SOUTH AFRICA'S NUCLEAR PROCUREMENT PROGRAMME: THE COURT'S REASONS FOR OVERTURNING THE DEALS

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Earthlife Africa – Johannesburg and another Non-Governmental Organisaton challenged the Minister of Energy and others in the Western Cape High Court on the various steps taken with regard to South Africa's nuclear power procurement programme. The applicants in the case challenged the steps made by the Minister of Energy in 2013 and 2016, in terms of section 34 of the Electricity Regulation Act 4 of 2006 ("the Act"); and challenged the constitutionality of the tabling by the Minister before Parliament of three intergovernmental agreements ("IGA's") during 2015.

Firstly, it had to be established if the Minister's actions constituted administrative actions and if so, was proper process followed, and secondly, was the tabling of the Russian IGA constitutional. The ruling was overturned as the Court ruled in favour of the applicants.

In terms of section 34 of the Act, the decision by the Minister has no force unless the regulator, NERSA, approves it.

The Court touched on section 33 of the Constitution which pertains to just administrative action which *is lawful, reasonable and procedurally fair,* as well the definition of "administrative action" in terms of section 1 of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") which states that it is any decision or failure to take a decision which adversely affects the rights of any person which has a direct, external effect.

Due to the nature of the Minister's decision which has far reaching consequences for the public as whole as well as specific role players in the electricity generation field, the Court held that the section 34 determination constituted an administrative action.

NERSA, the regulator, approved the Minister's decision however it failed to consult affected parties and this is a requirement for just administrative actions. The short period of time between the Minister's request for NERSA to consider its determination and its final decision, in a matter of weeks, rendered it unlikely that a fair procedure could have been followed.

A rational and fair decision making process would have made provision for public input to allow both interested parties and potentially affected parties to submit their comments to NERSA, before NERSA took the decision to agree with the Minister in the proposed determination.

Further, another procedural issue to the 2013 section 34 determination is the delay in gazetting the decision. The Minister approved and adopted the recommendation on 11 November 2013, NERSA concurred in the decision, sending a letter to this effect on 20 December 2013 however this decision was gazetted on 21 December 2015 – two years later. Section 9 and 10 of the National Energy Regulator Act 40 of 2004 ("NERA) provide that NERSA must act in a *justifiable and transparent manner and in the public interest*, and reasons therefor must be *made available to the public*. The Court held that until gazetting in December 2015, the Minister was in breach of his/her own decision and it is open to question whether the 2013 section 34 determination could have any legal effect until such time as it was gazetted. The failure to gazette or make the determination public for two years not only breached the Minister's own decision, thus rendering it irrational and unlawful, but violated

the requirements of open, transparent and accountable government.

Additionally, since section 34 was only in effect upon publication in the gazette, the Minister's failure to consult NERSA anew in December 2015 on her decision to gazette the determination in unaltered form constituted a breach of section 34 of the Act.

The Court found that the 2016 section 34 determination was also procedurally unfair as it was not preceded by any public participation process of consultation. NERSA gave its approval of the 2016 section 34 determination within three days of being asked by the Minister and therefore there is no question of any public participation prior to its decision.

NERSA provided that it agreed with the Minister so as to not act in bad faith, this concurrence was based on a material error of law as NERSA failed to act independently.

Section 231 of the Constitution deals with international agreements. The tabling of an IGA under section 231(3) permits the executive to bind South Africa to an agreement without parliamentary approval or the public participation. The Court found the Minister's decision to table the agreement in terms of section 231(3) to be irrational. The Court accordingly held that the Minister's decision to table the Russian IGA before Parliament in terms of section 231(3) of the Constitution is unlawful and unconstitutional and reviewed and set aside.

By Sasha Beharilal