A nuclear set-back for South Africa's nuclear procurement process: Earthlife Africa - Johannesburg (and Another) v The Minister of Energy (and Others)

On the 26th of April 2017 the High Court of South Africa (Western Cape Division, Cape Town) delivered judgment in the review application brought by Earthlife Africa (Johannesburg) (**Earthlife**) against the State in respect of the steps taken by it in furtherance of its nuclear power procurement programme. The Court held that the determinations made by the Minister of Energy (**Minister**) in relation to the requirement and procurement of nuclear new generation capacity is unlawful and unconstitutional and are set-aside. In this note, we outline the implications of this judgment insofar as ministerial determinations in terms of section 34 of the Electricity Regulation Act, 4 of 2006 are concerned.

This case principally dealt with, *inter alia*, whether the two determinations, made by the Minister and with which the National Energy Regulator of South Africa (**NERSA**) concurred in terms of section 34 of the Electricity Regulation Act (**section 34 determinations**), breached statutory and constitutional prescripts.

In the section 34 determinations, issued by the Minister in 2013 and 2016, the Minister determined that South Africa required 9.6GW of nuclear power to be procured by the Department of Energy (**2013 determination**) and that Eskom, rather than the Department of Energy, would be the procurer of the said nuclear power (**2016 determination**).

Earthlife raised many substantive and procedural grounds for the review of the section 34 determinations, which the Court ultimately upheld. The most salient of these grounds and the Court's findings thereon are briefly outlined below:

Does a section 34 determination constitute administrative action?

Section 34(1) of the Electricity Regulation Act deals with new generation capacity and any decision taken by the Minister in terms of this section must be concurred by NERSA. After considering the applicable provisions of the Constitution, which entrenches the right to just administrative action, the Court concluded that the determination pursuant to section 34 of the Electricity Regulation Act constituted administrative action, which may be subject to judicial review.

According to the Court, NERSA's concurrence of the Minister's determination is a "*vital link to the chain*" that makes a determination pursuant to section 34 of the Electricity Regulation Act, and if NERSA's concurrence does not meet the test for fair administrative action, then the chain to reaching that determination will be broken.

The Court was of the view that NERSA did not follow a rational and fair decision-making process (which is one of the key elements to a just administrative process) when it concurred with the Minister's decisions in relation to the section 34 determinations. The Court concluded that, a rational and fair decision-making process would have been followed if NERSA made provision for public input so as to allow both interested and potentially affected parties to submit their views to NERSA before it took a decision on whether or not to concur with the Minister's proposed determination.

Did the Minister's delay in gazetting the 2013 determination render it unconstitutional and unlawful?

The 2013 determination was made by the Minister in November 2013, however, it was only gazetted in December 2015. The Court held that the two-year delay in gazetting the 2013 determination had the effect of causing the Minister to be in breach of her own decision, thus rendering it irrational and unlawful and which also violated the requirements of open, transparent and accountable government. Furthermore, since the 2013 determination became effective only on the date of publication in the government gazette, the Minister's failure to consult NERSA in December 2015 on her decision to then gazette the determination in unaltered form constituted a breach of section 34 of the Electricity Regulation Act.

The Court concluded that these defects rendered the 2013 determination unconstitutional and unlawful and accordingly set the 2013 determination aside.

Can the 2013 and 2016 determinations co-exist?

When the 2016 determination was published it did not contain express provisions which would amend, revise or withdraw the 2013 determination nor, according to the Court, did it purport to do so. This resulted in there being two mutually inconsistent gazetted section 34 determinations on the procurement of nuclear new generation capacity. An obvious inconsistency was that the 2013 determination designated the Department of Energy as the procuring agency in the nuclear power programme whilst the 2016 determination designated Eskom as such.

The Court held that the co-existence of the 2013 determination and 2016 determination would be highly problematic due to the many questions it would raise in the minds of reader or interested members of the public. In this regard, the Court held that the 2016 determination was irrational due to its failure to expressly withdraw or amend the 2013 determination, and should be set aside on this basis.

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