Reportable

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case No 7653/03

In the matter between:

EARTHLIFE AFRICA (CAPE TOWN) Applicant

and

DIRECTOR-GENERAL: DEPARTMENT OF ENVIRONMENTAL AFFAIRS & TOURISM First Respondent

ESKOM HOLDINGS LIMITED Second Respondent

JUDGMENT: DELIVERED 26 JANUARY 2005

GRIESEL J:

Introduction

[1] The second respondent (Eskom) wishes to construct a demonstration model 110 MegaWatt class pebble bed modular reactor (PBMR) at the site of its Koeberg Nuclear Power Station near Cape Town. On 25 June 2003, the first respondent, the Director-General of the Department of Environmental Affairs and Tourism (the DG), granted Eskom the requisite authorisation in terms of s 22(3) of the Environment Conservation Act 73 of 1989 (ECA), subject to certain conditions which are not material for present purposes. This

application is brought by the applicant to review and set aside that decision by the DG.

[2] The applicant is Earthlife Africa (Cape Town), a non-governmental, non-profit, voluntary association of environmental and social activists in Cape Town. Its professed aims are to campaign against perceived 'environmental injustices' in the Cape Town area and to participate in environmental decision-making processes with a view to promoting and lobbying for good governance and informed decision-making. It is an autonomous branch of Earthlife Africa, which has several branches throughout South Africa. The applicant brings this application on its own behalf, on behalf of the residents of Cape Town who may be exposed to potential risks posed by the PBMR, and in the public interest.

Applicable Legislation

[3] Although the decision under review was made primarily in terms of s 22(3) of ECA, there is a closely interwoven framework of related legislation impacting on the present matter: it includes the National Environmental Management Act 107 of 1998 (NEMA); the Nuclear Energy Act 46 of 1999 (the NE Act); the National Nuclear Regulator Act 47 of 1999 (the NNR Act); as well as a number of regulations, treaties and policies that fall under the jurisdiction of different government departments, all containing their own

unique processes and requirements. For present purposes, however, the enquiry can be confined to ECA and its regulations.

[4] The starting point for purposes of this application is s 21(1), read with s 22(1), of ECA. In terms of these provisions, the national Minister of Environmental Affairs and Tourism (the Minister) may identify 'activities which in his opinion may have a substantial detrimental effect on the environment'. Having identified such activities, nobody may then undertake any of them without authorisation in terms of s 22. One of the activities that has been identified by the Minister in terms of the Act is the 'construction, erection or upgrading' of inter alia nuclear reactors, including the PBMR. It is also common cause that the Minister designated the DG to perform the function of determining Eskom's application in terms of s 22(3).

[5] In terms of s 22(2), read with the applicable regulations, the DG was required first to consider environmental impact reports (EIRs), which reports were to be compiled and submitted by such persons and in such manner as might be prescribed, dealing with the impact of the proposed activity on the environment.

[6] Section 22(3) authorises the Minister or 'competent authority' (in casu the DG) 'at his or its discretion (to) refuse or grant the authorization for the proposed activity …on such conditions, if any, as he or it may deem necessary'.

[7] Section 35(3) of ECA provides for appeals to the Minister by any person who feels aggrieved by a decision. Such person 'may appeal against such decision to the Minister…in the prescribed manner, within the prescribed period'. Regulation 11(1) of the applicable regulations provides that such an appeal must be lodged within thirty days from the date on which the record of decision was issued.

[8] Section 36(1) of ECA goes on to provide that '(n)otwithstanding the provisions of s 35', any interested party may request reasons for a decision within thirty days after becoming aware of it, while s 36(2) permits such interested party to apply to the High Court for review of the decision within thirty days after being furnished with the reasons or after expiry of the period within which they had to be given.

[9] Regulations promulgated in terms of the Act (the EIA Regulations)[1] prescribe the procedures for the preparation, submission and consideration of EIRs for purposes of applications for authorisation in terms of s 22. It is not necessary for present purposes to summarise the EIA Regulations in detail, save to point out, first, that an applicant for authorisation is required in terms of reg 3(1)(*a*) to appoint an independent consultant to comply with the regulations on its behalf; and second, one of the responsibilities of an applicant for authorisation in terms of reg 3(1)(*f*) is 'to ensure that all interested parties … are given the opportunity to participate in all the relevant procedures contemplated in these regulations'.

Factual Background

[10] In an application, dated 26 June 2000, Eskom applied to the DG for the necessary authorisation in terms of s 22 of ECA for 'the construction, commissioning, operation/maintenance and decommissioning' of a PBMR. The purpose of the proposed plant, according to Eskom, was to assess the techno-economic viability of the technology for South African and international application for electricity generation and other commercial applications. The application was prepared by a consortium of consultants, appointed by Eskom pursuant to the provisions of reg 3(1)(*a*).

---

[1] GN R1183 *GG* 18261 of 5 September 1997, as amended.

[11] The consultants duly undertook an environmental impact assessment, accompanied by an extensive process of public participation. During the period from the beginning of 2001 to March 2002, they completed the steps contemplated by regs 5, 6 and 7 of the EIA Regulations, comprising the preparation, submission and acceptance of a plan of study for scoping, a scoping report and a plan of study for the EIA. On 3 June 2002, they submitted a draft EIR to the department and to interested parties, including the applicant, for comment.

[12] Prior to filing its submissions, and during the period from June to September 2002, the Legal Resources Centre (the LRC) made various efforts on behalf of the applicant to obtain access to further information and documents relating to the draft EIR from the department, Eskom, the consultants and others. Their efforts were, however, largely unsuccessful. This aspect forms the basis of one of the applicant's complaints in the present review, as will appear below.

[13] On 4 September 2002, being the extended deadline for the submission of comments, the applicant submitted detailed written submissions on the draft EIR to the department. According to the applicant, its submissions were 'a serious study of complex technology and its implications', which took 'many hundreds of hours' to prepare and involved input from lawyers, scientists and social activists. It was intended as 'a serious contribution to the process'. In its

covering letter, the LRC requested an opportunity to make further submissions to the relevant departmental chief on behalf of the applicant regarding its input.

[14] The consultants subsequently produced their final EIR, which they submitted to the department on 28 October 2002. The final EIR was later published and distributed to interested parties. It was also made available on the Internet and in certain public libraries.

[15] During the period from October to May 2003, the LRC made various efforts on behalf of the applicant to be afforded a 'hearing' by the DG on the final EIR and on his decision whether to grant or refuse the authorisation sought by Eskom. The applicant, however, was persistently rebuffed and was not afforded the opportunity it sought. As will emerge later, this aspect forms the applicant's main ground of review.

[16] On 21 May 2003 the applicant launched an urgent application against the DG and Eskom in the Pretoria High Court, seeking access to all the information that Eskom had placed before the DG in support of its application for authorisation, and a reasonable opportunity to make representations to the DG on his decision whether to grant or refuse Eskom's application for authorisation. Both the DG and Eskom opposed the application, which ultimately

failed because the court held 'that the applicant has failed to establish that this is an urgent application and it is accordingly struck off the roll of this court'.

[17] Early in the whole process, during 2001, the DG appointed a panel of experts to advise him on Eskom's application. On 28 March 2003, and having studied the final EIR, the panel reported to the DG, recommending that the application be granted.

[18] On 25 June 2003, the Deputy DG of the department, Mr Wynand Fourie, submitted a memorandum to the DG in which he recommended that Eskom's application for authorisation be granted. The memorandum did not address or even mention the applicant's submissions on the draft EIR. On the same day the DG formally approved Eskom's application for authorisation and issued his record of decision accordingly.

[19] On 24 July 2003, i.e. within 30 days after the decision, the applicant lodged an appeal to the Minister against the DG's decision, as required by s 35(3) of ECA, read with reg 11(1) of the EIA Regulations. That appeal has not yet been finalised.

[20] The present application for review, which is being brought in terms of s 36 of ECA, read with s 6 of the Promotion of Administrative Justice Act 3 of

2000 (PAJA), was thereupon launched on 15 September 2003 and is being opposed by both the DG and Eskom.

Internal Remedies

[21] Before considering the individual review grounds, it is necessary first to consider two preliminary points. One of the grounds of opposition raised by Eskom – though not by the DG – was that the decision of the DG does not constitute 'administrative action' as defined by PAJA, on the basis that the decision does not have 'a direct external legal effect', as contemplated by the definition of 'administrative action' in s 1 of that Act. This aspect was raised for the first time in Eskom's written heads of argument and was not specifically relied on as a substantive defence in its answering affidavit. During oral argument before us, however, counsel – without expressly abandoning the point – did not address any submissions to us in support thereof. In the circumstances, I do not deem it necessary to devote any attention to it, save to state that, in my opinion, there is no substance in the point.

[22] The second, more substantial, point raised on behalf of both respondents is that it was incumbent upon the applicant, prior to launching the present application for review, first to have exhausted its internal remedies in terms of ECA. They rely in this regard on the provisions of s 7(2)(*a*) and (*b*) of PAJA, read with ss 35(3) of ECA.

[23] Section 7(2)(*a*) of PAJA provides that 'no court…shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted'. Paragraph (*b*) requires a court or tribunal, if it is not satisfied that any internal remedy referred to in paragraph (*a*) has been exhausted, to direct that the person concerned must first exhaust such remedy before instituting proceedings for judicial review in a court or tribunal in terms of this Act.

[24] As shown above, s 35(3) of ECA provides for appeals to the Minister by any person who feels aggrieved by a decision. This procedure, however, is not peremptory inasmuch as s 36 of the same Act makes provision for judicial review by the High Court 'notwithstanding the provisions of s 35'.

[25] It is common cause that an appeal to the Minister in terms of s 35(3) of ECA does constitute an 'internal remedy', as contemplated by s 7(2) of PAJA. It is further common cause that the applicant in this case has indeed lodged such an appeal and that it has also launched the present review application without awaiting the outcome of the appeal. The question is whether the present application should in these circumstances be barred until disposal of the appeal.

[26] During argument before us, much of the debate revolved around the apparent contradiction between s 7(2)(*a*) of PAJA, on the one hand, and s 36

of ECA, on the other. The applicant relied squarely on the provisions of s 36 of ECA and attempted to reconcile those provisions with the aforesaid provisions in PAJA. The respondents, on the other hand, contended for a narrow, literal interpretation of s 7(2)(*a*) and (*b*) of PAJA. Relying on *Sasol Oil (Pty) Ltd & Another v Mary Metcalfe NO,*[2] they argued inter alia that '(t)o the extent that earlier legislation is inconsistent with PAJA, PAJA must prevail'.

[27] In the view that I take of the matter, it is not necessary to resolve this hermeneutic dispute. Even if it were to be held in favour of the respondents that the present application is indeed prima facie barred in terms of the provisions of s 7(2)(*a*) of PAJA by reason of the applicant's failure to exhaust its internal appeal remedies in terms of s 35(3) of ECA, that would not be the end of the matter. Section 7(2)(*c*) of PAJA gives the court a discretion to exempt the applicant from the obligation to exhaust its internal remedy in terms of ECA. In the present case, the applicant did apply for exemption in terms of the said provision in response to the contention in the respondents' answering affidavits that this application was barred by reason of s 7(2)(*a*) of PAJA. It is to this enquiry that I now turn.

---

[2] 2004 (5) SA 161 (W) para 7 at 166C–D.

Application for exemption

[28] Section 7(2)(*c*) of PAJA provides as follows:

> *'A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interests of justice.'* [emphasis added]

[29] Currie and Klaaren note that 'by imposing a strict duty to exhaust domestic remedies [PAJA] has considerably reformed the common law.'[3] They point out, furthermore, that the exception to the requirement to exhaust internal remedies is a narrow one: s 7(2)(*c*) refers to 'exceptional circumstances…in the interests of justice', rather than 'good cause'.[4]

Exceptional Circumstances

[30] The applicant argued that it has met both requirements for exemption. As far as the first requirement is concerned, it is of course not possible to give a comprehensive definition of the concept. As Sir John Donaldson MR succinctly put it:

---

[3] *The Promotion of Administrative Justice Act Benchbook* 182.

[4] *Ibid.*

> *'By definition, exceptional circumstances defy definition, but, where Parliament provides an appeal procedure, judicial review will have no place unless the applicant can distinguish his case from the type of case for which the appeal procedure was provided.'*[5]

[31] This dictum highlights the first 'exceptional circumstance' in this case: the same statutory enactment that provides for the internal remedy (s 35(3) of ECA) also provides for the possibility of simultaneous judicial review (s 36 of ECA). To that extent, the present applicant can distinguish its case from the type of case for which only an appeal procedure is statutorily provided: ordinarily there will be an intention by the legislature, either express or implied, that the internal remedy is first to be exhausted. Such intention is absent in ECA.

[32] In my view, there are further factors, tending cumulatively to constitute exceptional circumstances:

- The present application concerns the very sensitive and controversial issue of nuclear power, which potentially affects the safety and environmental rights of vast numbers of people. In the result, Eskom's application for the construction of a PBMR has generated considerable local and national interest. It would be a most unsatisfactory

[5] *R v Secretary of State for the Home Department, ex parte Swati* [1986] 1 All ER 717 (CA) at 724*a-b*.

result if a matter of this magnitude and importance had to be decided on a 'technicality', only to be resumed at a later stage on the 'merits'.

- Had the respondents felt as strongly about this legal argument as they want the court to believe, they could have raised it as a preliminary legal point *in initio litis* in terms of rule 6(5)(*d*)(iii) of the Uniform Rules, thereby obviating the need to file bulky answering affidavits on the merits – not to mention a voluminous review record in excess of 4 000 pages in terms of rule 53(1)(*b*). They did not do so. Instead, substantive *and* substantial answering affidavits were filed, traversing in great detail all the factual and legal points raised by the applicant.

- Presently, some 70 appeals in terms of s 35 of ECA are pending with the Minister against the decision of the DG. Should this application for review be allowed to proceed and be successful, then those 70 appeals would all fall away, because the decision against which they had been directed would have been overturned. The hearing and determination of these appeals is likely to be a long, drawn out and complicated affair, raising as they do 'a myriad of complicated issues on the merits', in the words of counsel for the applicant. This application for review on the other hand, is confined to fairly crisp, identified procedural issues. If it succeeds, the costs and delay occasioned by the other appeals will be avoided. This course of action

would best serve, not only the applicant's interests, but also the interests of the state and the public interest as it will avoid unnecessary cost and delay.

- This case is different from the ordinary one contemplated by s 7(2)(*a*) of PAJA, where a balance has to be struck between a single applicant's internal remedy on the one hand and judicial review on the other. The balance that has to be struck in this case is between a single applicant's limited review on the one hand and more than 70 complicated appeals. It is in other words an exceptional case in which the interests of justice dictate that the court should allow the review to proceed.

[33] According to the respondents, the fact that there are a large number of appeals pending before the Minister cuts both ways. It is conceivable that the Minister may set aside the DG's decision on any one or more of the grounds raised by any of the appellants (not necessarily the applicant), or he may amend the decision. This would have the effect that this 'premature application' would be rendered academic. Moreover as it is clear from the decision that Eskom cannot commence construction of the PBMR unless and until it obtains the necessary authorisations in terms of the NNR Act and the NE Act, there was manifestly no urgency in bringing this review application. Eskom may not succeed in obtaining the necessary authorisations required under the

NNR Act or the NE Act. This would preclude the construction of the PBMR and would again render this review application academic. There is no sufficient reason, according to the respondents, why the applicant should not await the outcome of these various processes (both the appeal process under ECA and the processes under the NNR Act and the NE Act). Only if they confirm the authorisation of the PBMR would it be appropriate for the applicants to approach the court by way of a review application.

[34] I do not agree with this argument. The fact that the DG's approval is but the first step in a multi-stage process, does not mean that the audi rule is inapplicable, nor does it mean that an aggrieved party must await the *final* step before it can take legal action for review.[6]

[35] A similar argument to the one advanced before us on behalf of the respondents was considered – and rejected – by the Supreme Court of Appeal in *Director, Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others,*[7] where it was held inter alia:

> *'It is settled law that a mere preliminary decision can have serious consequences in particular cases,* inter alia *where it lays "…the necessary foundation for a possible decision…" which may have*

[6] Hoexter *The New Constitutional & Administrative Law Vol 2* (2002) 222.

[7] 1999 (2) SA 709 (SCA) para 17 at 718D–E (other case references omitted). See also *Van Wyk NO v Van der Merwe* 1957 (1) SA 181 (A) at 188B–189A; De Ville *Judicial Review of Administrative Action in South Africa* 240–241.

> *grave results. In such a case the* audi *rule applies to the consideration of the preliminary decision.'*

[36] In my view, similar considerations apply to the present situation. Granting of the necessary authorisation by the DG in terms of ECA is a necessary prerequisite to the further steps in the process. It is, at the same time, a *final* step as far as ECA is concerned. It follows that any procedural unfairness affecting a decision in terms of s 22 of ECA may render such decision susceptible to review.

Interest of Justice

[37] When considering the second requirement, the question may be posed as to when an aggrieved person would choose to pursue a review, as opposed to an appeal. At common law, appeal and review are 'distinct and dissimilar remedies':

> *'They are also irreconcilable remedies in the sense that, where both are available, the review must be disposed of first as, if the correctness of the judgment appealed against is confirmed, a review of the proceedings is ordinarily not available.'* [8]

[8] *Liberty Life Association of Africa v Kachelhoffer NO and Others* 2001 (3) SA 1094 (C) at 1108F-G; 1110J-1111C.

[38] In the instant matter, where both appeal and review are available in terms of ECA, it would be in the interest of justice to apply the above-mentioned ordinary rule by disposing of the review first, provided that the court heeds the caution expressed by O'Regan J in *Bato Star Fishing (Pty) Limited v Minister of Environmental Affairs and Others:*[9]

> *'…(A) court minded to grant permission to a litigant to pursue the review of a decision before exhausting internal remedies should consider whether the litigant should be permitted simultaneously to pursue those internal remedies. In considering this question, a court needs to ensure that the possibility of duplicate or contradictory relief is avoided.'*

[39] At common law, the question was whether the internal remedy was an effective one, or whether it was tainted by the irregularity on which the review is based. In the latter case, the court would be less likely to insist on exhaustion of the internal remedy:

> *'…(A)n appeal, unaccompanied by a review, to us appears to presuppose the regularity and validity of the proceedings in which the decision that is being assailed was given.'* [10]

---

[9] 2002 (2) SA 490 (CC) para 17 at 503B–D.

[10] *Liberty Life Association of Africa v Kachelhoffer NO and Others* footnote 8 above at 1111C. See also Devenish, Govender & Hulme *Administrative Law and Justice in South Africa* (2001) 427.

In the present instance, ECA indeed recognises a distinction between an appeal de novo in terms of s 35(3) and a review brought on the basis of preceding irregularity in terms of s 36. As will appear more fully from the next section of this judgment, one of the principal complaints raised by the applicant in the present instance is that it did not have an adequate opportunity to place its case before the decision-maker. Should the applicant, therefore, be compelled to pursue its 'internal remedy' in terms of ECA by way of an appeal to the Minister, it may have to do so on the basis of a record that, from its perspective, will be deficient. To that extent, it would be in the interest of justice, in my view, to afford the applicant an opportunity of supplementing the record before being obliged to prosecute its appeal to the Minister.

[40] A further factor to take into account in this context, as pointed out above, is the fact that voluminous papers have been filed on behalf of all parties in the present application. The papers, including the record on review, cover more than 5 000 pages. Furthermore, the merits of the matter have been fully argued before a full court of three judges over a period of two court days. It involved considerable input by more than ten highly qualified lawyers. Should the present application be dismissed on this narrow, technical ground, it would mean that all this time and effort will have been wasted and the parties will be no closer to a resolution of their differences. It cannot be in the interest of justice to countenance such a state of affairs.

[41] Even if it were to be held that the applicant erred in bringing this application for review in accordance with s 36 of ECA, it was argued that it was reasonable and understandable for the applicant to have assumed that this review had to be brought within the time periods prescribed by s 36 of ECA. It was at best 'a very difficult and complicated judgment call to make', as it was put in the heads of argument on behalf of the applicant. If the applicant had waited for its appeal under s 35 of ECA to be finalised before it launched this application for review, it might have faced the opposite contention today, namely that its application for review was time-barred under s 36. In my view, it would be contrary to the interests of justice to say to the applicant, at this stage, that it should have waited with its review until its appeal had been finalised at the risk of forfeiting its right of review by so doing.

[42] Finally, all other things being equal, and in case of doubt in relation to either of the two criteria laid down by s 7(2)(*c*) of PAJA, the court should, in my view, incline to an interpretation of the facts and the law that promotes, rather than hampers, access to the courts.[11]

[43] To sum up as far as this aspect is concerned, I am satisfied that exceptional circumstances are indeed present in this case *and* that the interests of justice require that the applicant be exempted in terms of s 7(2)(*c*) of PAJA

---

[11] Section 34 of the Constitution. See also *Zondi v MEC for Traditional and Local Government Affairs and Others* (CCT 73/03, 15 October 2004, as yet unreported) para 102 and the authorities cited in footnote 105. Available at http://www.concourt.gov.za/files/7303/zondi.pdf.

from the obligation of having to exhaust its internal remedies before approaching this court on review.

Review Grounds

[44] This brings me to the merits of the application for review. The applicant's principal ground of review is based on an allegation that its right to procedurally fair administrative action has been infringed, contrary to s 33(1) of the Constitution, read with s 6(2)(*c*) of PAJA.

[45] The first and obvious point to make in this regard is that procedural fairness depends on the circumstances of each particular case. This principle has been applied by the courts in innumerable cases pre-PAJA,[12] and is now enshrined in s 3(2)(*a*) of that Act.[13]

[46] The second important point to bear in mind is that the administrative action in question affects the rights, not only of individual persons, but of the public in general. It follows, therefore, that such administrative action should comply with both ss 3 and 4 of PAJA, unless of course either of the exceptions in terms of ss 3(5) or 4(4) is found to apply.

---

[12] See the authorities cited by De Ville *op cit* 246 n253.

[13] Section 3(2)(*a*): 'A fair administrative procedure depends on the circumstances of each case'.

[47] In the context of the present case, the parties were ad idem that the applicant was entitled, as part of its right to procedural fairness, to a fair hearing before a decision was made by the DG. It was further common cause that the right to a hearing did not extend to an *oral* hearing, but that 'a reasonable opportunity to make (written) representations', as contemplated by s 3(2)(*b*)(ii) of PAJA, sufficed. Where the parties differed was on the question whether or not, on the facts of this case, the applicant did indeed enjoy a fair hearing: the respondents maintained that the applicant had been afforded an adequate opportunity to make written representations, both during the public process that preceded the submission of the final EIR to the department, and thereafter.

[48] The applicant, while conceding that it did participate in the public process that led up to the submission of the final EIR, maintained nevertheless that the hearing afforded to it was flawed or deficient in the following respects:

(a) The applicant did not have access to crucial information and documents that were required to enable it to make full and proper representations;

(b) The applicant was not afforded an opportunity of making submissions on the consultants' *final* EIR, but was confined to submissions on the *draft* EIR; and

(c) The applicant was confined to making submissions to Eskom's consultants, and *not* to the DG himself, who was the decision-maker.

[49] I shall address these three issues separately in what follows.

Access to Material Information

[50] Fairness ordinarily requires that an interested party be given access to relevant material and information in order to make meaningful representations. De Smith Woolf & Jowell[14] summarise the principle as follows:

> *'If relevant evidential material is not disclosed at all to a party who is potentially prejudiced by it, there is prima facie unfairness, irrespective of whether the material in question arose before, during or after the hearing.'*

[51] On the other hand, however, it has repeatedly been emphasised that an interested party's right to disclosure of 'relevant evidential material' is not equivalent to a right to complete discovery, as this could 'over-judicialise' the

---

[14] *Judicial Review of Administrative Action* (5ed, 1995) 9–019. Compare also *Van Huyssteen v Minister of Environmental Affairs and Tourism* 1996 (1) SA 283 (C) at 299D–300F; *Masamba v Chairperson, Western Cape Regional Committee, Immigrants Selection Board and Others* 2001 (12) BCLR 1239 (C) at 1255A.

administrative process.[15] 'The right to know is not to be equated to the right to be given "*chapter and verse.*"' [16] What is required in order to give effect to the right to a fair hearing is that the interested party must be placed in a position to present and controvert evidence in a meaningful way. In order to do so, the aggrieved party should know the 'gist' or substance of the case that it has to meet.[17]

[52] In the present instance, it was conceded on behalf of the DG that a substantial number of documents and other information were annexed to the final EIR that were not previously made available to the applicant or any of the other objectors, notwithstanding efforts on the part of the applicant to obtain access to such documents and information. In the result, so it was claimed on behalf of the applicant, the final EIR was based on and incorporated various documents, which the applicant never had an opportunity to consider and comment upon.

[53] While the applicant's complaint is not without substance, I find it unnecessary to decide whether the failure to make the documents available to the applicant is in itself sufficient to vitiate the DG's decision. The reason is that

---

[15] Cf Lawrence Baxter *Administrative Law* 550 and authorities referred to therein; Hoexter *op cit* 199.

[16] *Nisec (Pty) Ltd v Western Cape Provincial Tender Board* 1998 (3) SA 228 (C) at 235B and authorities cited therein.

[17] *Du Preez and Another v Truth and Reconciliation Commission* 1997 (3) SA 204 (A) at 232C–D; *Chairman, Board on Tariffs and Trade and Ors v Brenco Inc & Ors* 2001 (4) SA 511 (SCA) para 42 at 532G–H. Cf also *Heatherdale Farms v Deputy Minister of Agriculture* 1980 (3) SA 476 (T) at 486D–G; *Nisec (Pty) Ltd v Western Cape Provincial Tender Board* footnote 16 above at 235C.

such failure was largely cured by the inclusion of some (if not all) of the documents in question in the final EIR. The first complaint thereby became subsumed in the applicant's next complaint, viz that it was not afforded an opportunity of commenting on the final EIR.

Submissions on Draft EIR

[54] The applicant claimed that it was confined to submissions on an earlier draft version of the EIR, notwithstanding its requests to the DG to be afforded a further 'hearing' on the final EIR.

[55] The respondents countered this complaint by claiming, first, that what the applicant was seeking from the DG was an *oral* hearing, to which it was not entitled. It is true, as pointed out by counsel for the applicant, that at no stage did the applicant expressly demand an *oral* hearing. However, the term 'hearing' was repeatedly used in the correspondence on its behalf by the LRC and that word is usually understood to refer to a hearing at which oral submissions and/or evidence can be tendered.[18] Be that as it may, this is not necessarily fatal to the applicant's case. The more fundamental enquiry is whether or not the applicant was entitled to make further written submissions in respect of the final EIR before a decision was made by the DG.

[18] See eg De Smith Woolf & Jowell *op cit* 9–012.

[56] In this regard, the respondents argued that the applicant did not enjoy a right of reply on the contents of the final EIR. If it were otherwise, so they contended, the process would become 'long, tedious, costly and repetitive'; in fact, it would be 'never-ending'. The DG's attitude appears inter alia from the following:

- In a letter addressed to the applicant's attorneys, dated 23 December 2002, the DG recorded that the Review Panel that had been appointed to advise the department felt that Eskom's consultants 'had adequately dealt with the majority of the issues raised by the interested and affected parties'; that all reports were available from the consultants (except for parts 'that contain commercially sensitive detail that should not have an influence on the environmental impact'); and that the nuclear safety issues are not his department's mandate, but rather fall under the mandate of the national nuclear regulator. He concluded as follows:

> *'Once a decision has been taken and the record of decision published, you will of course have the right to express your opinion about such record of decision. The law further provides for a process of appeal if required.'*

- On 16 January 2003, the applicant's attorneys addressed a further letter to the Minister, with copies to the DG as well as other officials, reiterating that an interested party has a right to lawful and procedurally fair administrative action 'by each of the decision-makers'. They reiterated their earlier request for a 'hearing' prior to any decision being taken.

- On 10 March 2003, the DG responded, stating his view that 'the EIA process makes no provision for public and private hearings at this stage of the prescribed process. …Sufficient opportunity existed previously and will be provided during the following appeal period for the public to raise relevant issues on this matter'.

- On 12 May 2003, the applicant's attorneys addressed an urgent letter to the DG, recording that they had been informed that a decision on Eskom's application was 'imminent'. They accordingly sought an assurance that the DG would 'afford our client a hearing prior to making this decision'.

- When the required assurance was not forthcoming, the applicant eventually launched the aforementioned application in the Pretoria High Court, seeking an order declaring that the applicant has 'a right to a reasonable opportunity to make representations to the (DG)',

together with an order directing the DG 'to afford the applicant a reasonable opportunity to make representations to him prior to making his decision'. In an answering affidavit, filed on his behalf in opposition to that application, the DG's attitude was spelt out in unambiguous terms:

> *'Applicant cannot comment on the final EIR as they had an opportunity previously to comment on the draft.'*

- The attitude adopted by the DG in these proceedings was similar: he submitted that 'the process prescribed by the ECA does not provide for further comment on the final EIR prior to the decision being taken by the competent authority'.

[57] In defence of this attitude, the respondents submitted that an opportunity to make representations to the consultants sufficed. They rely in this regard on the provisions of the EIA Regulations. These regulations, so the argument went, prescribe the manner in which EIRs are to be compiled and submitted. As such, they provide for a procedure which is 'fair but different' from the provisions of PAJA, which procedure has been faithfully complied with by the consultants on behalf of ESKOM. The respondents' approach implies that full public participation in the process was required, but only up to submission of the final EIR. Thereafter, according to their argument, public

participation is only revived to the limited extent that interested parties have a right of appeal to the Minister against the decision.

[58] I find this approach to be fundamentally unsound. The regulations provide for full public participation in 'all the relevant procedures contemplated in these regulations'.[19] The respondents seek to limit such participation to the 'investigation phase' of the process (as contemplated by regs 5, 6 and 7). After submission of the EIR, however, the 'adjudicative phase' of the process commences, involving the DG's consideration and evaluation, not only of the EIR, but also – more broadly – of all other facts and circumstances that may be relevant to his decision. There is nothing in the Act (ECA) or the regulations that expressly excludes public participation or application of the audi rule during this 'second stage' of the process. In line with settled authority,[20] therefore, it follows that procedural fairness demands application of the audi rule also at this stage.

[59] A further reason why I find the respondents' approach to be unsound, is because it overlooks the fact that, on the DG's own version (though not Eskom's), the final EIR was 'substantially different' from the draft EIR. The final EIR made material changes and incorporated substantially more documentation than the draft EIR. The question for decision can therefore be

---

[19] Reg 3(1)(*f*).

[20] See eg *Attorney-General, Eastern Cape v Blom* 1988 (4) SA 645 (A) at 662G–I.

narrowed down to an enquiry whether it was procedurally fair to take administrative action based on 'substantially different' new matter on which interested parties have not had an opportunity to comment.

[60] By analogy with the approach adopted in motion proceedings where new matter is raised in reply, I am of the view that, if such new matter is to be considered by the decision-maker, fairness requires that an interested party ought to be afforded an opportunity first to comment on such new matter before a decision is made.[21] Support for this attitude is to be found in the following dictum of Van den Heever JA in *Huisman v Minister of Local Government, Housing and Works (House of Assembly) and Another*:[22]

> *'Were new **facts** to be placed before the "Administrator" which could be prejudicial to an appellant, it would be only fair that the latter be given an opportunity to counter them if he were able to do so, more particularly were the matter one in which the extant rights of an appellant could be detrimentally affected.'*

[61] Similar sentiments are expressed by De Ville:[23]

---

[21] Cf Herbstein & Van Winsen *The Civil Practice of the Supreme Court of South Africa* 4 ed (1997) 359–361.

[22] 1996 (1) SA 836 (A) at 845F-G. See also *Hayes v Minister of Housing, Planning and Administration, Western Cape* 1999 (4) SA 1229 (C) at 1248B–C; Devenish *et al op cit* 288, 304–305.

[23] *Op cit* 244.

> *'Where the final decision-maker is not permitted to take account of new evidence or required to hold an enquiry him/herself, but simply has to take a decision on the evidence (and recommendations) presented to him/her after a full enquiry (complying with the requirements of procedural fairness), a hearing will not be required before the taking of a final decision.'*

[62] In the present case, where the draft EIR was substantially overtaken by the final EIR, it is clear to my mind that *new facts* had indeed been placed before the decision-maker on behalf of Eskom. In these circumstances, I am of the view that the applicant, as an interested party, was entitled, as part of its right to procedural fairness, to a reasonable opportunity to make representations to the DG on the new aspects not previously addressed in its submissions in relation to the draft EIR.

[63] In an alternative argument, the respondents submitted that, in any event, the applicant had had ample opportunity, after the submission of the final EIR until the DG's decision was made, to submit written comments on the final EIR – either to the consultants or to the DG. They point out that the applicant received the final EIR together with all the documentation on which it was based more than six months before the decision was made. Furthermore, the report was also made available, as noted above, on the Internet and in certain public libraries.

[64] However, as appears from the above brief extracts from the record,[24] the DG had consistently adopted the attitude that the applicant and other interested parties had no right to comment on the final EIR prior to the decision being taken. It is accordingly clear that the DG and other officials in his department had closed their minds to further submissions from interested parties. Given this background, it is opportunistic, in my view, for the DG to suggest that, in any event, the applicant had had an adequate opportunity to comment on the final EIR but failed to do so. Faced with the above-mentioned attitude on the part of the decision-maker, it would have been an exercise in futility for the applicant – at great expense and effort – to have prepared and submitted comments to the DG (or the consultants) on the contents of the final EIR. I accordingly agree with the submission on behalf of the applicant that in the circumstances the notional opportunity enjoyed by the applicant to comment on the final EIR was 'meaningless'.

[65] Finally, in considering the requirements of procedural fairness in the present scenario, I bear in mind that the general approach should be 'a generous rather than a legalistic one'.[25] At the same time, the court should be alive to the following caution expressed by the Constitutional Court:

---

[24] Para [56] above.

[25] *Van Huyssteen v Minister of Environmental Affairs and Tourism* 1996 (1) SA 283 (C) at 305I.

> *'In determining what constitutes procedural fairness in a given case, a court should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively (a principle well recognised in our common law and that of other countries. As a young democracy facing immense challenges of transformation, we cannot deny the importance of the need to ensure the ability of the executive to act efficiently and promptly.'* [26]

[66] Be that as it may, I do not think that it would be placing an undue burden on the department if it were required to consider further submissions from interested parties regarding the contents of the final EIR, especially in view of the fact that the department went to the trouble of making the report widely available to interested parties.

[67] On the facts of this case, I am satisfied that interested parties – including the applicant – were entitled to a reasonable opportunity to make further submissions on the final EIR prepared by the consultants. As a fact, the applicant was not afforded such an opportunity, contrary to s 3(2)(*b*)(ii) of PAJA.

---

[26] *Premier, Province of Mpumalanga v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal* 1999 (2) SA 91 (CC) para 41 at 109H–110A.

Representations to the DG

[68] Having come to the foregoing conclusion, it follows that the DG's decision was fatally flawed and falls to be set aside. It is therefore not strictly necessary to consider the applicant's final review ground. However, seeing that great stress was laid on this aspect (it was described by the applicant as its 'main complaint'), and because it may have a bearing on the future conduct of the matter, I deem it necessary briefly to state my views on this aspect.

[69] The applicant's complaint was that the DG, who was the decision-maker in this case, did not afford it a hearing at all. As pointed out above, although the applicant repeatedly asserted a right to make representations to the DG, the DG consistently refused to afford the applicant a hearing. Even an application to the Pretoria High Court to enforce this right proved fruitless. Instead, the applicant had to content itself with written submissions addressed to Eskom's consultants during the first phase of the process. The applicant submitted that this was manifestly not sufficient and that it was entitled to make representations to the decision-maker himself.

[70] In support of its argument, the applicant submitted that the very purpose of the audi rule is to give an interested party an opportunity to influence the way in which the decision-maker – in this case the DG – exercises his discretionary power. To deny interested parties an opportunity of making representations to him and to confine them instead to representations made to

someone else did not serve the purpose of the audi rule at all and was particularly invidious in the circumstances of the present case. This is so because, although Eskom's consultants were notionally 'independent' in the sense that they were not institutionally part of Eskom, they were employed by Eskom to act as its agent and the purpose of their engagement was to obtain the authorisation Eskom sought. Eskom employed them, both to prepare the application for authorisation and to perform the functions of its consultants under the EIA Regulations. The consultants were, in other words, clearly aligned on Eskom's side and were not independent consultants employed by the decision-maker to assist him in making his decision. It meant that the only 'hearing' afforded to the applicant, was an opportunity to make submissions to the consultants for 'the other side', as it was put. Moreover, it meant that the consultants were allowed an opportunity to adjust the final EIR and to comment on and rebut the applicant's submissions without giving the applicant a corresponding opportunity.

[71] It is not quite clear from the papers whether the applicant claimed a right to a hearing by the DG personally. Support for such a stance is to be found in the following remarks by Denning LJ in *R v Minister of Agriculture*

and Fisheries, Ex parte Graham; R v Agricultural Land Tribunal (South Western Province), Ex parte Benney:[27]

> *'The ordinary principles of fair dealing require that a farmer should be able to put his case in his own words before the very man who is to take action against him, rather than that he should have to put it before an intermediary, who in passing it on may miss out something in his favour or give undue emphasis to things that are against him. This is so manifestly just and reasonable that the Minister would, I think, in all cases have been bound to hear the representations himself, unless the Act authorised him to appoint someone else.'*

[72] However, it does not follow from the foregoing authorities that an interested party is invariably entitled to be heard by the decision-maker personally. The weight of authority appears to indicate that some other person or body may in suitable circumstances be appointed to 'hear' the interested party – whether orally or by receiving written representations. This procedure may be permissible where the enabling statute authorises it and it may be a convenient course to follow, eg where the credibility of witnesses is not involved.[28]

---

[27] [1955] 2 All ER 129 (CA) at 134F–G, quoted with approval in this Division in *Camps Bay Rate-payers and Residents Association and Others v Minister of Planning, Culture and Administration, Western Cape, and Others* 2001 (4) SA 294 (C) at 320A-C and *Hayes v Minister of Finance and Development Planning, Western Cape* 2003 (4) SA 598 (C) at 616G-H. See also *Hayes v Minister of Housing, Planning and Administration, Western Cape* 1999 (4) SA 1229 (C) at 1248H.

[28] Cf eg *Jeffs v New Zealand Dairy Production and Marketing Board and Others* [1966] 3 All ER 863 (PC) at 870F–G; De Smith Woolf & Jowell *op cit* 6–113.

[73] In the present case, the DG pointed out that it would not only be 'physically impossible for (him) to read each and every page submitted, but it would also be senseless'. According to the DG, some of the documents submitted to the department deal with 'highly complex matters of a scientific and technical nature' and unless he were to rely on expert advice in that regard, he would not be able honestly and effectively to apply his mind to those issues. It was specifically for this purpose that a panel of experts was appointed to advise the DG with regard to Eskom's application herein.

[74] I am satisfied that the present case is an appropriate one where the DG would be entitled to rely on the assistance and expert advice of others in coming to his decision. Nevertheless, it is an essential requirement that, before making his or her decision, the decision-maker should be fully informed of the submissions made on behalf of interested parties and he or she should properly consider them. As pointed out by the Privy Council in *Jeffs v New Zealand Dairy Production and Marketing Board and Others,*[29] in some circumstances it may suffice for the decision-maker to have before it and to consider 'an accurate summary of the relevant evidence and submissions if the summary adequately discloses the evidence and submissions to the (decision-maker)'. What is required, as a minimum, is that the summary will contain 'a fair

[29] Footnote 28 above at 870G–H.

synopsis of all the points raised by the parties so that the repository of the power can consider them in order to come to a decision.'[30]

[75] This is *not* what happened in this case. The applicant's submissions to Eskom's consultants on their draft EIR were incorporated in an annexure to the final EIR. But the DG did not read those submissions or even a summary thereof. The DG does say that he read the executive summary of the final EIR and that he 'considered' the report of the panel of experts. But it is clear from the report itself that it is a brief and rather perfunctory one that does not even mention the applicant's submissions. Thus, as a fact, the DG took his decision without any regard to the applicant's submissions and indeed without knowing what they were.

Conclusion

[76] Taking a step back and considering the evidence as a whole, the picture that emerges is one where the requirements of procedural fairness were by and large recognised and observed on behalf of the department up to and including the submission by Eskom's consultants of their final EIR. Subsequent thereto, however, no further submissions from interested parties were entertained or even invited by the DG, notwithstanding the fact that the final EIR differed materially from the earlier report on which the applicant did

---

[30] *Ohlthaver & List Finance and Trading Corporation Ltd and Others v Minister of Regional and Local Government and Housing and Others* 1996 NR 213 (SC) 234G.

comment. Furthermore, the DG made his decision without having heard the applicant and without even being aware of the nature and substance of the applicant's submissions. In these circumstances, I am driven to the conclusion that the process that underlay the decision of the DG was procedurally unfair and falls to be set aside.

[77] In the light of the conclusion I have reached, it is not necessary to deal with the two subsidiary review grounds, namely that the DG failed to properly address the problems posed by nuclear waste at the proposed PBMR; and that the DG abdicated his responsibility to properly consider safety issues by deferring to the National Nuclear Regulator.

[78] As for the appropriate remedy in these circumstances, s 8(1)(*c*)(i) of PAJA authorises the court to 'grant any order that is just and equitable', including orders setting aside the administrative action and 'remitting the matter for reconsideration by the administrator, with or without directions'. It is clear from the evidence on record that the DG's decision was preceded by a protracted process, involving public participation on a wide scale. By and large, the process was conducted in a manner that was thorough and fair. The fact that the final step, viz the DG's decision, is to be set aside as flawed should not result in the *whole* process having to commence afresh. I would accordingly regard it as just and equitable, in setting aside the DG's decision, to issue directions to provide for the reconsideration by the DG of the matter

after the applicant – and other interested parties – have been afforded an opportunity to address further written submissions to the DG on the final EIR as well as any other relevant considerations that may affect the decision.

[79] Finally, in view of the public interest generated by this matter, it needs to be emphasised that our decision does not express any opinion as to the merits or demerits of the proposed PBMR, in particular, nor of nuclear power in general. These were not matters that we were called upon to consider. Our decision deals solely with the procedural fairness of the DG's decision from an administrative law perspective and in that regard, we have found, for the reasons set out herein, that the decision was flawed and has to be set aside.

Order

[80] For the reasons set out above, it is ordered as follows:

1. **The first respondent's decision, made on 25 June 2003 in terms of s 22(3) of the Environment Conservation Act 73 of 1989, authorising the second respondent's construction of a pebble bed modular reactor at Koeberg, is reviewed and set aside.**

2. **The matter is remitted to the first respondent with directions to afford the applicant and other interested parties an opportunity of addressing further written submissions to him along the lines as set out in this judgment and**

within such period as he may determine and to consider such submissions before making a decision anew on the second respondent's application.

3. The respondents are ordered jointly and severally to pay the applicant's costs, including the costs of two counsel.

B M GRIESEL

DAVIS J: I agree.

D M DAVIS

MOOSA J: I agree.

E MOOSA