



DISPUTES

Kusile Pollution: SCA Orders Eskom and Regulators to Act

15 October 2026 5 min read

by Jones Antunes, Director (Reviewer), and Tashlin Ramanundh, Candidate Attorney

Environmental authorisations impose strict obligations which continue throughout the life of a project. In instances where unlawful pollution persists, preparing remedial plans does not discharge those obligations, and regulators cannot remain inactive in the face of non-compliance. In *Topigs Norsvin (Pty) Ltd v Eskom Holdings SOC Ltd and Others*, the Supreme Court of Appeal (“**SCA**”) considered whether pollution downstream of the Kusile Power Station (“**Kusile**”) justified court orders compelling Eskom Holdings SOC Ltd (“**Eskom**”) and the responsible authorities to comply with their environmental duties.

Factual Background

Topigs Norsvin SA (Pty) Ltd ("**Topigs**") operates a swine genetics business on a farm adjacent to the Kusile Power Station in Mpumalanga. Eskom is responsible for Kusile's construction and operation. Kusile's activities were subject to environmental authorisations, an approved environmental management programme and water-use licences, which imposed requirements governing pollution prevention, water quality monitoring and the management of contaminated water.

Through its representative on Kusile's Environmental Monitoring Committee, Topigs repeatedly raised concerns about inadequate monitoring and non-compliance. Reports were delayed or deficient and undertakings to address pollution were repeatedly left unfulfilled. Eskom acknowledged that its operations had adversely affected downstream water resources.

Topigs approached the Gauteng Division of the High Court, Pretoria ("**High Court**") for declaratory and mandatory relief, together with a structural interdict requiring continuing judicial supervision and reports every 15 days. The High Court dismissed the application, finding that section 28(12) of the National Environmental Management Act 107 of 1998 ("**NEMA**") provided an alternative remedy which Topigs had not pursued, and that its reliance on constitutional rights offended the principle of subsidiarity. Topigs then appealed to the SCA.

SCA Appeal

The SCA rejected the contention that Topigs had improperly bypassed environmental legislation by relying on section 24 of the Constitution. The principle of subsidiarity generally requires a litigant to rely on legislation enacted to give effect to a constitutional right. However, Topigs' case was substantively founded on NEMA, the National Water Act 36 of 1998 ("**NWA**") and breaches of Eskom's authorisations and licences. Furthermore, section 28(12) of NEMA was not an exclusive remedy. Section 32(1) permits an aggrieved person to seek appropriate relief for breaches or threatened breaches of environmental legislation. The failure expressly to invoke section 28(12) did not defeat proceedings firmly grounded in that statutory framework. The SCA found that Topigs had established a clear right, actual or reasonably apprehended harm, and the absence of another satisfactory remedy.

On the merits, Eskom's persistent non-compliance and the authorities' inadequate enforcement established breaches of statutory duties and section 24 of the Constitution. The SCA held that the enforcement powers in section 28(4) of NEMA could not be treated as discretionary in the face of established non-compliance. The responsible officials were required to act.

The SCA furthermore rejected the suggestion that this was merely a dispute between neighbours. The protection of water resources and the lawful exercise of public power raised matters of public interest, with pollution capable of affecting communities beyond the adjoining properties.

However, the SCA distinguished between compelling compliance and assuming ongoing supervision of technical remedial work. Updated action plans and steps taken by the departments after litigation commenced indicated a willingness to address their responsibilities. The structural interdict sought by Topigs was therefore inappropriate in the circumstances.

This did not justify refusing all relief. The SCA upheld the appeal in part and granted declarations of unlawfulness and constitutional breach, together with mandatory orders and reporting obligations. Eskom and its current board were directed to submit a detailed action plan under oath within 30 days of the order, identifying the necessary steps, responsible officials and timeframes. They were required to implement the plan without delay and report under oath within 60 days of the order on compliance, explaining any failures and proposed remedial steps.

The Directors-General of the Department of Water and Sanitation and the Department of Forestry, Fisheries and the Environment were ordered to take steps to ensure compliance. Furthermore, within 75 days of the order, they had to file affidavits confirming that they had considered and determined whether enforcement directives, compliance notices or remedial measures should be issued against Eskom under NEMA and the NWA. Topigs was granted leave to respond to Eskom's reports and approach the court for further compliance relief.

Topigs did not, however, succeed against every respondent. The SCA upheld the misjoinder of three senior Eskom employees. Section 24N(8) of NEMA, which provides for directors' liability for environmental harm, did not extend to ordinary employees merely because of their seniority. No relief was granted against the cited Ministers or the National Energy Regulator of South

Africa, as the necessary basis for relief against them had not been established. Topigs was ordered to pay the employees' costs. Eskom was ordered to pay Topigs' High Court costs and the reasonable costs of investigating and preparing the matter, including its expert's qualifying fees. The successful portion of the appeal also carried a costs award in Topigs' favour.

Concluding Remarks

The judgment highlights that environmental compliance requires effective implementation and enforcement of the conditions under which a project is authorised. Operators should ensure that remedial plans are implemented and that monitoring complies with the applicable standards. Furthermore, it is apparent that a court may decline continuing judicial supervision while still granting mandatory orders capable of securing compliance. The appropriateness of a structural interdict must therefore be considered separately from the entitlement to other effective relief.



Jones Antunes

Director

[View Profile](#)