorized activities which, if undertaken, 'will result in pollution, but within acceptable parameters by means of environmental authorisations, environmental management programmes and water use licenses'. While this assertion is true, sight must not be lost of the provisions of s 28(1) of NEMA which stipulates that 'in so far as such harm to the environment is authorised by law or cannot reasonably be avoided or stopped, [the polluter must take reasonable measures] to minimise and rectify such pollution or degradation of the environment'.

[125] It must be borne in mind that clause 3.1.5 of the 2008 EA requires that all polluted water at Kusile be recycled until *all* pollutants are captured as waste for disposal with the ash deposition. Furthermore, the 2015 IEA specifically provided that 'no effluent or wastewater must be discharged into any stormwater drain or furrow, whether by commission or omission'. This requirement is further buttressed in the 2021 Kusile Water Management Action Plan, in which Eskom committed to achieving 'a zero liquid effluent discharge'. It follows that these are the standards, among others, that the State respondents, as regulators, were required to enforce. It can therefore be seen that, in effect, prayer 1 merely echoes what is envisaged in the environmental authorisations applicable to Kusile.

[126] It is trite that a mandamus serves as an appropriate remedy upon the establishment of a breach by a public official of a duty imposed on it by a statute or by the Constitution;⁵¹ it serves as the mechanism that gives legal effect to the declarators. 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 is plain that the declaratory orders and a mandamus compelling the responsible authorities to consider and exercise their statutory enforcement powers is the minimum relief necessary to vindicate legality, without encroaching upon the separation of powers principle by second-guessing executive discretion or assuming a micro-management role. That having been said, there can be no quarrel with the appropriateness of prayer 1 as it refers to water resources downstream from Kusile and the discharge of substances that may 'escape' from Kusile, which is the form of pollution proscribed by the environmental authorisations. Furthermore, in circumstances where Eskom has conceded to an extended period of non-compliance with environmental authorisations and legislative requirements, it stands to reason that the granting of prayer 2 is warranted and necessary.

[127] Prayer 4 takes into account the existing duties under NEMA, the NWA, environmental authorisations and water use licenses and seeks an order mandating the Eskom respondents to take all necessary measures within 30 days to ensure compliance. This reflects a clear invocation of mandamus principles. In the same way, prayer 5 requires the submission of an action plan and program under oath, while prayer 6 mandates that the Eskom respondents take all necessary steps to ensure compliance with the obligations outlined in prayer 5 within 30 days of this order. A court's directive to an organ of state to provide reasons, plans, or reports and the taking of necessary steps to ensure compliance are well-established forms of mandamus.

[128] That being the case, a case has been made out for the granting of a mandamus as sought in prayers 4, 5 and 6. Prayers 7, 8, 9, 10, 11, and 12, however, are on a different footing, as they mandate the submission of rolling reports at short intervals and warrant ongoing court oversight, which is representative of a structural interdict. I will revert to this aspect.

⁵¹ *MEC, Department of Welfare, Eastern Cape v Kate* [2006] ZASCA 49; 2006 (4) SA 478 (SCA); [2006] 2 All SA 455 (SCA) (*Kate*) para 31.

[129] As regards prayer 3, its text seeks a declaration that the respondents have violated their responsibilities by allowing the discharge of pollutants from Kusile, which harms water resources and the environment, poses risks to human health, and constitutes a breach of Topigs's fundamental rights. In my view, the observation indicated in the previous paragraph – that Eskom and the DFFE and DWA, as represented by the respective Director-Generals, have not fulfilled their obligations under the EA, the IEA, NEMA, and NWA – supports a conclusion of unconstitutionality. This is particularly pertinent as NEMA stipulates that its provisions must be interpreted in conjunction with the Constitution. Under the circumstances, a breach of s 24 of the Constitution is self-evident, and a declaration of their conduct as a breach of that fundamental right must follow.⁵²

[130] What is sought in prayer 4 is a mandamus that is consistent with the responsibilities of government officials engaged in the development of listed activities, as well as the duties assigned to government officials, as envisaged in s 28 of NEMA. This also aligns with the obligations of Eskom and the State respondents as set out in the EA. It is common ground that the monitoring responsibilities assigned to officials at the DWS and DFFE were not adequately fulfilled. It follows that granting an order envisaged in prayer 4 can in no way encroach on the principle of separation of powers. I consider the orders set out in prayers 1 to 5 of the Notice of Motion sufficient to address the respondents' non-compliances. Barring prayers 7, 8, 9, 10, 11, and 12, the declaratory relief sought against Eskom and the State respondents, and the attendant mandamus, align with all the obligations set out in the EA, IEA, NEMA, and NWA. Such relief is appropriate relief, and severable from the structural relief, which I consider next.

Structural interdict

[131] Several factors militate against granting a structural interdict in this matter. It must be borne in mind that an updated action plan was issued twice⁵³ after the application was launched. Although the State departments over the years failed to respond to the inadequacies Topigs brought to their attention with the desired alacrity and thus failed to

⁵² Compare *Groundwork Trust and Others*, note 37 above.

⁵³ In addition to the amendments of to the 2023 action plan.

act with the diligence prescribed in NEMA,⁵⁴ the measures taken by State departments since the launching of the application reveal a willingness on the part of State respondents to fulfill their responsibilities without further ineptitude. Given the highly technical nature of the mitigatory measures that warrant consideration and the complexity thereof, I agree with the State respondents' assertion that granting the structural interdict in the manner proposed by Topigs could position the court as a recurring arbiter in a dispute that will necessitate ongoing adjudication of technical issues that transcend the judicial function.

Conclusion

[132] As mentioned in the foregoing paragraphs of this judgment, the high court dismissed Topigs's application on two main grounds: (i) that the third requirement of an interdict had not been proven, and (ii) that granting the relief sought would offend the principle of subsidiarity. My view is that the high court erred in both respects. Against the background of ongoing violations of fundamental rights resulting from Eskom and the relevant State departments' insufficient monitoring and inadequate enforcement of instruments intended to mitigate environmental harm, there is a significant risk of human beings consuming contaminated water.

[133] Furthermore, considering the assertions in the founding affidavit that indicate that Topigs regarded NEMA as the source of its remedy, as well as the express provisions of s 32(1) of NEMA, I am of the view that closing the door of justice in the face of Topigs and the small community it represents by dint of an alleged failure to observe the subsidiarity principle would be tantamount to putting form over substance. In my opinion, the high court erred in concluding that the principle of subsidiarity in our law would be offended if Topigs were to succeed in its case on the basis that it should have invoked the provisions of s 28(12) of NEMA.

[134] I conclude that the high court erred in concluding that the third requirement of an interdict, namely, the absence of an alternative remedy in due course, was not met. In my opinion, Topigs is entitled to relief, albeit not in the exact terms it sought. For all the reasons already set out, it is clear that all three requirements for the granting of an interdict have been satisfied. Thus, a proper case has been made for the granting of a declaratory

⁵⁴ See s 28(4)(c) of NEMA.

order and a mandamus against the Eskom respondents and the State respondents. As I see it, the following orders must be made against the various respondents: (a) a declaration of breach of constitutional and statutory duties by the protagonists; (b) a mandamus against the Eskom respondents, and (c) a non-supervisory compliance order against the relevant State respondents, together with ancillary relief.

Against which parties should the orders be made?

[135] It is plain from the discussion in this judgment that the main protagonists who were obliged to ensure compliance with the EA, IEA, and other applicable prescripts were Eskom, the DFFE, and the DWS. It follows that appropriate relief must be granted against the relevant Directors-General. As regards the Ministers, I first deal with the Minister of Energy, who was cited as the 18th respondent in this matter, who did not participate in the proceedings, and was absolved of liability by the high court. Like the high court, I am satisfied that Topigs did not succeed in showing the Minister's involvement in this case, let alone that he had a legal duty. The high court correctly dismissed the case against him.

[136] While the 14th and 16th respondents, the Minister of Water and Sanitation and the Minister of Environmental Affairs, respectively, serve as the executive custodians of the responsibilities outlined in NEMA and the NWA, it is important to clarify that the actions or omissions of their respective Directors-General, as the functionaries, cannot, without more, be directly attributed to the respective Ministers simply because they are the political heads of the relevant departments. It would be inappropriate to impose obligations on them that are not expressly set out in the NEMA and NWA frameworks.⁵⁵ Moreover, Topigs has not asserted that the officials' non-compliance was specifically brought to the attention of the responsible Ministers. That being the case, I am not inclined to grant a mandamus or structural interdict against them.

[137] As regards the 19th respondent, NERSA, it is an entity operating within the four corners of the NERA. The provisions of that Act do not impose any obligations on NERSA to police compliance with the licensee's license conditions. I agree that Eskom's non-compliance with its EA and/or water use license conditions is unrelated to any license

⁵⁵ See *Kate* note 51 above, para 30.

issued by NERSA. In my view, Topigs failed to show that NERSA was under any legal duty to prevent pollution at Kusile. This means that the high court also correctly held that NERSA was not a necessary party to the litigation and dismissed the application against NERSA. It follows that the appeal directed at that finding of the high court regarding NERSA falls to be likewise dismissed, and no orders will be made against it.

[138] Based on the same reasoning, the high court's orders of dismissal in relation to the 11th to 13th respondents (senior employees) and the 18th respondent (Minister of Energy) are correct. They cannot be tampered with on appeal. The appeal against the orders in respect of those respondents therefore falls to be dismissed. Since the 18th and 19th respondents are organs of the State, the *Biowatch* principle is applicable in respect of the dismissal of the appeal insofar as it relates to them. Topigs must, however, pay the costs in respect of the 11th to 13th respondents. The appellant did not persist with relief against the 2nd, 4th, 5th and 7th respondents, the former directors of Eskom, and no adverse costs order is warranted. Given that the appellant has secured relief, it is entitled, under s 32(3)(b) of NEMA, to the order sought, that Eskom pay the reasonable qualifying fees of its expert witness, Dr Meyer.

[139] In the result, the following order is granted.

Order

1. The appeal succeeds to the extent set out below.
2. The appeal is dismissed insofar as it concerns the 2nd, 4th, 5th, 7th, 11th, 12th, 13th, 14th, 16th, 18th and 19th respondents. In relation to the 2nd, 4th, 5th, 7th, 14th, 16th, 18th and 19th respondents, each party will bear their own costs in the appeal. In relation to the 11th, 12th and 13th respondents, the appellant is ordered to pay the costs in the appeal.
3. The appeal is upheld with costs insofar as it concerns the 1st, 3rd, 6th, 8th, 9th, 10th, 15th, 17th and 20th to 31st respondents; such costs to include those occasioned by the employment of two counsel.
4. The order granted by the high court is set aside and substituted with the following:

‘1 It is declared that the respondents (excluding the 2nd, 4th, 5th, 7th, 11th, 12th, 13th, 14th, 16th, 18th and 19th respondents) are under a legal duty to ensure that the water resources downstream from the Kusile Power Station comply with the environmental authorisation issued in 2008 under the Environment

Conservation Act 73 of 1989, the approved Environmental Management Programme, 2014 as approved under s 24N of National Environmental Management Act 107 of 1998 (NEMA), the Integrated Environmental Authorisation issued in 2015 under the NEMA, the National Environmental Management: Waste Act 59 of 2008 (NEMWA) and the applicable conditions of its Water Use Licences issued under the National Water Act 36 of 1998 (NWA) with references 04/B20F/BCFGIJ/41, 04/B20F/CGI/1836, 06/B11K/G/6921, 06/B20F/CFI/8171 and 06/B20F/CIBG/10792 and to ensure that the water resources downstream from the Kusile Power Station are not polluted by the construction, operation or management of the Kusile Power Station and that no substances are discharged or allowed to escape therefrom so as to pollute or detrimentally affect a water resource, degrade or damage the environment or cause a threat for human life as prescribed in the above instruments.

- 2 It is declared that the respondents (excluding the 2nd, 4th, 5th, 7th, 11th, 12th, 13th, 14th, 16th, 18th and 19th respondents) are in breach of the duties referred to in paragraph 1 above insofar as they have failed to take reasonable legislative and other measures within their respective powers to minimise and rectify pollution by taking measures set out in s 28 of the National Environmental Management Act.
- 3 It is declared that the conduct of the respondents (excluding the 2nd, 4th, 5th, 7th, 11th, 12th, 13th, 14th, 16th, 18th and 19th respondents), in failing to comply with the terms and conditions of the instruments mentioned in paragraph 1 above, is unconstitutional and a breach of the fundamental right enshrined in s 24 of the Constitution.
- 4 The first respondent (Eskom Holdings SOC Limited) and the 3rd, 6th, 8th, 9th, 10th, and 20th to 31st respondents (the current board of Eskom) are directed to take all necessary steps to ensure that the water resources downstream from Kusile Power Station comply with the instruments mentioned in paragraph 1 above. To this end, the respondents named in this paragraph shall, within 30 days of the date of this order, file at this court under oath and provide to the applicant a detailed action plan and programme, which they will implement without delay so as to ensure compliance with the duties

and obligations referred to in paragraph 1, so as to address the following matters:

4.1 the steps to be taken to ensure that its officials, staff, employees, agents, consultants or contractors will give effect to and ensure compliance with the obligations emanating from the action plan and programme as contemplated in paragraph 4.

4.2 which officials will be responsible for taking such steps, as well as reporting thereon; and

4.3 when each of such further steps mentioned in the action plan will be taken.

5 The first respondent (Eskom Holdings SOC Limited) and the 3rd, 6th, 8th, 9th, 10th, and 20th to 31st respondents (the current board of Eskom) are directed and ordered to file a detailed report to this court under oath and to serve it on the applicant within 60 days of the date of this order, specifically dealing with the following:

5.1 the steps taken by them to implement this order;

5.2 where the order is not complied with, a comprehensive explanation proffering reasons for non-compliance and outlining the remedial steps to be taken.

6 The Applicant is granted leave to file further affidavits in response to any affidavit or report from the first respondent (Eskom Holdings SOC Limited) and the 3rd, 6th, 8th, 9th, 10th, and 20th to 31st respondents (the current board of Eskom Holdings SOC Ltd), and is granted leave to approach the court for appropriate relief, including orders and/or directives regarding compliance with the orders contained in paragraphs 1 - 5 above.

7 It is declared that the Director-General of the Department of Water and Sanitation (15th respondent) and the Director-General of the Department of Forestry, Fisheries and the Environment (the 17th respondent) have acted unlawfully by failing to adequately enforce compliance with the applicable environmental and water use regulatory frameworks applicable to the Kusile Power Station.

8 The 15th and 17th respondents are directed to take all steps and compliance measures to ensure compliance with the instruments referred to in paragraph 1 and, within 75 days of the date of this order, to file with the

Registrar of this Court and serve on the applicant an affidavit confirming that they have considered, assessed and determined, in accordance with s 28 of NEMA and sections 19 and 53 of the National Water Act, whether enforcement directives, compliance notices, or remedial measures should be issued against the 1st respondent (Eskom Holdings SOC Limited) arising from the non-compliance declared in paragraphs 1, 2 and 3 above;

- 9 The 15th and 17th respondents are directed to exercise their statutory powers lawfully and without undue delay and may not decline to act on the basis that enforcement processes are discretionary where a failure of compliance has been established.
- 10 The first respondent (Eskom Holdings SOC Limited) is ordered to pay the applicant's costs, including those occasioned by the employment of two counsel.
- 11 The costs of the 11th, 12th and 13th respondents are to be paid by the applicant.
- 12 The first respondent is ordered to pay the reasonable costs of the investigation and preparation of the matter, including the qualifying fees of the applicant's expert witness, Dr Meyer in terms of s 32(3)(b) of NEMA.'

M B Molemela

President of the Supreme Court of Appeal of South Africa

Appearances

For the appellant:

M M Oosthuizen SC, with N Fourie

Instructed by: Bishop Fraser Attorneys, Johannesburg
Claude Reid Attorneys, Bloemfontein

For the 1st to 13th

and 20th to 31st Respondents:

Instructed by:

P Lazarus SC, with B Dhladhla
Edward Nathan Sonnenbergs Inc,
Johannesburg
Lovius Block Attorneys, Bloemfontein

For the 14th to 17th Respondents:

Instructed by:

A Liversage SC
Office of the State Attorney, Pretoria
Office of the State Attorney, Bloemfontein.