

Who is an Organ of State in Terms of the Institution of Legal Proceedings Against Certain Organs of State Act

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Eskom Holdings Soc Ltd v Botha and Others

INTRODUCTION

In *Eskom Holdings SOC Ltd v Botha* (2026) ZASCA 48 (9 April 2026), the Supreme Court of Appeal (“SCA”) considered whether Eskom constitutes an “organ of state” for purposes of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 (the “Act”).

The judgment is significant because it clarifies that, although Eskom may qualify as an organ of state under the broader constitutional definition contained in section 239 of the Constitution of the Republic of South Africa, 1996 (the “Constitution”), it does not fall within the narrower definition contained in the Act.

BACKGROUND

The matter arose from an action instituted against Eskom by several farmers whose properties suffered fire damage as a result of Eskom’s negligence.

Eskom raised a special plea based on the plaintiffs’ failure to serve the required notice in terms of section 3 of the Act prior to instituting proceedings.

The central dispute was therefore whether Eskom fell within the Act’s definition of an “organ of state”.

The High Court dismissed Eskom’s special plea, and the Full Court upheld that decision. Eskom thereafter appealed to the SCA.

ESKOM’S ARGUMENTS

Eskom advanced two principal arguments in support of its contention that it qualified as an organ of state under the Act.

Section 1(1)(c): Functions Performed “in Terms of the Constitution”

First, Eskom argued that it fell within section 1(1)(c) of the Act, which includes, within the definition of an “organ of state”, any institution “exercising a power or performing a function in terms of the Constitution”.

Eskom argued that the phrase “in terms of” should be interpreted broadly to include functions performed “pursuant to” or “in accordance with” legislation and constitutional obligations. It argued that, following its conversion into a public company wholly owned by the state, it assumed public responsibilities aimed at ensuring universal access to electricity and promoting the social and economic welfare of the public.

It argued that the generation and transmission of electricity constitutes national governmental functions and that Eskom operates within the constitutional framework governing organs of state.

Section 1(1)(g): Liability for Eskom’s Debts

Secondly, Eskom argued that it fell within section 1(1)(g) of the Act, which includes “any person for whose debt an organ of state contemplated in paragraphs (a) to (f) is liable”.

Eskom contended that the National Treasury is effectively liable for its debts, particularly in light of the Eskom Debt Relief Act 7 of 2023. Eskom argued that the Treasury’s financial obligations towards Eskom brought it within the scope of section 1(1)(g).

THE SCA’S FINDINGS

A Narrow Interpretation of the Act

The SCA emphasised that the Act does not apply to all constitutional organs of state. The SCA placed considerable weight on the wording of the Act itself, particularly the repeated use of the phrase “certain organs of state” in both the title and preamble.

The SCA held that the Act creates a limited and closed category of institutions entitled to the procedural

protections therein. It was specifically intended to create consistency for pre-existing notice requirements applicable to certain public bodies, rather than create a blanket to all state owned entities.

Eskom Does Not Perform Functions “in Terms of the Constitution”

The SCA accepted that Eskom is an organ of state under the broader constitutional definition in section 239 because it performs public functions in terms of legislation. However, the Court held that this was insufficient for purposes of section 1(1)(c) of the Act.

The Court drew a clear distinction between entities performing functions directly in terms of the Constitution and entities exercising public powers under ordinary legislation.

The SCA found that section 1(1)(c) requires a “direct and immediate connection” between the institution and powers expressly conferred by the Constitution itself. The Court referred to institutions such as the South Africa Police Service whose functions are specifically established in the Constitution, as an example of an entity that falls within the section.

By contrast, Eskom is not mentioned in the Constitution, nor are its powers and functions constitutionally entrenched. Its existence and powers arise from legislation rather than directly from the Constitution. Accordingly, Eskom does not fall within section 1(1)(c) of the Act.

National Treasury Is Not Liable for Eskom’s Debts

In considering section 1(1)(g), the SCA further held that the Eskom Debt Relief Act merely provides a framework for financial assistance to Eskom. It does not transfer Eskom’s liabilities to National Treasury.

The SCA rejected the suggestion that litigants could elect to pursue either Eskom or the National Treasury for damages arising from Eskom’s conduct.

CONCLUSION

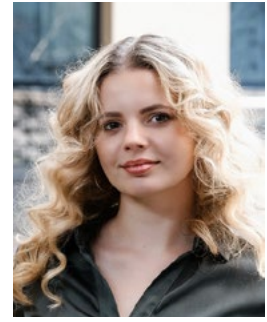
The SCA ultimately held that Eskom is not an organ of state for purposes of the Act. Consequently, litigants are not required to comply with the provisions of the Act before instituting proceedings against Eskom.

The judgment confirms that the Act must be interpreted restrictively and applies only to the specific categories of organs of state identified in the legislation itself.

The judgment is likely to have broader implications for litigation involving state-owned entities, particularly where those entities seek to rely on the procedural protections afforded by the Act.



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