THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1049/2024

In the matter between:

ESKOM HOLDINGS SOC LIMITED	**FIRST APPELLANT**
THE INFORMATION OFFICER:	
ESKOM HOLDINGS SOC LIMITED	**SECOND APPELLANT**
and	
AFRIFORUM NPC	**RESPONDENT**

Neutral citation: *Eskom Holdings SOC Limited and Another v AfriForum NPC* (1049/2024) [2026] ZASCA 34 (23 March 2026)

Coram: SMITH and BAARTMAN JJA and MAMOSEBO AJA

Heard: 20 February 2026

Delivered: 23 March 2026

Summary: Administrative law – statutory interpretation – Promotion of Access to Information Act 2 of 2000 – whether the duty on a public body to justify refusal of access to information met – whether disclosure would be likely materially to jeopardise the economic interest and financial welfare of South Africa – conclusions, contradictory and confusing reasons, do not meet the test for refusal – default position public body must provide requested information.

ORDER

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

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

JUDGMENT

Baartman JA (Smith JA and Mamosebo AJA concurring):

Introduction

[1] On 22 March 2024, the Gauteng Division of the High Court, Pretoria per Windell J (the high court), directed the appellant (Eskom) to grant the respondent (AfriForum) access to information it had refused to provide. AfriForum had, in terms of s 78 (read with s 82) of the Promotion of Access to Information Act 2 of 2000 (PAIA), sought access to Eskom's active coal and diesel contracts as well as its contracts to supply electricity to neighbouring countries. Eskom provided some of the information and relied on s 42(3)*(b)* and *(c)* alternatively s 36(1)*(b)* and *(c)*, of PAIA to refuse access to the information that forms the subject of this appeal. The high court found Eskom's grounds for refusal insufficient and without merit and directed it to provide AfriForum access to the outstanding information. The appeal against that finding, is with leave of the high court.

[2] In 2022, South Africa experienced debilitating blackouts due to loadshedding that Eskom imposed nationwide. On 11 June 2022, AfriForum

formally requested access to specified Eskom records.[1] Eskom only granted access to some of the requested information but denied access to its coal and diesel contracts. That denial forms the subject of this appeal. The request was framed as follows:

'5.3.4. All active contracts that Eskom or any one of its subsidiaries has concluded to purchase coal;

5.3.5. All active contracts that Eskom or any one of its subsidiaries has concluded relating to the transportation and distribution of coal;

5.3.6 All active contracts that Eskom or any one of its subsidiaries has concluded to purchase diesel;

5.3.7. All active contracts that Eskom or any one of its subsidiaries has concluded relating to the transportation and distribution of diesel.'

[3] In correspondence dated 12 September 2022, Eskom relied on s 42(3)*(b)* and *(c)* of PAIA to refuse access to the coal and diesel contracts, stating the following:

'5. … you request all active contracts … to purchase coal ... Eskom has considered your request and declines to grant access to the contracts in terms of Section 42 (3) (b) and (c) of the PAIA. However, please see the list of active coal contracts and contract type below…

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[1] Section 18 of PAIA provides that:

'Form of requests

(1) A request for access must be made in the prescribed form to the information officer of the public body concerned at his or her address or fax number or electronic mail address.

(2) The form for a request of access prescribed for the purposes of subsection (1) must at least require the requester concerned-

(a) to provide sufficient particulars to enable an official of the public body concerned to identify-

(i) the record or records requested; and

(ii) the requester;

(b) to indicate which applicable form of access referred to in section 29 (2) is required;

(c) to state whether the record concerned is preferred in a particular language;

(d) to specify a postal address or fax number of the requester in the Republic;

(e) if, in addition to a written reply, the requester wishes to be informed of the decision on the request in any other manner, to state that manner and the necessary particulars to be so informed; and

(f) if the request is made on behalf of a person, to submit proof of the capacity in which the requester is making the request, to the reasonable satisfaction of the information officer.

(3) (a) An individual who because of illiteracy or a disability is unable to make a request for access to a record of a public body in accordance with subsection (1), may make that request orally.

(b) The information officer of that body must reduce that oral request to writing in the prescribed form and provide a copy thereof to the requester.'

6. … you request all active contracts … relating to the transportation and distribution of coal. Eskom has considered your request and declines to provide the contracts in terms of Section 42 (3) (b) and (c) of PAIA …

7. … you request all active contracts … to purchase diesel. Eskom … declines to provide the contracts in terms of Section 42 (3) (b) and (c) of PAIA … .

8. … you request all active contracts … relating to the transportation and distribution of diesel. Note that transportation costs are included in the price of diesel and do not have separate contracts. Access to the contracts is not granted.

…

10. [in respect of the redacted contracts, Eskom explained] Please [note the] redaction is to protect personal information of third parties as well the mandatory protection of commercial information of such third parties …'.

[4] On 28 September 2022, an internal appeal followed, in which AfriForum additionally relied on s 46 of **PAIA**[2] to access the information sought. Thereafter, AfriForum approached the high court. At the time, Eskom had not given notice of its decision in respect of the internal appeal. That failure amounted to a dismissal of the internal appeal.[3]

[5] In the high court, AfriForum alleged that it was entitled to the information based on it being a non-profit company,[4] with its main purpose being the promotion and advocacy of democracy, equality, civil and all constitutional rights. And that its standing as a civil rights organisation has been recognised by South African courts in numerous matters. AfriForum claimed a national membership exceeding 303 000, all of whom are Eskom electricity consumers either directly or through municipalities. Eskom's contractual obligations are of

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[2] Section 46 is quoted in paragraph 26 below.

[3] Section 77(7) 'If the relevant authority fails to give notice of the decision on an internal appeal to the appellant within the period contemplated in subsection (3), that authority is, for the purpose of this Act, regarded as having dismissed the internal appeal.'

[4] Companies Act 71 of 2008.

the utmost relevance and in the public interest because it is a state entity with a monopoly in the supply of electricity.

[6] Allegations of corruption and state capture have been levelled at Eskom in reports by the Judicial Commission of Inquiry into the Allegations of State Capture[5] (the Zondo Commission). In addition, AfriForum alleged that the information it sought was of high public interest and not commercially confidential. AfriForum relied on s 11 of PAIA for these assertions. [6]

[7] AfriForum from the information Eskom had provided, calculated that Eskom had, in the period 2018 to 2022, sold, supplied, or distributed 60 567 gigawatt hours of electricity to neighbouring countries. In that period, South Africa experienced a critical shortage of electricity, which was sold at exorbitant prices. Therefore, AfriForum asserted that given the dire electricity shortage and high costs thereof in South Africa, the public had a right to know at what price and on what conditions Eskom was supplying electricity to neighbouring countries. In an open tender, repeated in this Court, Eskom has made its contracts with neighbouring countries available. Therefore, that request requires no further consideration in this appeal.

[8] In correspondence dated 18 November 2022, Eskom amplified its reasons provided in its 12 September 2022 letter, for refusing access to the outstanding information. I deal with those reasons below.

[9] The high court found that Eskom's initial and additional reasons for refusing access to the required information 'was insufficient and without any merit'. In paragraph 22 of its judgment the high court held:

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[5] Proclamation 3 of 2018 GN 41403 *GG*, 25 January 2018.
[6] Section 11 is quoted in paragraph 15 below.

'Section 42(3)(b) of PAIA refers to "financial, commercial, scientific or technical information…" the disclosure of which "would likely to cause harm to the commercial or financial interests of the State or a public body". Regarding the requirement that the disclosure is *likely* to cause harm to the commercial or financial interests of a public body, Eskom failed to provide any information at all. In *M&G Media Ltd and Others v 2010 FIFA World Cup Organising Committee South Africa Ltd and Another*[7] the court remarked that "… a greater degree of probability is required where the ground of refusal uses the language of "likely to" rather than "reasonably be expected to". A body invoking a "likely to" ground of refusal must therefore show "based on real and substantial grounds, that there is a strong probability that a harmful consequence will occur". Eskom failed to meet this requirement.'

[10] In granting leave to appeal, the high court accepted that the correct test was explained by this Court in *Transnet Ltd and Another v SA Metal Machinery Company (Pty) Ltd* (*Transnet*).[8] This Court, with reference to s 36(1)*(b)* and *(c)* of PAIA, held that the distinction between 'would be likely to cause harm' and 'could reasonably be expected' is not the degree of probability but the degree of expectation. The high court accepted that it had applied a more stringent test and on that narrow basis granted leave to appeal to this Court.

[11] The issues in this appeal are therefore as follows:

(a) The correct test to be applied to s 42(3)*(b)* of PAIA;

(b) Whether Eskom's refusal to grant access to the required information is justified – applying the correct test.

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

Discussion

[7] *M&G Media Ltd and Others v 2010 Fifa World Cup Organising Committee South Africa Ltd and Another* 2011 (5) SA 163 (GSJ); [2010] ZAGPJHC 43 para 403. See also I Currie et al *The Commentary on the Promotion of Access to Information Act* (2002) at 103.

[8] *Transnet Ltd and Another v SA Metal Machinery Company (Pty) Ltd* 2006 (6) SA 285 (SCA); [2006] 1 All SA 352 (SCA); 2006 (4) BCLR 473 (SCA) para 42 (*Transnet*).

[12] Eskom has persisted that, in terms of s 42(3)*(b)* and *(c)*, additionally s 36(1)*(b)* and *(c)* of PAIA, it was justified in refusing access to its coal and diesel contracts on the basis that such disclosure would likely cause harm to the commercial or financial interests of the State and third parties.

[13] Eskom is a wholly state-owned public entity.[9] The right to access information held by a public body is entrenched in the Constitution. Section 32(1) provides that:

'**Access to information**

(1) Everyone has the right of access to –

(a) any information held by the state; and

(b) any information that is held by another person and that is required for the exercise or protection of any rights.

(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.'

[14] PAIA was enacted to give effect to s 32(1) of the Constitution. Sections 42(3)*(b)* and *(c)* of PAIA provides that the information officer of a Public Body *may* refuse a request for access to a record of the body if the record: (own emphasis)

'*(b)* contains financial, commercial, scientific or technical information, other than trade secrets, the disclosure of which would be likely to cause harm to the commercial or financial interests of the State or a public body;

(c) contains information, the disclosure of which could reasonably be expected-

(i) to put a public body at a disadvantage in contractual or other negotiations; or

(ii) to prejudice a public body in commercial competition…'.

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[9] Schedule 2 of the Public Finance Management Act 1 of 1999. Eskom is an organ of state in terms of s 239*(b)*(ii) of the Constitution.

[15] On 11 July 2022, AfriForum requested the information, referred to above, in terms of s 18 of PAIA. The application was statutorily compliant. That triggered the provisions of s 11, which provides that:

'**Right of access to records of public bodies**

(1) A requester must be given access to a record of a public body if-

(a) that requester complies with all the procedural requirements in this Act relating to a request for access to that record; and

(b) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part.'

[16] Eskom relied, for its refusal to grant access to its coal and diesel contracts, on s 42(3)*(b) and (c).*[10] Initially, Eskom refused access to the requested information with reference only to certain sections of PAIA without providing any facts to justify invoking those sections. The high court correctly held that Eskom was obliged to provide adequate reasons for its refusal with reference to the specific provisions of PAIA relied upon.[11] In correspondence dated 18 November 2022, Eskom provided reasons for the refusal with reference to the relevant sections. However, that correspondence did not reach AfriForum before it launched this application. Therefore, AfriForum dealt with the further reasons in its reply instead of in the founding papers.

[17] In the letter of 18 November 2022, Eskom advanced the following reasons for its persistent refusal to allow access to its coal and diesel contracts: (a) Eskom spends approximately R70 billion annually on coal purchases – its largest purchase commodity – and transport. Coal contracts are commercially sensitive and disclosing the information would compromise Eskom in future negotiations.; (b) disclosure of coal contract prices would enable existing and prospective suppliers to negotiate higher prices. Those suppliers who are charging less would

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[10] Section 42(3)*(b)* and *(c)* is quoted in paragraph 14 above.
[11] Section 25(3)*(a)* of PAIA.

increase their prices, '[c]consequently, the price payable for coal by Eskom would drastically increase'; (c) this would cause harm to Eskom's commercial and financial interest; (d) 'it is highly likely that all potential coal suppliers and transporters…[would] position themselves to supply or transport coal for Eskom at inflated costs or at terms and conditions not favourable to Eskom'; and (e) suppliers, major and minor, 'can be reasonably expected' to collude.

[18] In addition, there was a reasonable expectation that suppliers would take advantage of the energy shortage created by the Russia-Ukraine war. Eskom alleged that the above was the prejudice subsections 42(3)*(c)*(i) and (ii) envisaged and that it would cause the 'commercial or financial [harm]' as envisaged in s 42(3)*(b)*. Eskom further expressed the intention to rely on s 36(1)*(b)* and s 36(1)*(c)*(i) and (ii) of PAIA, as coal supply and transportation contracts contain confidential and commercially sensitive clauses. Its disclosure would also cause harm to third parties. That section provides as follows:

'**Mandatory protection of commercial information of third party**

(1) Subject to subsection (2), the information officer of a public body must refuse a request for access to a record of the body if the record contains-

(a) …

(b) financial, commercial, scientific or technical information, other than trade secrets, of a third party, the disclosure of which would be likely to cause harm to the commercial or financial interests of that third party; or

(c) information supplied in confidence by a third party the disclosure of which could reasonably be expected –

(i) to put that third party at a disadvantage in contractual or other negotiations; or

(ii) to prejudice that third party in commercial competition.'

[19] In reply, AfriForum countered as follows: (a) the World Bank routinely publishes data relating to coal and other commodities widely. Thus, there can be no confidentiality regarding coal prices; (b) allegations of rampant fraud and

maladministration have been levelled at Eskom from the Zondo Commission report, the independent auditor's report and other sources. Therefore, it was in the public interest to disclose the information; (c) Eskom procures coal through a public tender process, in which evaluation committees determine cost-effectiveness in a competitive process; (d) unsuccessful bidders are entitled to access the contract awarded; (e) it is apparent, from the list of entities with whom Eskom has active coal contracts and the proximity of Eskom power stations to mines that coal is transported by road. Considering Eskom's precarious financial position, disclosure of amounts spent on these contracts are in the public interest which 'outweighs any harm or potential harm by virtue of section 46*(b)* of PAIA'. AfriForum, for these reasons among others, alleged that it was in the public interest to grant access to the requested records. It also asserts that Eskom has not satisfied the requirements for refusal to grant access.

[20] As indicated above, this Court is called upon to determine the correct test to apply when considering whether Eskom's reasons show that disclosure 'would likely cause harm, as contemplated in s 42 (3)*(b)*, or could reasonably be expected to disadvantage Eskom in negotiations, as contemplated in s 42 (3)*(c)*'. In *Transnet,* this Court, with reference to s 36(1)*(b)* and *(c)* of PAIA, held that the distinction between 'would be likely to cause harm' and 'could reasonably be expected' is not the degree of probability but the degree of expectation. This Court held that:

'It follows that the difference between *(b)* and *(c)* of s 36(1) is to be measured not by degrees of probability. Both involve a result that is probable, objectively considered. The difference, in my view, is to be measured rather by degrees of expectation. In *(b)*, that which is likely is something which is indeed expected. This necessarily includes, at least that which *would* reasonably be expected. By contrast, *(c)* speaks of that which "could reasonably be expected".

The results specified in *(c)* are therefore consequences (i) that could be expected as probable (ii) if reasonable grounds exist for that expectation.'[12]

[21] The two sections, 36 and 42, are similar in context and text. Therefore, the correct test to be applied in this instance is the *Transnet* test. In applying that test to these facts, I find that Eskom has not dealt with the common-cause fact that the price of coal is a matter of public knowledge for the reasons dealt with above, and further that it procures coal through a competitive and transparent tender process. The relevant Bid Evaluation Committee is obliged to enter into commercially sensible contracts. The contract entered into with a successful bidder is often the subject of litigation in review proceedings and so becomes public knowledge. As the high court correctly observed, 'once a contract is awarded the confidentiality clause offers no further protection from disclosure as regards the tender price'. Eskom's reasoning is obviously contradictory, considering that bidders have historically known the existing price of coal before bidding. It is therefore not reasonable to apprehend collusion among competitors who have not done so in the past. Disclosure, in those circumstances, would not affect Eskom's negotiation position negatively.

[22] With regard to the interest of third parties, Eskom made general allegations that they would be disadvantaged and suffer economic harm. In the circumstances of this matter, the alleged harm is not apparent from the papers and appears illusionary considering the public nature of the tender process. PAIA makes provision for an unsuccessful bidder to access the contract, either at the conclusion of a bidding process or prior to award of the contract to the successful bidder. In this way, contract terms, such as pricing, are disclosed to third parties. Eskom does not clarify what is commercially sensitive about these contracts. In

[12] *Transnet* para 42.

the circumstances of this matter, applying the test set out above, Eskom has not satisfied the burden upon it to justify refusing access to the information sought.

[23] Eskom provided the same grounds for refusing access to its diesel contracts as for its coal supply contracts. Eskom relies on diesel to generate electricity; the expenditure on diesel is therefore substantial. Diesel, like coal, is procured through an open competitive procurement process. Diesel prices are regularly published as an excerpt from the Globalpetrolprices.com website, annexed to AfriForum's papers show. At the time, the price of diesel was R22.21 per litre in South Africa, according to the excerpt. That price is used to measure pricing in supply agreements. In those circumstances, there can be no commercial sensitivity to the disclosure of the price at which Eskom purchased diesel. Third parties can also not suffer any prejudice as they engaged in a public tender process with its disclosure obligations.

[24] Therefore, no issues of commercial sensitivity arise from the disclosure of the diesel contracts. Disclosure would also not create an opportunity for collusion as the average diesel price was public knowledge throughout. The transport costs are not dealt with separately. However, as the average diesel price is common knowledge, disclosure would enable a determination of whether Eskom was paying market-related transport costs. As was the case in respect of the request for access to the coal contracts, Eskom failed to provide any factual basis for the alleged commercial sensitivity regarding transport costs and the resultant harm anticipated.

[25] The public, in whose interest Eskom concludes these contracts, has a right to access them. That is the default position. The reasons advanced to deny access do not meet the required test. It follows that I cannot fault the high court's finding that there is nothing to support the allegation that the agreements are confidential,

contain information that is commercially sensitive, and would disadvantage Eskom or third parties in contractual negotiations. In the circumstances of this matter, the alleged harm is not a probable or reasonable apprehension and so the coal and diesel contracts should be disclosed. This is so because Eskom did not meet the standard for refusal in terms of s 36(2)*(a)*, *(b)* and *(c)* as well as s 42(3) *(b)* and *(c)*.

[26] As indicated above, AfriForum also relied on s 46 for access to the information sought. The section provides as follows:

'**Mandatory disclosure in public interest**

Despite any other provision of this Chapter, the information officer of a public body must grant a request for access to a record of the body contemplated in section 34 (1), 36 (1), 37 (1) *(a)* or *(b)*, 38 (a) or (b), 39 (1) (a) or (b), 40, 41(1) *(a)* or *(b)*, 42 (1) or (3), 43 (1) or (2), 44 (1) or (2) or 45, if-

(a) the disclosure of the record would reveal evidence of –

(i) a substantial contravention of, or failure to comply with, the law; or

(ii) an imminent and serious public safety or environmental risk; and

(b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question.'

[27] The finding that Eskom has not met the standard for refusal in terms of subsections 36(2)*(a)*, *(b)* and *(c)* as well as subsections 42(3)*(b)* and *(c)*, obviate the need to determine whether the requirements for s 46 have been met. This is so as the default position is that a public body must disclose the requested documents, in terms of s 11, as discussed above. I conclude with the observation that compliance with s 46 requires evidence specific to the contracts sought to be accessed. General allegations of corruption at a public entity are not sufficient.

[28] For the reasons given, I am persuaded that the high court reached the correct conclusion, despite applying the incorrect test. I therefore make the following order:

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

E BAARTMAN
JUDGE OF APPEAL

Appearances:

For appellants:	N H Maenetje SC and H Rajah
Instructed by:	Mchunu Attorneys, Johannesburg
	Hill, McHardy & Herbst Attorneys, Bloemfontein
For first respondent:	A T Lamey and C Van Schalkwyk
Instructed by:	Hurter and Spies Inc, Pretoria
	Hendre Conradie Inc, Bloemfontein.