REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1)	**NOT** REPORTABLE
(2)	**NOT** OF INTEREST TO OTHER JUDGES

CASE NO: 2024-063165
DATE: 18 February 2026

In the matter between:

SIBANYE GOLD (PTY) LIMITED	First Applicant
SIBANYE SOLAR PV (PTY) LIMITED	Second Applicant
SIBANYE STILLWATER LIMITED	Third Applicant

and

ESKOM HOLDINGS SOC LTD	First Respondent
THE NATIONAL ENERGY REGULATOR OF SOUTH AFRICA ('NERSA')	Second Respondent
FAR WEST RAND DOLOMITIC WATER ASSOCIATION	Third Respondent

Neutral Citation: *Sibanye Gold and Others v Eskom Holdings SOC and Others (2024-063165)* **[2025] ZAGPJHC ---** (18 February 2026)

Coram: Adams J

Heard: 9 and 10 October 2025

Delivered: 18 February 2026 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 14:00 on 18 February 2026.

Summary: Administrative law – judicial review – review application based on the Promotion of Administrative Justice Act 3 of 2000 (PAJA) – application for wayleave to enter and to work on Eskom's servitude – administrative action constituted by Eskom's refusal to grant applicants' wayleave application – applicants contended that the decision to refuse the wayleave application was invalid and unlawful and stands to be reviewed and set aside –

The court held that Eskom's refusal was based on ulterior purposes and motives and was in bad faith – the refusal was based on material errors of law – Eskom misinterpreted and misapplied its own internal policies governing wayleaves – Eskom based its refusal on alleged operational concerns and safety risks, which remain entirely unsubstantiated and bears no relation to the information before it – Eskom's attempt to use the wayleave process to impose a 'wheeling' alternative was further irrational, unreasonable and unlawful –

Remedy – just and equitable – substitution order to be granted as being just and equitable – in conducting the enquiry there are certain factors that should inevitably hold greater weight – the first is whether a court is in as good a position as the administrator to make the decision – the second is whether the decision of an administrator is a foregone conclusion – such an order warranted *in casu* –

Application succeeds – decision declared to be invalid and unlawful – reviewed and set aside – substitution order granted.

ORDER

(1) The first respondent's decision to refuse the applicants' wayleave application with reference WS171/2023 (‘the impugned decision’) is declared to be unlawful and constitutionally invalid.

(2) The impugned decision be and is hereby reviewed and set aside.

(3) The impugned decision is substituted with a decision to grant the applicants' wayleave application with reference WS171/2023.

(4) The first respondent shall pay the applicants’ costs of this opposed application, such costs to include the costs consequent upon the utilisation of two Counsel, one being Senior Counsel (where so employed), on scale ‘C’ of the applicable tariff provided for in the Uniform Rules of Court.

JUDGMENT

Adams J:

[1]. In this opposed application, which came before me as a Special Motion on 9 and 10 October 2025, the first, second and third applicants, whom I shall refer to collectively as ‘Sibanye’, apply for an order reviewing and setting aside the decision by the first respondent (‘Eskom’) to refuse their application for a wayleave (‘the impugned decision’). The wayleave application of 10 January 2023 was under reference WS171/2023 and, in a nutshell, was for leave to develop a 50-megawatt (MW) ‘behind-the-meter’[1] solar photovoltaic (PV) power plant[2] in western Gauteng, which will supply electricity to Sibanye’s Kloof Mine.

[1] ‘Behind-the-meter’ refers to an energy system where energy is produced for the customer's own consumption and reduces the electricity needed from the grid while also reducing the consumer's electricity bill.

[2] A solar photovoltaic power station is a facility that converts sunlight directly into electricity using photovoltaic cells (PV cells). PV cells are made of semiconductor materials (like silicon) that absorb

The intention is to connect this solar plant to a section of the Kloof substation – owned and operated by Sibanye, by a six-kilometre power line (the facility line), which will cross Eskom's 132 kilovolt (KV) transmission lines.

[2]. Eskom's aforesaid 132 KV transmission lines run on and across land owned by the first applicant and the third respondent, Far West Rand Dolomitic Water Association, of which the first applicant is a majority member. Eskom holds a servitude over the said property.

[3]. Because the facility line proposed by Sibanye was to cross Eskom's servitude and its 132 KV transmission lines, Sibanye was required by law to apply for a wayleave to enter and conduct work within Eskom's servitude. The decision to grant or refuse the wayleave applied for, so Sibanye contends, is an administrative decision, reviewable under and in terms of s 6 of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'), as well as on the basis of the principle of legality. There is, in my view, no dispute about the foregoing.

[4]. As I have indicated above, the wayleave application was submitted during January 2023. However, on 4 December 2023, Eskom rejected the application for the wayleave and furnished its reasons for the decision on 13 December 2023.

[5]. Sibanye contends that Eskom's decision falls to be reviewed and set aside and that the reasons for its decision are flawed. Hence its application for the judicial review of the decision by Eskom, which application is brought on five primary grounds, namely: (a) Eskom's refusal was based on ulterior purposes and motives and was in bad faith; (b) the refusal was based on material errors of law, in which Eskom has misinterpreted and misapplied the licensing exemption regime under Schedule 2 of the Electricity Regulation Act 4 of 2006 (ERA); (c) Eskom misinterpreted and misapplied its own internal policies

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sunlight and generate electricity through the photovoltaic effect. PV cells are grouped together into panels or modules to increase the amount of electricity generated. These panels are mounted on racks or structures to optimize their exposure to sunlight.

governing wayleaves; (d) Eskom based its refusal on alleged operational concerns and safety risks, which remain entirely unsubstantiated and bears no relation to the information before it: and (e) Eskom's attempt to use the wayleave process to impose a 'wheeling' alternative was further irrational, unreasonable and unlawful.

[6]. The applicants' application is primarily based on the provisions of s 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and it may be apposite, with a view to place in context the issues implicated in this application, to cite the relevant portion of the said provision in full. It reads as follows: -

'**6 Judicial review of administrative action**

(1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.

(2) A court or tribunal has the power to judicially review an administrative action if –

(a) the administrator who took it –

(i) was not authorised to do so by the empowering provision;

(ii) acted under a delegation of power which was not authorised by the empowering provision; or

(iii) was biased or reasonably suspected of bias;

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(c) the action was procedurally unfair;

(d) the action was materially influenced by an error of law;

(e) the action was taken-

(i) for a reason not authorised by the empowering provision;

(ii) for an ulterior purpose or motive;

(iii) because irrelevant considerations were taken into account or relevant considerations were not considered;

(iv) because of the unauthorised or unwarranted dictates of another person or body;

(v) in bad faith; or

(vi) arbitrarily or capriciously;

(f) the action itself –

(i) contravenes a law or is not authorised by the empowering provision; or

(ii) is not rationally connected to –

(aa) the purpose for which it was taken;

(bb) the purpose of the empowering provision;

(cc) the information before the administrator; or

(dd) the reasons given for it by the administrator;

(g) the action concerned consists of a failure to take a decision;

(h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or

(i) the action is otherwise unconstitutional or unlawful.

(3) … … …’.

[7]. Therefore, in issue in this judicial review application is whether valid grounds exist for the review and the setting aside of the decision by Eskom. And, if so, what just and equitable remedy should be granted.

[8]. The issues in this matter are to be decided against the factual backdrop of the matter. In that regard, most if not all of the facts in the matter as set out in the paragraphs which follow are by and large common cause.

[9]. Moreover, the South African Government’s official policy in regard to renewable energy is aimed at enhancing the country’s power generation capacity. Its main objective is to secure private sector investment for the development of new electricity generation capacity, thereby giving effect to the policy decision to diversify South Africa’s energy mix which was articulated in the 1998 White Paper on Energy Policy of South Africa. The policy has also been designed to contribute to broader national developmental objectives such as job creation, social upliftment and economic transformation primarily through broadening of economic ownership.

[10]. In June 2021, the government announced sweeping reforms to facilitate the rapid rollout of private electricity projects. These reforms involved substantial amendments to Schedule 2 of the Electricity Regulation Act 4 of

2006 which have expanded the exemptions from licensing requirements under the Act. Qualifying projects are no longer required to hold electricity generation and distribution licenses issued by the National Energy Regulator of South Africa (NERSA).

[11]. In announcing these reforms, the President of the country stressed that this was a critical intervention to address loadshedding and the stagnant economy. '[R]esolving the energy supply shortfall and reducing the risk of load shedding', he stressed, 'is our single most important objective in reviving economic growth'. The President emphasised that the new exemption regime 'will be crucial in developing a response to the energy crisis that is ambitious enough, bold enough and urgent enough'.[3]

[12]. This is therefore the context in which the issues in this matter are to be decided upon. In that regard, I interpose here to mention that, in my view, if regard is had to this context and the official policy adopted by the South African government, the Eskom's approach to Sibanye's wayleave application is to say the least surprising.

[13]. Sibanye has secured all necessary regulatory approvals and authorisations for this project; the finances are in place and contractors have been appointed. The only outstanding approval is the wayleave.

[14]. Sibanye's planned solar project falls squarely under the new Schedule 2 exemption regime under the ERA. The project is exempt from the licensing requirements and was duly registered with NERSA in 2022.

[15]. This project will reduce Sibanye's burden on the national grid, freeing up energy for other consumers, while also contributing to Sibanye's decarbonisation efforts. It will involve a substantial investment of over R1 billion, which is anticipated to generate 400 jobs. Once operational, it will sustain

[3] Announcement by President Cyril Ramaphosa on Amendment to Schedule Two of The Electricity Regulation Act – Thursday, 10 June 2021.

Sibanye's gold mining operations and the associated 5000 jobs that depend on these operations.

[16]. In recognition of the strategic and economic importance of this project, the government has designated it as a 'Strategic Integrated Project' (SIP) in terms of the Infrastructure Development Act 23 of 2014 (Act). The purpose of that designation is to expedite its development, giving it priority in all planning, approval and implementation procedures, on strict timelines prescribed in the Act.

[17]. In May 2022, Eskom issued a budget quote, reflecting Sibanye's proposed technical solution of the solar plant connecting at the Kloof substation through the facility line. Sibanye accepted this budget quote in May 2023 and paid the connection charge guarantee of over R15 million, excluding VAT. Meanwhile, Sibanye was engaging Eskom on its application for a wayleave.

[18]. The crossing of Eskom lines is ubiquitous, including municipal, telecoms and Transnet lines and other power projects. Sibanye's consulting engineers had obtained similar approvals to cross Eskom lines before.

[19]. Eskom's internal policy governing wayleaves, titled 'Standard for the approval of work where Eskom's rights may be encroached upon and/or services/assets placed at risk' (the Eskom wayleaves policy), provides a speedy process for resolving these applications. This policy requires an initial site inspection followed by the conclusion of a standard form agreement regulating the work and any resulting liability. The policy stipulates that this process should take no more than fourteen days to reach completion.

[20]. On 28 February 2023, Eskom and Sibanye representatives conducted an initial site inspection to assess the planned crossing of power lines and the point of connection at the Kloof substation. Sibanye's representative prepared a risk identification form, including a detailed technical report by Sibanye's consulting engineers, Zutari (Pty) Ltd, setting out a proposed technical solution for the

cable crossing, compliant with the relevant South African National Standards (SANS).

[21]. Eskom’s technical team did not raise any concerns during the site inspection. During October 2023, an Eskom representative, Mr Moodley, indicated for the first time that Eskom would only permit the crossing if the facility line used underground cables and not an overhead line. Although this solution was less desirable (because it was more expensive and underground cables were at risk of cable theft), Sibanye accepted this as a compromise.

[22]. On 4 October 2023, almost nine months after the wayleave application was lodged, the application came before Eskom's Provincial Executive Committee (PEXCO) for the Gauteng Cluster. The PEXCO supported the wayleave application, on the condition that it would involve the use of underground cables at the crossing point. Eskom's Distribution Licence and Regulatory Committee (DLRC) reached the same conclusion at its meeting held on 20 October 2023.

[23]. Despite this internal support, Eskom’s Ad Hoc Distribution Executive Committee (DEXCO) rejected the application at its meeting held on 16 November 2023. The minutes of that meeting reflect that this decision was based primarily on the DEXCO’s belief that ‘it was not within the applicants rights’ to build the facility line ‘from a regulatory point of view’, despite NERSA’s repeated confirmation that the project was exempted from licensing requirements. The minutes do not record any specific concerns over the technical feasibility of using underground cables to cross the Eskom lines or the proposed technical solution that had been presented to Eskom.

[24]. The matter was referred back to the Gauteng PEXCO, which met on 28 November 2023. The minutes recorded that PEXCO was requested to change its initial decision, which it accordingly did.

[25]. Eskom communicated its refusal of the wayleave in a letter dated 4 December 2023, which was delivered the next day, being 5 December 2023. Following further engagements, Eskom set out its reasons for this decision in a further letter dated 13 December 2023. In its decision and reasons, Eskom presented a new alternative proposal, entailing the connection of the solar plant to Eskom's Libanon substation. This would require 'wheeling' of power to the Kloof substation through Eskom's distribution network. At no time during the preceding twelve months had Eskom tabled this proposal.

[26]. Eskom's proposal came with a hefty 30% additional wheeling cost, over and above the other network costs, which Eskom refused to waive or reduce. Sibanye was unable to accept this proposal, as this tariff would have considerably inflated the costs, making the solar project commercially unfeasible.

[27]. In its 13 December 2023 reasons letter, Eskom offered four reasons for refusing the wayleave, namely: (a) Alleged non-compliance with the exemption requirements under Schedule 2 of the ERA; (b) Eskom's preferred alternative of a connection to the Libanon substation and the conclusion of a wheeling agreement; (c) The need for 'orderly development of electricity infrastructure in South Africa'; and (d) Unspecified 'inherent operational risks'.

[28]. In its answering affidavit, Eskom has sought to add new reasons to support its decision, which were never communicated to Sibanye nor are they reflected in the Rule 53 record of the decision. These new reasons include: (a) The alleged public interest in refusing the wayleave; (b) Reliance on a previously undisclosed internal policy on the 'Management of Eskom's Distribution Areas of Supply and Standalone Customers', identification number 240-165509-996; and (c) The new and unspecified allegation that the servitude 'was earmarked for projects before the applicant applied for it'.

[29]. With that factual background and context in mind, I now turn to deal with the grounds of review raised by Sibanye in relation to the impugned decision.

[30]. Sibanye contends that Eskom's refusal of the wayleave was based on an ulterior and improper purpose in that its refusal was motivated by the desire to 'retain' Sibanye as a customer and to protect its 'stream of revenue' as it projected that the 'revenue loss due to the PV generator injection will be a reduction of approximately R57 156 000 per annum on average based on estimated reduction in consumption'. Eskom says so in as many words in its answering affidavit.

[31]. Sibanye therefore contends that Eskom's refusal of the wayleave was no mere decision to refuse the crossing of power lines. Instead, it was intended to block the renewable energy project in its entirety, to prevent Sibanye from reducing its reliance on Eskom's electricity.

[32]. I find myself in agreement with this submission on behalf of Sibanye. This is, as contended by Sibanye, the very definition of an ulterior purpose or motive, in that Eskom, as the decision-maker 'uses a power … for a purpose other than that for which it has been given'. The simple point is that a wayleave is a purely administrative permission to allow access to Eskom's servitudes in a safe and orderly manner, as is confirmed by Eskom's wayleaves policy. Nothing in that policy confers on Eskom the right to use wayleaves to block the development of renewable energy projects or to use this as leverage to impose Eskom's preferred commercial terms.

[33]. Moreover, Eskom's ulterior motives are also in direct conflict with the purpose of the exemption regime under Schedule 2 of the ERA and the declaration of this project as a SIP under the Act. Eskom's internal processes could not be used to subvert these statutory instruments, which have the clear purpose of expediting the rollout of private energy projects such as this.

[34]. I therefore accept Sibanye's first ground of review.

[35]. What is more is that Eskom's motives are also irrational, unreasonable and involved irrelevant considerations. It overlooks the fact that Sibanye will

remain a major customer of Eskom with or without the solar project. The 50MW of power will merely reduce Sibanye's reliance on Eskom's supply to the Kloof Mine, freeing up capacity from the national grid, reducing the burden on Eskom and the risk of national load shedding. In any event and contrary to the picture painted by Eskom in its answering affidavit, Eskom historically could not meet the applicants' energy needs and as a result the applicants' suffered significant energy deficits through operational disruptions, production losses and increased risk.

[36]. I therefore conclude that Eskom's disclosure of improper and ulterior motives provides sufficient grounds for reviewing and setting aside the decision, on all of the grounds pleaded in the founding papers, including sections 6(2)(e)(ii), 6(2)(e)(iii), 6(2)(e)(v), 6(2)(e)(vi) and 6(2)(i) of PAJA, alternatively the principle of legality.

[37]. Secondly, it is contended on behalf of Sibanye that Eskom's decision is also vitiated by material errors of law.

[38]. In its 13 December 2023 reasons letter, Eskom based its refusal of the wayleave on the belief that the facility line was not compliant with Schedule 2 of the ERA and the Exemption Notice issued by the Minister pursuant to the said Schedule. Eskom interpreted schedule 2 of the Act as conferring on Eskom a 'first right of refusal', allowing it to dictate how a private energy project is to connect to its grid.

[39]. This interpretation of schedule 2 of the Act is, in my view, clearly misdirected if regard is had to the express wording of clauses 3.1 and 3.2. Clause 3 provides as follows:

'3 **Activities exempt from licensing, but which must comply with the Code and must be registered with the Regulator**

The following activities are exempt from the requirement to apply for and hold a licence under the Act, but these activities, excluding activities listed in 2 above, must comply with the Code and must be registered with the Regulator –

3.1 The operation of any generation Facility with or without energy storage, irrespective of size or capacity, with a Point of Connection on the transmission or distribution power system, in circumstances where –

3.1.1 the generation Facility is operated to supply electricity to one or more customers by Wheeling and the generator has entered into a Connection agreement with the holder of the transmission or distribution licence in respect of the power system over which the electricity is to be wheeled; and

3.1.2 the generation Facility has a Point of Connection but does not export nor import any electricity onto or from the transmission or distribution power system.

3.2 The operation of a distribution Facility up to the Point of Connection that connects the generation Facility where there is conveyancing of electricity through the transmission or distribution power system.

3.3 The operation of a generation Facility with or without energy storage for Demonstration purposes only, whether or not the Facility is connected to a transmission or distribution power system and where the Facility will be in operation for not more than 36 months.

3.4 The continued operation of an existing generation Facility with or without energy storage which, immediately prior to the date of commencement of this Schedule, was exempt from the requirement to apply for and hold a licence under the Act, must register with the Regulator within six months of commencement of this Schedule subject to the generation Facility having complied with the Code and being connected to the transmission or distribution power system.

3.5 The selling of electricity by a Reseller in circumstances where-

3.5.1 the price charged by the Reseller to customers does not exceed the tariff that would have been charged to such customers for the electricity if it had been purchased from the Distributor for the area in which the electricity is supplied to the customer, and

3.5.2 the Reseller has entered into either a service delivery agreement in accordance with the Municipal Systems Act (where the licensed Distributor is a municipality) or a similar agreement with the Distributor (where the licensed Distributor is not a municipality) that regulates the relationship between the Reseller and the Distributor and the obligations of the Reseller in respect of the quality of supply to customers, and the Regulator has ratified the general terms and conditions of such service delivery agreement.

3.6 Save for the licensing requirements, a registered generator shall comply with all applicable legislative and regulatory requirements necessary for the sustained operation of the national interconnected power system.'

[40]. It bears emphasising that the schedule makes no reference to any 'right of first refusal' as claimed by Eskom, nor is any reference made to such a supposed right in the Minister's Exemption Notice. Moreover, on the evidence before me and as explained by Sibanye, the facility line falls under clause 3.2 of Schedule 2 and is not subject to the requirements of clause 3.1. NERSA has also consistently confirmed that the project and the facility line fall squarely under the Schedule 2 exemptions and do not require a licence.

[41]. Accordingly, the conclusion I reach is that Eskom's original reasons confirm that the decision was materially influenced by errors of law as contemplated in section 6(2)(d) of PAJA and the principle of legality. It was also based on irrelevant considerations, in terms of section 6(2)(e)(iii) of PAJA, and was otherwise unconstitutional or unlawful in terms of section 6(2)(i) of PAJA and the principle of legality.

[42]. The third ground of review raised on behalf of Sibanye is that there has been non-compliance by Eskom of its own Internal Policies.

[43]. It was submitted on behalf of Sibanye that Eskom's wayleave policy envisages a mechanical process for issuing wayleaves to conduct work within Eskom's servitudes. There was no genuine dispute on the papers that the applicants had satisfied the requirements of this policy. I find myself in agreement with this submission. In its answering affidavit, Eskom conceded that its wayleave policy 'does not, on the face of it confer a discretion on Eskom' to refuse wayleaves once the requirements are satisfied. However, Eskom suggested that this policy must be read with 'the other policies'.

[44]. In its answering affidavit, Eskom claimed, for the first time, that its decision was made in terms of a different policy, that being 'Management of Eskom's Distribution Areas of Supply and Standalone Customers' with identification number 240-165509-996. It attempts to suggest that this policy establishes a prohibition on the crossing of Eskom lines.

[45]. As contended on behalf of Sibanye, Eskom's new reliance on this policy is mistaken for the simple reason that this policy was not mentioned in Eskom's reasons for refusing the wayleave application. This is a good example of an impermissible after-the-fact justification. Moreover, on its own terms, this policy is confined to activities that require a distribution license. It has no application to exempted distribution facilities, such as the project *in casu*. The policy itself confirms that it is confined to licensing processes and activities that require licenses, involving changes to licensed areas of supply. Therefore, Eskom was mistaken in believing itself to be bound to apply this policy to this wayleave application.

[46]. Most importantly, and this point deserves particular emphasis, Eskom's internal policy is not legislation and cannot be applied, as a rigid rule, to preclude all crossing of Eskom lines. To the extent that Eskom applied this policy as a rigid fetter, its decision is unlawful. In any event, there is no dispute that Eskom has frequently granted wayleaves allowing other power projects to cross its lines. This demonstrates that Eskom's policy does not create an absolute prohibition and that Eskom has inconsistently applied this policy in this case.

[47]. This, too, provides grounds to review and set aside the decision on the pleaded grounds, including that the decision was materially influenced by an error of law in terms of section 6(2)(d) of PAJA; it was based on irrelevant considerations in terms of section 6(2)(e)(iii) of PAJA; and was otherwise unlawful as contemplated in section 6(2)(i) of PAJA and the principle of legality.

[48]. The fourth ground of review relates to the allegation by Eskom that there are ‘inherent operational risks’ in creating a ‘hybrid network’, that the ‘technical solution proposed by the applicant is not safe’ and that it is supposedly a ‘hazard’. As contended by Sibanye, these allegations are made baldly and without substantiation – none of these alleged risks are explained or substantiated on the papers or, for that matter, in the Rule 53 record. The Rule 53 record does not contain any assessment by Eskom’s technical teams supporting these findings and alleged risks. The deponent to Eskom’s answering affidavit – who is not a technical expert – simply repeats these bald allegations, without any supporting evidence, let alone a confirmatory affidavit, from Eskom’s technical teams that assessed the applicants’ proposed technical solution.

[49]. Moreover, Sibanye has addressed these technical concerns in detail. The proposed technical solution was prepared by a reputable engineering firm, which has obtained similar approvals from Eskom in the past. The proposed technical solution complies with all relevant SANS standards and was evaluated by Eskom’s technical teams. Importantly, the absence of any genuine technical objections was confirmed by the fact that Eskom issued a budget quote and received payment of the connection fees. And Sibanye agreed to Eskom’s proposal of running an underground cable, which addressed any remaining technical concerns.

[50]. It is also so, as argued by Sibanye, that Eskom’s technical teams, its PEXCO and its DLRC supported the application and this alternative solution of an underground cable, without raising any concerns over safety. While Eskom’s DEXCO refused the application, it did not raise any specific concerns with the technical solution proposed by Sibanye. Eskom’s 13 December 2023 reasons letter for refusing the wayleave did not raise any specific concerns with the technical proposals submitted by the applicants, beyond making bald claims of ‘operational risks’.

[51]. Furthermore, Eskom has not explained what a 'hybrid network layout' is. Such a concept is, in any event, inapposite because the proposed facility line is separate and distinct from any Eskom distribution infrastructure and has no impact on such Eskom distribution infrastructure.

[52]. As for Eskom's new allegation that its line has been earmarked for other projects, this is again an impermissible after-the-fact justification, that did not appear in any of the reasons for the decision or Rule 53 record. Sibanye called on Eskom to disclose these plans in a Rule 35(12) request, but none were forthcoming.

[53]. Ultimately, Eskom's admission of its ulterior purpose demonstrates the true reason for the refusal: Eskom was motivated by purely commercial interests and not any genuine concerns over operational risks or safety of crossing its lines.

[54]. This provides further grounds to review and set aside the decision, including on the grounds that the decision bears no rational connection to the information before Eskom, it was unreasonable, and it again involved irrelevant considerations and the disregard of relevant information.

[55]. As for Eskom's alternative wheeling proposal, which, according to it, offers the 'least life-cycle cost', Sibanye contends that there are two defects in Eskom's insistence on this alternative.

[56]. First, Eskom's answering affidavit confirms that it had no genuine interest in pursuing this alternative. On Eskom's own version, it wished to block the solar project in its entirety, as the wheeling proposal would still have resulted in lost revenue for Eskom, which it wished to avoid. Eskom's inherent opposition to the project explains its insistence to push its alternative connection option which it knew presented an untenable commercial position for Sibanye.

[57]. Second, the wayleave process does not afford Eskom the right or power to impose its preferred commercial terms on counterparties. As emphasised above, a wayleave is merely an administrative process for gaining access to Eskom's servitudes and crossing its lines and is not intended to be used as a mechanism for imposing Eskom's preferred commercial terms.

[58]. This again provides grounds to review and set aside the decision on all of the pleaded grounds, including that Eskom's decision was irrational, unreasonable and unlawful.

[59]. For all of these reasons, I conclude, in sum that the impugned decision stands to be declared unlawful and invalid and should be reviewed and set aside. The unlawfulness and the invalidity lie therein that the decision was made in the face of and against the grain of legislation which has as its objective the achievement of long-term energy security, with solar and renewable energy as its cornerstone.

The Remedy

[60]. A court is constitutionally authorised, once it has found conduct to be unlawful, to craft an order that is appropriate to the circumstances. Section 172(1)(b) of the Constitution provides that, following upon a declaration of constitutional invalidity, a Court may make any order that is just and equitable.

[61]. Section 8 of PAJA gives the courts a wide discretion to make any 'just and equitable' order to remedy the violation of the right to just administrative action. This includes, in exceptional circumstances, the court substituting or varying the administrative action with a decision in terms of the court's order (s 8(1)(c)(ii)(aa)). Substitution, however, is an extraordinary remedy. A court is therefore empowered to substitute the decision-maker's decision with its own as an 'extraordinary remedy'.

[62]. In this matter, Sibanye submits that there are exceptional circumstances that make it just and equitable to substitute Eskom's decision with a decision to grant the wayleave, in terms of section 8(1)(c)(ii) of PAJA.

[63]. In *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another*[4], the Constitutional held as follows at para 47: -

‘To my mind, given the doctrine of separation of powers, in conducting this enquiry there are certain factors that should inevitably hold greater weight. The first is whether a court is in as good a position as the administrator to make the decision. The second is whether the decision of an administrator is a foregone conclusion. These two factors must be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of an administrator. The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties. It is prudent to emphasise that the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances.’

[64]. Sibanye submitted that the decision to grant the wayleave is indeed a foregone conclusion and this Court is in as good a position to authorise this right of access. I agree. As submitted by Sibanye, the granting of wayleaves is a purely mechanical, administrative matter, in terms of Eskom’s wayleaves policy. Eskom’s technical teams have already accepted the proposed solution of an underground cable. Eskom has never suggested that any further information is required.

[65]. Once the wayleave is granted, the precise modalities of how and when Sibanye will be granted access will be determined by Eskom’s wayleaves policy, which envisages the conclusion of a standard form agreement between the parties, found in Annexure B to the policy, regulating the work and any liability.

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[4] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* 2015 (5) SA 245 (CC).

[66]. Moreover, there are further reasons why substitution is warranted. Those are: - (a) First, Eskom has demonstrated itself to be biased against this project and is dead-set on preventing it from proceeding, as confirmed in its answering affidavit. Such evidence of bias ought to weigh heavily in favour of a substitution; (b) Second, expedition is needed given the lengthy delays. Eskom's decision-making process dragged on for almost 12 months, not including the further delays of litigation, despite the fact that its own wayleaves policy required this process to be concluded in fourteen calendar days; and (c) Third, the undisputed economic and social importance of the project, involving an investment of over R1 billion and substantial job-creation potential, also weighs heavily in favour of swift resolution.

[67]. For these reasons, we Sibanye's application ought to succeed.

Costs

[68]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*[5].

[69]. I can think of no reason why I should deviate from this general rule. The applicants should therefore be ordered their costs of the opposed application, to be paid by Eskom.

Order

[70]. In the result, I make the following order:

(1) The first respondent's decision to refuse the applicants' wayleave application with reference WS171/2023 ('the impugned decision') is declared to be unlawful and constitutionally invalid.

(2) The impugned decision be and is hereby reviewed and set aside.

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5 *Myers v Abrahamson* 1951(3) SA 438 (C) at 455

(3) The impugned decision is substituted with a decision to grant the applicants' wayleave application with reference WS171/2023.

(4) The first respondent shall pay the applicants' costs of this opposed application, such costs to include the costs consequent upon the utilisation of two Counsel, one being Senior Counsel (where so employed), on scale 'C' of the applicable tariff provided for in the Uniform Rules of Court.

[redacted]

L R ADAMS
Judge of the High Court
Gauteng Division, Johannesburg

HEARD ON:	9 and 10 October 2025
JUDGMENT DATE:	18 February 2026 – Judgment handed down electronically
FOR THE FIRST, SECOND AND THIRD APPLICANTS:	J Babamia SC, with C McConnachie
INSTRUCTED BY:	Norton Rose Fulbright SA Inc, Sandhurst, Sandton
FOR THE FIRST RESPONDENT:	S L Shangisa SC, with L Rakgwale
INSTRUCTED BY:	Tasneem Moosa Incorporated, Houghton Estate, Johannesburg
FOR THE SECOND AND THIRD RESPONDENTS:	No appearance
INSTRUCTED BY:	No appearance