



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED. <i>OK</i>
<i>07/03/2017</i>	
DATE	<i>C. Garbett</i> SIGNATURE

Case no. 51505/2014

7/3/2017

In the matter between:

EARTHLIFE AFRICA JOHANNESBURG

FIRST APPLICANT

C.T. GARBETT

SECOND APPLICANT

and

MINISTER OF ENVIRONMENTAL AFFAIRS

FIRST RESPONDENT

MINISTER OF ENERGY

SECOND RESPONDENT

NATIONAL NUCLEAR REGULATOR

THIRD RESPONDENT

CHIEF EXECUTIVE OFC OF THE NATIONAL

NUCLEAR REGULATOR

FOURTH RESPONDENT

NUCLEAR ENERGY CORPORATION

OF SOUTH AFRICA LIMITED

FIFTH RESPONDENT

JUDGMENT

RABIE, J

1. In this application the applicants seek to have an authorisation granted by the first respondent in terms of section 22 of the Environment Conservation Act 72 of 1989, set aside and to have the fifth respondent interdicted from proceeding with the installation and operation of a test smelter and two subsequent induction smelters until a fresh authorisation has been granted by the first respondent.
2. There is only one issue upon which the success or failure of the application hinges, namely whether the said authorisation has lapsed because of the failure of the fifth respondent to comply with clause 3.4 of the authorisation which reads as follows:

"If the activity authorised by this letter does not commence within five years from the date of signature of this letter, the authorisation will lapse and the applicant will need to reapply in terms of the applicable legislation or any amendments thereto."

3. The following may serve as a brief background: The Republic of South Africa, being a country producing nuclear materials, is a member of the International Atomic Energy Agency in support of the Nuclear Non-proliferation Treaty pursuant to which it implements and applies the Safeguards Agreement which, inter alia, recommends and prescribes methods for the disposal of nuclear waste material. To this end the Republic has passed legislation establishing the fifth respondent, an entity established in terms of section 3 of the Nuclear Energy Act to, inter alia, undertake and promote research and development in the field of

nuclear energy and radiation sciences and technology and, subject to the Safeguards Agreement, to make these generally available. Also to process source material, special and restricted nuclear material and to re-process and enrich source material and nuclear material. During the 1990s the Republic took a decision to decommission the uranium enrichment facilities at Pelindaba, near Pretoria. As a result thereof there were uranium contaminated scrap materials comprising both ferrous and non-ferrous metals stored at the Pelindaba site. The significant portion of this metal consisted of Separating Elements Assemblies which, in accordance with non-proliferation agreements, should be destroyed.

4. These materials pose a safety risk and the fifth respondent has therefore embarked upon an international study looking at adequate means to decontaminate the said materials on the Pelindaba site by way of which the materials could be safely managed according to international waste management practices.
5. The process of disposing of the nuclear material has to be preceded by authorisations obtained from both the first respondent and the third respondent. In this regard the provisions of the Environment Conservation Act, 73 of 1989, may be mentioned. According to section 22 no person shall undertake an activity identified in terms of section 21(1) or cause such an activity to be undertaken except by virtue of a written authorisation issued by the Minister or a competent authority designated for such purpose.
6. Section 21 of the Environment Conservation Act provides as follows:

"21 Identification of activities which will probably have a detrimental effect on environment

(1) The Minister may by notice in the Gazette identify those activities which in his opinion may have a substantial detrimental effect on the environment, whether in general or in respect of certain areas."

7. In the Regulations promulgated under section 21 the Minister identified in Schedule 1 certain activities in general as activities which may have a substantial detrimental effect on the environment. Section 1(b) of Schedule 1 stipulates the following:

"1 The construction, erection or upgrading of –

(a) ...

(b) nuclear reactors and facilities for the production, enrichment, processing, re-processing, storage or disposal of nuclear fuels and wastes; ..."

8. The first respondent consequently applied for authorisation in terms of section 22 of the Environment Conservation Act which was granted to it in 2003. Various appeals were lodged to the Minister against this authorisation which eventually led to the Minister re-issuing the authorisation on 31 August 2007. After dealing with the background to the matter the following was stated in the Minister's authorisation:

"Record of decision

Record of decision for project reference a 24/16/3/248 proposed installation and operation of two induction smelters in area 26 at the nuclear energy Corporation of South Africa, Pelindaba.

By virtue of the power vested in me in terms of section 33 (1) Environment Conservation Act, (Act 73 of 1989) ("the Act"), I hereby, in terms of section 23 (3) of the Act, authorise South African Nuclear Energy Corporation (NECSA) to undertake the activities specified/detailed below subject to the indicated conditions as stipulated in this record of decision."

9. Paragraph 1 of the Record of Decision then, inter alia, provides as follows:

"1. Description, extent and location of the activity

The project entails the installation and operation of a test smelter and subsequent construction and operation of two induction smelters within the Necsa site as part of Necsa's waste management and minimisation programme. Part of the programme includes the

decontamination of approximately 40,000 separating elements that were part of the uranium enrichment plant."

10. Paragraph 3.4 of the Record of Decision provides as follows:

"3.4 Duration of authorisation

If the activity authorised by this letter does not commence within five years from the date of signature of this letter, the authorisation will lapse and the applicant will need to reapply in terms of the applicable legislation or any amendments thereto."

11. It may be mentioned that although sections 21 and 22 of the Environment Conservation Act including the notices and regulations issued pursuant thereto were repealed by section 50 (2) of the National Environmental Management Act, Act 107 of 1998, all applications made under the Environment Conservation Act Regulations which were not finalised before their repeal, are in terms of Regulation 84 of the 2006 Regulations to be dispensed with under the Environment Conservation Act Regulations. Regulation 73 of the 2010 Regulations also adopted authorisations issued in terms of previous Regulations. This application thus concerns the provisions of the Environment Conservation Act, the Regulations promulgated in terms thereof and the authorisations granted in terms thereof.
12. As far as the physical actions on the fifth respondent's site are concerned, the following had, inter alia, been done as a consequence of the authority granted to the fourth respondent: Preparation of an existing transformer bay which was the first physical activity by which the smelter construction started. This activity started during the beginning of May 2012 and was completed by the end of July 2012; Placement of the new transformer for the smelter on the modified existing transformer bay. This activity was executed after the transformer bay preparation was completed and was completed within the first week of August 2012; The

laying of electrical cables from Area 26 (the smelter site) in order to connect the newly installed transformer to the electrical substation in Area 30. The work in this regard was completed before the end of August 2012.

The Applicants' stance:

13. According to the applicants the first respondent failed to commence with the activity within five years from the date of the signature of the Record of Decision and consequently, so it was submitted, the authorisation had lapsed and the fifth respondent has to apply afresh for such authorisation from the Minister of Environmental Affairs.
14. The applicants argued that the Minister elected to define the "activity" as a single activity by using the word "and" conjunctively. Consequently, so it was submitted, the fifth respondent had to commence with the installation and the operation of a test smelter and the subsequent construction of two induction smelters and the operation of those smelters within the five year period. Since the fifth respondent had, according to the applicants, only commenced with preparation activities, and not with the installation of the test smelter and not with the operation of the test smelter and not with the construction of the two induction smelters and not with the operation of the two smelters, the fifth respondent had not, according to the applicants, commenced with the "activity" authorised in the Record of Decision as required by paragraph 3.4 thereof.
15. The applicants further submitted that since the first respondent is not entitled to proceed with the project in the absence of any authorisation as contemplated in

section 21 of the Environment Conservation Act, this court should grant the relief prayed for in the Notice of Motion.

16. The applicants also referred to the licence to be issued by the fourth respondent in terms of section 21 of the National Nuclear Regulator Act, 47 of 1999. Such a licence was issued by the fourth respondent but according to the applicants it was incompetent for the fourth respondent to do so since the authorisation in terms of section 22 of the Environment Conservation Act had, according to them, lapsed. It is not necessary to deal further with this issue since the relief claimed by the applicants did not relate to the aforesaid licence. The licence must accordingly and for purposes of this application be regarded as a valid licence.

The Respondents' stance:

17. The fifth respondent filed an answering affidavit dealing with all the averments on behalf of the applicants. After emphasising the fact that the project was undertaken in execution of the international duties of the Republic flowing from the aforesaid International Treaty, it was submitted that the construction, erection and the operation of this nuclear facility for the disposal of nuclear wastes, was identified in terms of section 21 of the Environment Conservation Act and that this meant that the fifth respondent required an authorisation in terms of section 22 of the said Act from the first respondent.
18. It was submitted that the authorisation issued by the first respondent gives particulars of the project and stated in paragraph 3.1 thereof that the authorisation applies in respect of the installation and operation of a test smelter and subsequent installation and operation of two induction smelters. The question of

the operation of these facilities results from paragraph 9 of the said Schedule 1 which identifies scheduled processes listed in the second schedule to the Atmospheric Pollution Prevention Act, 1965. It was submitted that it is clear from the answering affidavit that the commissioning of the smelters, once constructed, would take place over a matter of years into the future. The commissioning is an activity which only follows upon the construction of the facilities somewhere in the future.

19. It was submitted that the project is consequently one composite activity consisting of the construction and erection of the facility and once so constructed, the commissioning and operation thereof. It was submitted that the argument by the applicants that the fifth respondent had to commence with all the elements of the project within five years, is based upon a highly impractical and artificial interpretation of the section 21 authorisation by stressing the word "and", and thus by breaking up the activity into various elements which all have to be commenced with within the five year period.
20. I agree with the submissions on behalf of the fifth respondent. On the applicants' interpretation the authorisation required the completion of every element of the composite activity preceding the operation thereof in order to arrive at the last element of commissioning and operation, which, according to the applicant, also had to commence within the five year period. This is not what was required. Only the commencement or the starting of the execution of this composite activity was required within five years.
21. Paragraph 3.4 of the Record of Decision requires the "activity" authorised by the authorisation, to commence within five years. According to paragraph 1 of the

Record of Decision the "activity" is described by reference to the project which entails the installation and operation of a test smelter and the subsequent construction and operation of two induction smelters. On the applicants' interpretation the construction and the operation of the test smelter as well as the construction as well as at least the commencement of the operation of the two induction smelters would have had to be done within the five year period. This is so because the one element of the activity follows upon the other. If this was the intention of the first respondent in the Record of Decision, he would simply have required that the last element or stage, namely the operation of the two test smelters, had to commence within five years. This was not done and instead reference was made to the "activity" which was identified in paragraph 1.

22. It is also not without significance that the "activity" identified in Schedule 1 of the Regulations is "the construction, erection or upgrading of...nuclear...facilities for the...disposal of nuclear fuels and wastes". The activity clearly primarily refers to the construction of the relevant facility and adds its operation to complete the reference to one composite activity. The activity logically commences with the construction process. In my view it would be artificial and wrong to break up the project into its different elements or into different parts and to interpret the Record of Decision in a manner requiring each such element or part to commence (and finalised in most cases) within the five year period.
23. The activity referred to by the first respondent in the Regulations is the activity of constructing or erecting or upgrading certain facilities for certain purposes. That is the activity the first respondent referred to and which had to be commenced with within the five year period. It is clear from the Record of Decision that the

installation and operation of the test smelter would have preceded the installation and operation of the two induction smelters. In fact, the results of the test smelter would have been considered by the relevant Department. Similarly the operation of the induction smelters would only have commenced after its complete installation. As mentioned above, if the first respondent intended the operation of the induction smelters, which constitutes the last stage of the project, to have been commenced within a five-year period, he would simply have said so. The use of the word "and" is simply used to describe the broader activity or the whole project and does not detract from the fact that one activity was authorised and that it commenced at the installation stage.

24. In the affidavit filed on behalf of the first respondent it was stated that they understood the commencement of an activity as comprising any physical activity, including site preparation and any other activity on site in furtherance of a listed activity or specified activity as commencing with a project as intended in the authorisation. This view accords with my interpretation.
25. Lastly, as far as the installation or construction is concerned, little needs to be said. There can be no doubt that the work done on the site constitutes construction of the envisaged facilities and not mere preparation as the applicants would have it. According to the first respondent substantial work had been undertaken and according to him the project was in the middle or about to be completed.
26. In the result I am of the view that the authorisation granted to the fifth respondent on 31 August 2007 has not lapsed and consequently that the relief prayed for cannot be granted.

27. As far as costs are concerned, there is no reason why costs should not follow the event. Senior counsel who appeared on behalf of the fifth respondent did not insist on costs on the tariff of senior counsel.
28. In the result, the following order is made:
1. The application is dismissed with costs.

A handwritten signature in black ink, appearing to read 'C.P. Rabie', written over a horizontal line.

C.P. RABIE

JUDGE OF THE HIGH COURT