IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Case No: 19529/2015

In the matter between:

EARTHLIFE AFRICA - JOHANNESBURG	First Applicant
SOUTHERN AFRICAN FAITH COMMUNITIES' ENVIRONMENT INSTITUTE	Second Applicant

and

THE MINISTER OF ENERGY	First Respondent
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Second Respondent
THE NATIONAL ENERGY REGULATOR OF SOUTH AFRICA	Third Respondent
SPEAKER OF THE NATIONAL ASSEMBLY	Fourth Respondent
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	Fifth Respondent

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SUPPLEMENTARY HEADS OF ARGUMENT FOR FIRST AND SECOND RESPONDENT

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INTRODUCTION

1. These Supplementary Heads of Argument deal with the issues arising from the further affidavits filed by the parties in respect of the 2016 determination to the extent that they are not already covered by the Main Heads of Argument dated 2 December 2018.

2. At the outset we again point out that the whole case (and thus the arguments) for the Applicants is based on their own narrative, including a false theory about the nature or substance of a ministerial determination made under section 34(1) of the Electricity Regulation Act 4 of 2006:[1] we repeat that it is not a purchase order or ministerial command for the immediate procurement of additional generation capacity for the supply of electricity (whether from a nuclear or any other source of energy) by Eskom but it is indeed the developing and implementing of national policy and/or the performing an executive function as provided for in national legislation, in accordance with and as contemplated in section 85(2)(b) and (e) of the Constitution.[2]

3. Accordingly we respectfully submit that the ministerial decision to make the 2016 determination and/or the decision to concur therein is not "*administrative action*" as defined in section 1 of the Promotion of Administrative Justice Act 3 of 2000[3] and thus not subject to review on the grounds listed in section 6 thereof: in this

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1 hereinafter referred to as the ERA.

2 See paragraph 4.53 and 4.60-4.64 of the further affidavit.

3 hereinafter referred to as "*the PAJA*".

regard the executive powers or functions of the National Executive referred to in section 85(2)(b) and (e) of the Constitution is expressly excluded from that definition.[4]

4. Given the false or incorrect premise of the Applicants' argument in this regard, the foundation for their attack on the validity of the 2016 determination is with respect misconceived and falls away; on this basis alone and already, the relief pursued by the Applicants in respect of the 2016 determination should be dismissed with costs, such costs to include the costs incumbent upon the employment of three counsel.

5. Furthermore and in any event, the grounds or reasons relied upon by the Applicants in this regard are also unfounded: we deal with each of those grounds or reasons in turn.

PUBLIC PARTICIPATION

6. In our Main Heads of Argument we have already dealt with the argument as advanced by the Applicants, based upon a right to public participation in respect of a determination under section 34(1) of the ERA and derived from either section 3 or section 4 of the PAJA or derived from section 10(1)(d) of the National Energy Regulation Act 40 of 2004:[5] such a determination is not

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4 See paragraph 4.36 of the further affidavit.

5 hereinafter referred to as the NERA.

"*administrative action*" as defined in the PAJA and section 10(1)(d) of the NERA also does not apply to such a determination.

7. We also submit that the doctrine of legality does not require any public participation for such a determination in terms of section 34 of the ERA: in this regard we repeat what we have stated in **paragraph 2 above** and we also point out that such a determination in itself is not any kind of step in an actual procurement process - a determination is made in the exercise of the policy-formulating powers of the National Executive and not in the exercise of the procurement powers of the State.[6]

8. A ministerial determination in terms of section 34 of the ERA is in essence and in substance nothing more than a policy decision by the National Executive, binding only upon the National Energy Regulator of South Africa[7] - as provided for in section 34(3) of the ERA - in the issuing of a generation licence: that process, for the application, consideration and issuing of a generation licence upon which the procurement of new generation capacity will then follow, is the process where public participation must legally and should practically takes place.

9. A mere determination in terms of section 34 of the ERA does not legally imply or require that a procurement of new generation capacity must and shall follow:

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6 See Bolton *The Law of Government Procurement in South Africa* (2007) 13-14: the government procurement process starts with the solicitation of tenders.

7 cited herein as the Third Respondent and hereinafter referred to as NERSA.

the legal consequences thereof (if and when one is made) are spelt out in section 34(3) of the ERA and in effect it constrains NERSA not to go beyond the national policy stance adopted by the National Executive, so that absent such a determination NERSA has more freedom of choice and a larger space for decision-making in the issuing of a generation licence.

10. There against the issuing of a generation licence is an official stamp of approval and a licence to start with and complete the actual procurement of new generation capacity: this is where public participation belong and there is with respect no duty or requirement that the National Executive must consult and engage with the public in formulating or implementing its national policies or in performing its executive functions.

11. In the result we respectfully submit that there is no basis to review and set aside the 2016 determination on the basis that there was no public participation: none was required, either in law or in fact.

IRRATIONAL AND UNREASONABLE DECISION

12. In our Mains Heads of Argument we have already dealt with the role, place and function of the Integrated Resource Plan (2010-2030) within the legislative scheme of the ERA; in this context we also repeat what we have stated in **paragraph 2 above.**

13. We also point out that the draft 2016 update in its present state is mostly concerned with monetary costs and/or financial considerations "***before any policy adjustments***": this important rider or qualification is ignored in the argument as advanced on behalf of the Applicants and it is **precisely the policy adjustments based on non-monetary or non-financial considerations** (such as the desirable reduction of the emission of greenhouse gases from South African coal plants, a proper energy-mix to improve security of the supply of electricity, and the desirability and pressing need for the development of the national industry and economy so as to create jobs and alleviate the pervasive poverty in the country[8]) which influence the **polycentric policy decision to make a determination** in terms of section 34(1) of the ERA that will allow up to and a maximum of 9.6 GW of electricity to be generated from new nuclear plants under or in terms of generation licences to be considered and issued by NERSA as and when circumstances would justify.[9]

14. Imposing such a binding maximum limit or ceiling upon the powers of NERSA in the issuing of generation licences (as contemplated in section 34(3) of the ERA) by way of a national policy contained in the 2016 determination,[10] by taking the existing policy under the approved Integrated Resource Plan (2010-2030) into account, is with respect not irrational nor does such taking into account transmute into "*blind reliance*" simply because the Applicants label it so.

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8 See paragraph 4.59 of the further affidavit.

9 See paragraph 4.65 of the further affidavit.

10 See paragraph 4.45 of the further affidavit.

15. We therefore dispute that there was in fact any, or any proven, "*blind reliance*" on the "*outdated*" (but still the only officially approved) Integrated Resource Plan (2010-2030) when the national policy of the National Executive was given body or made binding in the 2016 determination under section 34 of the ERA.

16. In the result we respectfully submit that there is no basis to review and set aside the 2016 determination on this basis and that, taking into account Integrated Resource Plan (2010-2030), did not make the 2016 determination irrational or unreasonable.[11]

17. The further argument by the Applicants, that the 2016 determination is also irrational or unreasonable because Eskom's refusal to provide consent to the Department of Energy ("*the Department*") to procure new nuclear power plants on its behalf was allegedly a "*key reason*" for it, is with respect totally misconceived and opportunistic in the extreme.

18. A chronological analysis of the main or relevant events show that:

18.1 the original 2013 determination contemplated a specific role for the Department in nuclear procurement;

18.2 that role was reconsidered because the Department had no legal mandate or power to bind other juristic entities in a nuclear procurement

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11 See paragraph 4.16 of the further affidavit.

process without their consent or cooperation;

18.3 in that process Eskom indicated (before the 2016 determination was made) that it was willing and able to procure and be the owner-operator of the new nuclear power plants;[12] and

18.4 the 2016 determination then followed.

19. At no stage was Eskom designated as the procurer because of its prior refusals or to pacify and/or reward Eskom for such refusals, and that was never the motivation: Eskom was so designated in the 2016 determination because:

19.1 Eskom already was the owner and operator of the nuclear power plants at Koeberg;

19.2 Eskom was already identified for policy purposes as the future owner and operator of the nuclear power plants in South Africa; and

19.3 Eskom was better situated to procure and be the owner-operator of the new nuclear power plants.

20. The fallacy of this opportunistic argument by the Applicants is demonstrated by their insistence that the Minister should have abused the position of the

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12 See paragraph 4.28 of the further affidavit.

Government as the sole shareholder in Eskom by interfering in the lawful management of that independent company by its Board of Directors.

21. In the result we respectfully submit that there is no basis to review and set aside the 2016 determination on this basis and that Eskom's historical refusal to allow anyone else but Eskom to procure power plants for Eskom (nuclear or otherwise) was never a so-called "*key ground*" for its designation in the 2016 determination to procure new nuclear power plants.

REGULATOR'S CONCURRENCE

22. In the Main Heads of Argument we have already dealt with the legal framework, applicable to the concurrence required from NERSA in a determination made under section 34(1) of the NERA.

23. The arguments advanced by the Applicants in this regard selectively place the focus on the facts which support those arguments but completely ignore those facts which destroy those very same arguments: the main rationale for the decision by NERSA to concur in the 2016 determination was the negative impact on the nuclear procurement process and/or the nuclear programme if such concurrence was not given.

24. Again the Applicants elevate a remark made during discussions, that it would be bad faith not to concur in an amendment to the 2013 determination in which

NERSA had already concurred, as a so-called "*key reason*" for the decision to concur.

24.1 We respectfully submit that there is no factual basis to elevate this remark to a so-called "*key reason*".

24.2 Upon the totality of facts and circumstances before NERSA, it is clear that its concurrence was based upon support for the nuclear programme and/or nuclear procurement process on the merits thereof; facilitation of investment in the electricity supply industry and the promotion of diversity in energy sources were foremost in the mind of the members and not some docile placating of the Minister.

25. The Applicants again advance the argument that NERSA failed to apply its mind to whether or not 9.6 GW of nuclear new generation capacity was still required but in this regard we need to repeat paragraph 2 above: because of the misconception of the true nature and substance of a ministerial determination under section 34(1) of the ERA, the Applicants argue incorrectly that a number of considerations should have been taken into account but were not whilst those considerations were with respect not relevant for the purposes of developing and implementing national policy or performing an executive function.

26. The same misconception underlies the argument that no consideration was given to the financial implications of designating Eskom as the procurer of 9.6

GW of nuclear new generation capacity: there were and are no such financial implications at this stage of policy decision-making and, whatever financial implications there are, will only be taken into account at a later stage when Eskom applies to NERSA for the issuing of a generation licence and/or starts with the process of actual procurement of any new nuclear power plants.

27. In the premise there is with respect no ground or reason to interfere with the concurrence of NERSA in the 2016 determination.

SPECIFIC SYSTEM FOR PROCUREMENT

28. We have already dealt with this argument of the Applicants in the Main Heads of Argument; in addition we point out that in none of the previous determinations made in terms of section 34(1) of the ERA was a specific and separate procurement system ever specified (for example, in the case of renewable sources of energy).[13]

29. The Applicants also complain that unlike the 2013 determination, the 2016 determination does not even include a generic statement in relation to the role of the procurer: such a generic statement not required by section 34(1) of the ERA as part of any determination and is therefore in any event superfluous, but moreover there is no practical need for such a description because Eskom has a fully developed procurement system of its own; it is also not clear what, in the

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13 See paragraph 4.56 of the further affidavit.

contemplation of the Applicants, the function of such a generic statement would be in a determination which is only binding upon NERSA under section 34(3) of the ERA but not on anyone else.

30. The portrayal of the 2016 determination as the effective outsourcing of nuclear procurement to Eskom with a licence to reign freely over such procurement is also not correct.[14] Eskom already has the power to conduct such nuclear procurement under and within the boundaries of its existing procurement system and supply chain management system regardless of any determination under section 34(1) of the ERA, with the effect of the 2016 determination not to outsource to Eskom but to constrain NERSA in issuing a generation licence for new nuclear generation capacity.

31. The Applicants also refer to the absence in the 2016 determination of any provision to deal with the so-called "*procurement steps*" already undertaken by the Department: we repeat that none of those steps or actions were in fact or in law "*procurement steps*" for reasons that we have already canvassed in the Main Heads of Argument.[15]

32. We respectfully submit that the further argument of the Applicants in this regard, dragging in international agreements or treaties from the international arena to the national arena of procurement law, conflates international law and

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14 See paragraph 4.47 and 4.53 of the further affidavit.

15 See paragraph 4.51 of the further affidavit.

international relationships with municipal law and local realities: regardless of the contents of any determination in terms of section 34(1) of the ERA (in municipal energy law) or the prescripts for any procurement by Eskom (under municipal procurement law), at the level of international law and international relationships the Government and all organs of state (which include Eskom) have an international obligation to comply with international law pertaining to the peaceful use of nuclear energy and pertaining to the trade in nuclear technology - under these circumstances even the "*generic procurement system*" of Eskom, namely the existing procurement system applicable to organs of state under the Public Finance Management Act 1 of 1999 read with the Treasury Regulations and section 217 of the Constitution, allows for a tender or bid to go out with threshold requirements in a two-stage process[16] with all potential tenderers to first qualify for the tender or bid by complying with those threshold requirements (which in this instance would include the existence of an appropriate treaty) before the merits of the tender or but is considered.

33. The Applicants lastly harp on the alleged distinction between a Request for Proposals and a Request for information in the context of procurement in order to show what confusion is created by the lack of a specific nuclear procurement system: these two concepts are not defined in any legislation and, in the present context, there is no practical difference between them - the purpose of such a

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16 See for example Bolton *The Law of Government Procurement in South Africa* (2007) 10 and 157-158 on two-stage bidding: this is a recognised method to reduce the size of the pool of competitors.

request is simply to gather information and test the marketplace.[17]

34. In the premise and in view of the existing procurement system or systems already available to Eskom in law and in fact, there is no legal requirement or any need under section 34(1) of the ERA for the 2016 determination to again spell out and specify a separate procurement system for the procurement of new nuclear power plants by Eskom.

NO AMENDMENT

35. The Applicants argue that on the face of the 2016 determination it did not formally and expressly amend the 2013 determination.

36. This argument is an exercise in semantics and nitpicking that places form above substance: in substance it constitutes such an amendment, it was intended as such an amendment and it is accepted by both the Minister and by NERSA (which is the only institution that will be bound by it in terms of section 34(3) of the ERA) as an amendment.[18]

37. In any event and even if we assume for the moment that both the 2013 determination and the 2016 determination stand separately from each other and with both having the force of law, then they are not mutually inconsistent: the

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17 See paragraph 4.54 of the further affidavit.

18 See paragraph 4.30, 4.36-4.40 and 4.44 of the further affidavit.

Applicants labelled them mutually inconsistent because they misconceive the true nature and effect thereof as an executive command or purchase order for the immediate procurement of new nuclear generation capacity but, when viewed as an instrument of national policy developed and implemented by the National Executive (which in reality it is), there is no reason on earth why, for purposes of policy, two entities both cannot be designated as a procurer of nuclear power plants and then lodge separate applications for the issuing of a generation licence by NERSA (who can only issue such licences up to a combined total not exceeding a maximum of 9.6 GW of new nuclear generation capacity).

38. In the premise we also submit that there is no ground or reason to interfere with the 2016 determination on this basis.

CONCLUDING REMARKS

39. In the result we respectfully submit that the 2016 determination (and also the 2013 determination, to the extent that it is still relevant) is a valid and legal determination made fully in accordance with the law and that there is no ground, reason or basis upon which it should be reviewed and set aside.

40. We therefore respectfully submit that the relief pursued by the Applicants in respect of the 2016 determination (and also the 2013 determination, to the extent that it is still relevant) be dismissed with costs, such costs to include the

costs incumbent upon the employment of three counsel.

41. Lastly we point out that on the occasion of the postponement of this matter in December 2016, a punitive cost order was made against the Minister: We respectfully submit that, in view of the explanation of the Minister contained in the further affidavit to the effect that she was discharging the ongoing and continuing responsibilities of her office in good faith, the scale of that cost order should be revisited and replaced with an order allowing only party and party costs.

Signed and dated at Pretoria on 7th day of February 2017.

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