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BREAKING DOWN THE NUCLEAR PROCUREMENT JUDGMENT - *EARTHLIFE AFRICA-JOHANNESBURG AND 1 OTHER V THE MINISTER OF ENERGY AND 5 OTHERS*

By Ms Christine Botha: Legal Officer, Centre for Constitutional Rights

On 26 April 2017, the Western Cape High Court highlighted the foundational values of a democratic society built on openness and accountability in the matter of *Earthlife Africa-Johannesburg vs the Minister of Energy* (*Earthlife* judgment). The *Earthlife* judgment concerned the review application of the State's dubious steps between 2013 and 2016 in the furtherance of its nuclear procurement programme. The judgment sets an important precedent for public participation in any future determinations by the Minister of Energy (the Minister) regarding the procurement for nuclear energy.

The review application concerned three main issues. First, the constitutionality and lawfulness of the two determinations made by the Minister in terms of section 34 of the *Electricity Regulation* Act of 2006 (the Electricity Act) were challenged. Second, the tabling procedure of the 2014 Russian intergovernmental agreement (Russian IGA) regarding a nuclear partnership was challenged. Lastly, the Minister's delay in tabling the 1995 USA intergovernmental and 2010 South Korean intergovernmental agreements for nuclear cooperation after 20 years and five years respectively was also challenged. This discussion will only focus on the constitutionality and lawfulness of the section 34 determinations.

In brief, the Minister has the power in terms of section 34 of the Electricity Act (section 34 determination) to determine if new generation capacity is needed and the types of energy sources from which electricity must be generated from. Such section 34 determinations need to be approved by the National Energy Regulator of South Africa (NERSA). In November 2013, the Minister determined that South Africa required 9.6GW (gigawatts) of nuclear power and that it should be procured from the Department of Energy (the 2013 section 34 determination). The public was only informed in December 2015 when the Minister published the 2013 section 34 determination in the *Government Gazette*, which apparently was mainly due to the pressure of Earthlife's initial declaratory application. To understand the magnitude of this determination it must be placed in perspective. South Africa's only nuclear plant, Koeberg, generates approximately 1.8 GW of electricity.

During this time (September 2014), the President authorised the Minister to sign the Russian IGA, which laid the foundation for the construction of large-scale nuclear plants in South Africa with Russian Water-Water Energetic Reactors (VVER). Further IGAs were also entered with China and France in 2014. Importantly, these IGAs, the 1995 USA and 2010 Korean IGAs were tabled in Parliament in June 2015 under section 231(3) of the Constitution. Section 231(3) intergovernmental agreements do not require the approval of the National Assembly or the National Council of Provinces as the "technical" nature of the agreement is usually associated with "daily activities of government department" and only needs to be tabled in Parliament within a reasonable time. During the review proceedings, the Minister issued a new section 34 determination in December 2016 (2016 section 34 determination), which

was in all respects similar to the 2013 section 34 determination but it now identified Eskom as the procurer. As Eskom was not joined in the initial application, the matter had to be postponed. The Court was very critical of this delay caused by the Minister and a special cost order was ordered against the Minister.

The section 34 determinations were challenged on procedural and substantive grounds, but only the procedural challenge was analysed by the Court. Earthlife contended that the section 34 determination and NERSA's concurrence therewith constituted "*administrative action*" as outlined in the *Promotion of Administrative Justice Act* of 2010 (PAJA). Since the Minister and NERSA's decision was not preceded by any public participation, it breached the requirement for lawful administrative action. A further procedural challenge related to the unreasonable delay of publishing the 2013 section 34 determination and the fact that the 2016 section 34 determination does not expressly withdraw the 2013 section 34 determination causing a situation where two mutually inconsistent section 34 determinations are at play.

The Court dismissed the Minister's argument that the section 34 determinations only amounted to "*encased policy directives"*, which are excluded from PAJA. The Court specifically found that various indicators such as the legislative source of the Minister's power, the far-reaching effect of the determinations and the external legal binding effect not only on NERSA but also on other stakeholders, indicate the administrative nature of these determinations. Therefore, a fair public participation process had to precede this determination. Furthermore, the Court also held that NERSA's role also constituted administrative action and NERSA could not simply rubber stamp the decision. Finally, the Court emphasised it was crucial that public participation had to take place considering the far-reaching consequences of these section 34 determinations, not only in regard to the estimated expenditure of one trillion rand which would ultimately be for the public's account but also the impact on the allocation of State resources.

Furthermore, the Court agreed that the Minister's two-year delay in publishing the 2013 section 34 determination with no reasonable explanation and the fact that the record indicates it was partly done to circumvent the review application, is irrational. The 2016 section 34 determination's failure to expressly withdraw the 2013 section 34 determination, was also found to be contrary to the Rule of Law as it lacks certainty and can be reviewed as an independent ground under the catch-all review provision of PAJA. Both section 34 determinations were set aside on the basis that they are unlawful and unconstitutional. Although not discussed herein, the tabling of the Russian IGA was also set aside as unconstitutional and unlawful on the basis that the specificity and scope of key elements indicated a firm legal commitment between the parties, which cannot be justified as an agreement of "routine nature" under section 231(3) of the Constitution. Furthermore, the Court also found the delay of the Minister to table the 1995 USA and 2010 Korean IGA unlawful and unconstitutional as a "reasonable period" is a jurisdictional requirement for section 231(3) of the Constitution.

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This judgment is a victory for the right to public participation in a democratic society and sends a clear warning to the State that the foundational values of section 1 of the Constitution, which emphasise openness, accountability and the Rule of Law cannot be trampled upon. On the whole, the *Earthlife* judgment is a cautious one, ever mindful of the separation of powers and largely deferential to the Executive's prerogative. While not completely ruling out South Africa's nuclear ambitions, it nonetheless throws a spanner into the works - through the judgment's demand for transparency and public participation in the energy sector. The Government recently, rightly so, indicated that it will not appeal the decision.