Date of hearing: 3 June 2003

IN THE HIGH COURT OF SOUTH AFRICA

TRANSVAAL PROVINCIAL DIVISION

Case Number: 13542/03

In the matter between:

EARTHLIFE AFRICA (CAPE TOWN) **Applicant**

and

DIRECTOR-GENERAL: DEPARTMENT OF ENVIRONMENTAL AFFAIRS AND TOURISM **1st Respondent**

ESKOM HOLDINGS LIMITED **2nd Respondent**

APPLICANT'S HEADS OF ARGUMENT

RELIEF SOUGHT

1. The notice of motion seeks the issue of a rule *nisi* in which the substantive relief which the applicant seeks is set out, and, separately therefrom, an interim interdict pending the confirmation or discharge of the rule *nisi*.[1]

2. The application was initially brought on some 24 hours notice when it came before Motata J on Thursday 22 May 2003. It was adjourned by the

Judge to Monday 26 May 2003, apparently to give the first respondent more time to consider its position and to answer the applicant's papers.[2]

3. First the second respondent and then the first respondent delivered answering affidavits during the course of the day on 26 May 2003 and the matter was then adjourned for the applicant to reply and for hearing on 3 June 2003.[3]

4. It appears to the applicant that the papers are now complete and that the Court is in a position to deal with the substantive relief sought by the applicant as part of the rule *nisi* and an interdict is not necessary unless judgment is reserved.[4] [5]

5. If either of the respondents credibly contend that they have not had the opportunity to answer the papers on the substantive relief and that they are accordingly only prepared at this stage to deal with the interim relief (i.e. the interdict), then the applicant will only seek the interdict at this stage. It will otherwise seek final relief in the form of paragraphs 2(a) to 2(e) of the notice of motion.

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1 Notice of Motion: 2/2 and 3/3 (references are given as [page No./paragraph No.]).
2 McDaid (reply): 113/2(a).
3 McDaid (reply): 114/2(f) – 115/2(g).
4 McDaid (reply): 115/3.
5 Apologies are extended for the use of the word "sight" rather than "site" in paragraphs 2(a) and 3 of the notice of motion. An appropriate amendment will be sought.

URGENCY

6. Both the first and second respondents assert that the application is not urgent and that the urgency claimed by the applicant is self-created.[6]

7. The applicant asserts that when this matter was enrolled on 22 May 2003 and again on 26 May 2003, on the basis of the information then available to the applicant and what was then before court, the matter was of considerable urgency such as to warrant the applicant proceeding as it did. The factual position is as follows:

   (a) In October 2002 the applicant first asserted in correspondence to the Minister of Environment and Tourism that it had a right to be heard prior to a decision being taken on the second respondent's application for authorisation.[7]

   (b) The Minister did not reply until late in December 2002, but he did not answer the question that had been directed to him as to who had the authority to make the decision on the PBMR.[8] The first respondent also replied, in almost identical terms, in late December 2002.[9]

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6 Fourie: 80/17.1.2; Lekganyane: 108/6.13.
7 "EJM3": 34-35.
8 "EJM4": 36-37.
9 "EJM5": 38-39.

(c) On returning from his Christmas annual leave, the applicant's attorney wrote to the Minister again on 16 January 2003, again asserting the applicant's right to be heard and giving more substance to that assertion, and again asking who had the authority to make the decision on the PBMR.[10]

(d) The first respondent replied on 10 March 2003 stating that he was the relevant decision-maker and arguing that the applicant had already had its opportunity to be heard.[11]

(e) The applicant's attorneys then commenced preparation of an application to be brought in the normal course, i.e. non-urgent, because they had information which showed that a decision on the PBMR was a long way off.[12]

(f) When on 12 May 2003 the applicant received information that, contrary to the applicant's expectations, the decision was going to be made in May, it immediately wrote to the first respondent and asked him to confirm whether or not this was so and, if it was not, when he anticipated that a decision would be made.[13]

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10 "EJM6": 40-41.
11 "EJM7": 42-43.
12 McDaid (reply): 121/12(c)-(d).
13 McDaid (reply): 122/12(f)-(g); "EJM8": 44.

(g) Although the first respondent replied to the fax in question on 15 May 2003, he did not answer either of the two critical enquiries.[14] The applicant accordingly still did not know what the situation was with regard to when a decision might be made.

(h) On Monday 19 May 2003 when the applicant's attorney arrived at his office he found that late on the preceding Friday an e-mail had been sent to him by the second respondent's Consultants in which it was stated that a decision was expected "in May 2003".[15]

(i) As two-thirds of May had already passed, the applicant took the attitude that a decision might be made at any time and that the matter was accordingly extremely urgent.[16]

(j) On the same day the applicant then wrote to the first respondent asking him to give an undertaking not to make his decision until the applicant's assertion of a right to be heard prior thereto had been adjudicated, and advising that if no such undertaking was given by close of business on 20 May an urgent application for

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14 McDaid (reply): 123/12(h); "EJM11": 156.
15 "EJM 9": 46; McDaid (reply): 123/12(i).
16 McDaid (reply): 123/12(l).

appropriate relief would be brought.[17] No reply has yet been received to that fax.[18]

(k) The applicant accordingly launched the application early on 21 May and served the papers first by fax (at approximately 11h00)[19] and then by hand (at lunchtime and shortly thereafter)[20]

8. It was only during the course of the morning on 26 May 2003 that the applicant was informed by the first respondent's representatives that in fact a decision was not going to be made in May, but that it might be made at any time thereafter.[21]

9. In those circumstances it is submitted that the applicant was entirely reasonable and justified in bringing the application when it did, and that the urgency of the matter might easily have been avoided if the Consultants had not sat on the information available to them for 6 weeks,[22] and if the first respondent had observed the simple courtesy of replying to the applicant's enquiries of 12 May 2003.

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17 "EJM10": 58.
18 McDaid (reply): 125/12(n) and (p).
19 Pole: 63-67.
20 Segole: 68-69.
21 McDaid (reply): 114/2(e), 126/12(r).

IN LIMINE: AUTHORITY OF DEPONENT

10. Although it heads the point "*Locus Standi*", the first respondent asserts that the deponent to the founding affidavit, Ms McDaid, lacks authority from the applicant.

11. We submit that this point is without foundation in the light of the resolution of the applicant's steering group,[23] clause 3.1.10 of the applicant's constitution[24] and McDaid's explanation that she is authorised by the applicant to bring the application[25] and that the resolution is a proper resolution.[26] [27]

IN LIMINE: NON-JOINDER

12. The first respondent asserts that there has been a fatal non-joinder of the National Nuclear Regulator and the Minister of Mineral and Energy Affairs.[28]

13. The interest which it is alleged that the said Minister has in the application is that the applicant "raises issues relating to a nuclear power plant and the

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22 McDaid (reply): 123/12(J).
23 "EJM1": 28.
24 "EJM12": 159.
25 McDaid (founding): 6/2.
26 McDaid (reply): 129/17(a) – 130/17(d).
27 See *Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk* 1957 (2) SA 347 (C).
28 Fourie: 84/17.3.1-85/17.3.2.

resultant nuclear waste which issues resort under the [said] Minister" (sic). The first respondent is apparently waiting for the Department of Mineral and Energy Affairs to formulate a policy for the handling of nuclear waste.[29]

14. The interest which it is alleged that the National Nuclear Regulator has in the application is that "the safety impact of the project and the issuing of a safety analysis report" is provided for by the National Nuclear Regulator.[30]

15. A plea of non-joinder can only be successful if joinder of the party identified was a necessity, that is to say that the party concerned has "a direct and substantial interest" in the order that the court might make.[31]

16. A direct and substantial interest is "an interest in the right which is the subject matter of the litigation and not merely a financial interest" and it is a "legal interest".[32]

17. The right which is the subject matter of this litigation is the applicant's alleged right to be heard by the first respondent before he makes his decision on the application for authorisation. It is not the legality or otherwise of the PBMR proposal. Neither does it have anything to do with

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29 Fourie: 84/17.3.1.
30 Fourie: 85/17.3.2.
31 *United Watch and Diamond Co (Pty) Ltd v Disa Hotels Ltd* 1972 (4) SA 409 (C) at 415E; *Segal v Segil* 1992 (3) SA 136 (C) at 140F-143J.
32 *Wistyn Enterprises (Pty) Ltd v Levi Strauss & Co* 1986 (4) SA 796 (T) at 801C-804E.

government policy on the disposal of nuclear waste or the National Nuclear Regulator's safety analysis report.

18. Although the first respondent has apparently invited the Department of Mineral and Energy Affairs and the National Nuclear Regulator to make an input to him on certain aspects of the PBMR proposal, he remains the authorised decision-maker in terms of section 22 of the Environment Conservation Act 73 of 1989 ("ECA").[33] It is only to him that the applicant wishes to enforce a right to make representations.

19. In those circumstances we submit that there is no merit in the non-joinder point in *limine.*

IS THE RELIEF NECESSARY?

20. Both the respondents assert that at any time between October 2002 and now the applicant could in any event have made representations to the first respondent and that the relief sought is accordingly unnecessary.[34]

21. This assertion is false inasmuch as it is clear beyond doubt that the attitude of the first respondent has always been that there is no opportunity to be

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33 See "EJM7": 42/3.

34 Fourie: 82/17.1.7; Lekganyane: 107/6.8, 108/6.10, 108/6.12, 109/6.14.

heard at this stage of the process, i.e. after the final EIR has been delivered and before the decision on authorisation:

(a) In "EJM5" on 23 December 2002 the first respondent declined the applicant's request for an opportunity to be heard and stated that "**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 a record of decision**".[35]

(b) In "EJM7" on 10 March 2003 the first respondent stated that "**the EIA process makes no provision for public and private hearings at this stage of the prescribed process**" and that "**the next step in the prescribed … process is the issuing of a record of decision**".[36]

(c) In his affidavit Mr Fourie on behalf of the first respondent makes the following statements:

(i) "**The applicant is not entitled to come and address the first respondent**".[37]

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35 "EJM5": 38-39.
36 "EJM7": 42-43.
37 Fourie: 88/27.

(ii) "**Applicant cannot comment on the final EIR as they had an opportunity previously to comment on the draft EIR**".[38]

(iii) "**Applicant became aware on 18 December 2002 that it will not be granted a further hearing for reasons mentioned in annexure 'EJM4'**".[39]

(iv) "**There has never been a regular practice that first respondent grants any interested party a hearing before making a decision on the authorisation of the activity**".[40]

22. Further, by opposing the declaratory relief in paragraph 2(a) of the notice of motion, the first respondent is adopting the position that the applicant does not have a right to a reasonable opportunity to make representations to him prior to him making his decision.

23. In those circumstances for the applicant to have gone to the trouble and expense of preparing representations and sending them to the first respondent would have been an exercise in futility; he clearly would have disregarded them entirely.

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38 Fourie: 94/37.1.
39 Fourie: 97/42.

THE RIGHT TO BE HEARD

24. Section 33(1) of the Constitution provides that "everyone has the right to administrative action that is … procedurally fair".

25. The Promotion of Administrative Justice Act 3 of 2000 ("PAJA") gives substance to the administrative justice rights in section 33 of the Constitution. In particular, section 3 of PAJA deals with the right to procedurally fair administrative action. Section 3(1) of PAJA provides as follows:

> "Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair."

26. We submit that the applicant enjoys the right to procedurally fair administrative action with respect to the first respondent's decision on the PBMR because:

(a) The PBMR is an activity identified in terms of section 21 of ECA a potentially having a substantial detrimental affect on the environment.[41]

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40 Fourie: 100/49.
41 McDaid (founding): 10/16.

(b) In particular, it is an activity which is scheduled in Government Notice R.1182 of 5 September 1997.[42]

(c) It is for this reason that the second respondent requires authorisation in terms of section 22 of ECA.

(d) The members of the applicant and the people whose interests it seeks to represent and protect have a right to the following in terms of section 24 of the Constitution:

> "(a) to an environment that is not harmful to their health or well-being; and
> (b) to have the environment protected, for the benefit of present and future generations, through reasonable and legislative and other measures that –
> (i) prevent pollution and ecological degradation;
> (ii) promote conservation; and
> (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."

(e) It is these rights that may be materially and adversely affected by the first respondent's decision, which means that that decision must be procedurally fair.

27. Section 3(2)(b)(ii) of PAJA provides that in order to give effect to the right to procedurally fair administrative action, an administrator, subject to

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42 *Ibid*.

subsection (4), must give a person referred to in section 3(1) "a reasonable opportunity to make representations".

28. Subsection (4) provides that an administrator may depart from any of the requirements of subsection (2), but in deciding to do so he or she must take into account all relevant factors including five specified factors.

29. Not only does the first respondent not seek to rely on subsection (4) in his affidavit, but he clearly did not take the specified factors into consideration. His rationale for denying the applicant the opportunity to make representations is that the EIA regulations do not provide for such an opportunity at this stage.

30. We submit that in adopting this approach the first respondent has fallen into error. The position is that where a statute empowers a public official to give a decision that may prejudicially affect the rights of an individual, there is a right to be heard unless the statute shows, either expressly or by necessary implication, a clear intention on the part of the legislature to exclude such a right.[43]

31. An analysis of the EIA regulations reveals that there is nothing therein that determines when interested and affected parties may make an input. In particular, there is nothing therein that excludes the right to make

representations to the decision-maker him or herself on the basis of the final EIR and all other documentation that serves before the decision-maker.

32. A right to be heard in an environmental decision-making context analogous to the present was afforded a public interest environmental group by the Supreme Court of Appeal in *Director: Mineral Development, Gauteng Region v Save the Vaal Environment* 1999 (2) SA 709 (SCA).

33. The point is simply that although the applicant had the opportunity to participate in the EIA process, it has never had the opportunity to make representations to the decision-maker. It has had to address the second respondent's Consultants and they then presented those representations in a massaged form, and additional information, to the first respondent.

34. The EIA process that is handled by the Consultants is in effect the investigative phase of the enquiry. If it was not expressly provided that interested and affected parties had a right to participate in that phase, they would not enjoy such a right.[44] To afford them an opportunity to participate at that stage cannot deprive them of their right to be heard at the deliberative or adjudicative phase.

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43 *Attorney-General, Eastern Cape v Blom* 1988 (4) SA 645 (A) at 662G-H.

44 *Chairman, Board on Tariffs and Trade v Brenco Inc* 2001 (4) SA 511 (SCA), especially paragraph 29 at 527E-G; *Simelane v Seven Eleven Corporation SA (Pty) Ltd* 2003 (3) SA 64 (SCA), especially paragraph 22 at 78E-I.

35. The applicant's case for an opportunity to be heard by the first respondent is made all the stronger by the fact that the final EIR contains substantially more and different information to that contained in the draft EIR on which is previously had the opportunity to comment.[45]

ADDITIONAL INFORMATION

36. It appears from Mr Fourie's affidavit that in addition to the final EIR the first respondent will make his decision having regard to the following:

(a) The Department of Mineral and Energy Affairs' policy on the disposal of nuclear waste;[46]

(b) The safety analysis report of the National Nuclear Regulator;[47]

(c) The general operating rules and the safety and security impact assessment;[48] and

(d) The reports of the first respondent's specialists.[49]

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45 McDaid (reply):146/43(a) – 149/43(h); "EJM23": 206-211.
46 Fourie: 84/17.3.1.
47 Fourie: 85/17.3.2.
48 Fourie: 95/39.1.
49 Fourie: 96/40.2.

37. It has long been held that the right to procedural fairness includes the right to access to the relevant information in order to make representations. In *Du Preez v Truth and Reconciliation Commission* 1997 (3) SA 204 (SCA) at 232C the Supreme Court of Appeal approved of this statement:

> "Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

38. The Court also recognised a common law obligation on a decision-maker to give relevant information to the person implicated.[50]

39. A Full Bench of the CPD in *Masamba v Chairperson, Western Cape Regional Committee, Immigrants Selection Board* 2001 (12) BCLR 1239 (C) at 1255A stated the following with regard to the *audi alteram partem* rule in the constitutional context:

> "Any consideration which may count against a party affected by a decision, as also any prejudicial information which will be placed before the decision-maker, must be communicated to such party, so as to enable him or her to deal with such consideration or information."

40. In the premises we submit that the applicant has a right to the information that will serve before the first respondent to which it does not already have access, namely the inputs of the Department of Mineral and Energy

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[50] At 235F-G.

Affairs and the National Nuclear Regulator and the reports of the first respondent's appointed experts.

THE INTERIM INTERDICT

41. In the event that the Court is not able to deal with the final relief at this stage, the applicant will seek an interim interdict in the form of paragraph 3 of the notice of motion.

42. Insofar as the requisites for an interim interdict are concerned:

(a) We have already dealt above with the question of the applicant's *prima facie* right to be heard.

(b) We submit that the applicant has established a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted. The reason for this is simply that a decision on the authorisation may be made at any time and once it has been made the applicant's opportunity to be heard thereon will be lost forever.

(c) Insofar as the balance of convenience is concerned, the only possible prejudice to the respondents in the granting of the interim relief is that the decision will be delayed. However, viewed in the

context of the fact that the second respondent commenced this process approximately 3 years ago[51] and the final EIR has been before the first respondent since November 2002,[52] a short further delay is insignificant. Moreover, the decision on authorisation is of enormous importance to the people of the Western Cape and fairness must not only be done, it must be seen to be done.

(d) We submit that the applicant has no other satisfactory remedy. The respondents contend that the applicant would have the remedy of a review of the decision on authorisation, but for the reasons given by Farlam J (as he then was) in *Van Huyssteen NO v Minister of Environmental Affairs and Tourism* 1996 (1) SA 273 (C) at 308G-309B, this is erroneous.[53]

COSTS

43. In the event that the applicant is successful, the costs should naturally follow the result. These costs should include the costs reserved on 22 and 26 May 2003.

44. In the event that the applicant is not successful, we submit that the applicant should nor be mulcted in costs in reliance on section 32(2) of the

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51 Fourie: 74/4.
52 Lekganyane: 107/6.7.

National Environmental Management Act 107 of 1998 ("NEMA") which provides:

> "A court may decide not to award costs against a person who, or a group of persons which, fails to secure the relief sought in respect of any breach or threatened breach of any provision including a principle of this Act or any other statutory provision concerned with the protection of the environment or the use of natural resources if the court is of the opinion that the person or group of persons acted reasonably out of a concern for the public interest or in the interest of protecting the environment and had made due efforts to use other means reasonably available for obtaining the relief sought."

45. The applicant has sought relief in respect of a breach or threatened breach of sections 2(f), (g) and (k) and 24(7)(d) and (h) of NEMA and of the right to be heard that is inextricably part of the decision-making power in section 22 of ECA. We submit that the applicant has acted reasonably.

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2 June 2003.

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[53] See also McDaid (reply): 152/48