IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.: 56907/2021

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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In the matter between:

AFRICAN CLIMATE ALLIANCE	First Applicant
VUKANI ENVIRONMENTAL JUSTICE MOVEMENT IN ACTION	Second Applicant
THE TRUSTEES FOR THE TIME BEING OF GROUNDWORK TRUST	Third Applicant

and

THE MINISTER OF MINERAL RESOURCES AND ENERGY	First Respondent
THE NATIONAL ENERGY REGULATOR OF SOUTH AFRICA	Second Respondent
MINISTER OF FORESTRY, FISHERIES AND THE ENVIRONMENT	Third Respondent
THE PRESIDENT OF THE REPUBLIC OF SOUTH	Fourth Respondent

AFRICA

THE MINISTER OF ELECTRICITY	Fifth Respondent
and	
CENTRE FOR CHILD LAW	*First Amicus Curiae*
VAAL ENVIRONMENTAL JUSTICE ALLIANCE	Second *Amicus Curiae*

JUDGMENT

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van der Westhuizen, J

[1] An application in respect of a contentious issue relating, *inter alia,* to harm to the environment and the resulting health issues, was launched by the three applicants in this matter. At heart was the South African Government's plan to procure an additional 1500 megawatts of new coal-fired power stations, thus impacting upon the rights of current and future generations. Although the application was pointedly in respect of the health rights of children, the general effect of the intended procurement equally impacted on the health rights of the nation as a whole.

[2] The applicants are institutions or rights group that advance the best interests of children, and who take up the cudgels for the youth on various issues that impact, or may impact negatively, on the constitutional rights of children.

[3] The alleged main perpetrators of transgressing those rights are the respondents, in particular the first and second respondents: The Minister of Mineral Resources; and the National Energy Regulator of South Africa. After the launch of the application, the first respondent was replaced by the President, subsequent to the National Elections taking place earlier this year, when a new ministry was tasked with dealing with

the issue of electricity in the stead of the first respondent, namely, the fifth respondent, the Minister of Electricity. The first and second respondents opposed the application. A notice to abide was filed by the fourth respondent. At the hearing of the matter, the fifth respondent gave notice of his intention to abide the decision of the court and did not further participate in the proceedings.

[4] Two parties sought to join the proceedings. They were the Centre for Child Law and a civic group known as the Vaal Environmental Justice Group. Both parties were granted leave to join as *amici curiae.*

[5] The application was a constitutional challenge to and a review of three decisions;

(a) the Integrated Resources Plan 2019 (IRP 2019) published by the first respondent on 18 October 2019 and relating to the addition of 1500 megawatts of new coal-fired power to be added to the grid between 2023 and 2027;

(b) the determination published by the first respondent on 25 September 2020 (the Minister's determination) exercising his powers under section 34 of the Electricity Regulations Act, 4 of 2006 (ERA) which sought to give effect to the IRP decision;

(c) The decision by the National Energy Regulator of South Africa (NERSA) to concur in the Minister's determination and which was made public on 10 September 2020 (NERSA's concurrence).

[6] The bases of the applicants' challenges to the aforementioned decisions are three-fold:

(a) The Bill of Rights;

(b) The Promotion of Administrative Justice Act, 3 of 2000 (PAJA);

(c) Constitutional principles of legality in terms section 1(c) of the Constitution, should PAJA not apply.

[7] The relief sought by the applicants involved a declaration of invalidity of the impugned decisions with ancillary relief.

[8] The crisp issue to be determined was whether the aforesaid decisions were reviewable and, if so, whether in terms of PAJA or in terms of the principle of legality.

[9] The applicants contended that the aforesaid decisions were exercises of public power, subject to the Bill of Rights and the principle of legality. It was further contended that the decisions were also administrative actions subject to PAJA.

[10] On behalf of the first respondent it was contended that the decisions did not constitute administrative action in view thereof that Minister's powers to compile and publish the IRP were not derived from the ERA, but were of the nature of policy making powers as the executive authority responsible for electricity. With regard to the constitutionality challenge, it was contended that no limitation of rights occurred. It was further contended that none of the impugned decisions affected or have the potential to affect the rights to life and human dignity, health or food as advocated by the applicants. A third string to the first respondent's bow related to the contention that it would not be just and equitable for the court to interfere with the government's planning at this stage. There is no merit in the latter contention in view of what follows.

[11] The second respondent's main contention was that its decision to agree or not agree with the first respondent cannot be viewed in isolation. It was to be seen in the context of the extensive and public IRP processes that were followed. In that regard, the first respondent contended that environmental considerations were factored into and

considered when the IRP was developed. *In casu* no facts or any evidence supporting that

contention was collated in the Rule 53 record. The papers of the first respondent merely contained bald and unsubstantiated contentions.

[12] The IRP, *viz*, the Integrated Resource Plan, is in essence a document designed to determine a new generation capacity that is required to ensure the continued uninterrupted supply of electricity, and to determine the types of energy sources from which electricity must be generated and the percentages thereof to be generated from such sources. In the IRP various sources of energy are detailed from which it is intended to generate electricity from a mixture of sources, including wind, nuclear, hydro, coal natural gas, solar and the like. “Integrated resource plan” means a resource plan established by the national sphere of government to give effect to national policy.[1]

[13] In the present instance, the applicants contended that the irksome issue was the proposed addition of 1500 megawatt new coal-fired power over the period detailed in the draft IRP of 2019. It was further contended by the applicants that the proposal did not consider the effect thereof upon the rights of children under the Constitution, with specific reference to sections 1(c), 24, 28, 9,10, 11 and 27 of the Constitution. In respect of sections 9, 11, and 27 of the Constitution, those sections do not find application in the present instance as the rights contained in these sections relate to specific issues not relevant to a consideration in this application. At best, and in respect of children, sections 24 and 28(2) of the Constitution may be relevant in this application. Section 10 of the Constitution may find application to a limited extent *in casu*.

[14] With reference to the provisions of section 7(2) of the Constitution, the applicants contend that the government is obliged to respect, promote and fulfil those rights, not only to refrain from conduct that would

[1] Section 1 of the Electricity Resource Act, 4 of 2006

infringe upon those rights, but must also take positive, reasonable and effective measures to protect and promote those rights.[2]

[15] It is to be noted that section 36 of the Constitution may impose a limitation on any right contained in the Constitution, and in particular on any right stipulated in the Bill of Rights. That limitation of a right only has reference to a law of general application. In the present instance, the concern is not addressed to an impugned law of general application, but to a decision by the first respondent (and by extension the fifth respondent) in respect of the provision of energy resources to supply electricity to the Republic.

[16] Reverting to the provisions of section 1 of ERA, it confirms that the first respondent, and by extension the fifth respondent, has the authority to determine the policy relating to the supply of electricity to the Republic. That confirmation underscores the obligation of the relevant Minister to determine a plan to give effect to that policy, in the form of an IRP. The IRP is to be developed by the Minister in conjunction with the second respondent, and then to be published by the Minister in the Government Gazette. The IRP would encompass the policy determination in respect of the supply of electricity for the Republic.

[17] PAJA defines an administrative decision as any decision taken, or any failure to take a decision by an organ of state.[3] It does not include a decision by a Cabinet Minister. *In casu*, the Minister is obliged to determine the policy for the supply of electricity to the Republic, and in so doing it is obliged to publish an IRP. The latter is to be done in conjunction with the second respondent. Those decisions are not a result of an administrative decision on the part of the first respondent. It thus follows that the provisions of PAJA do not apply in this instance to the conduct of the first respondent. Consequently, the impugned decisions by the Minister are not subject to a review under PAJA. The impugned decision of the second respondent to concur in the first

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[2] *Glenister v the President of the Republic of South Africa* 2011 (3) SA 347 (CC) at [105]-[107]
[3] Section 1 of PAJA read with section 239 of the Constitution

respondent's impugned decisions, flow from its obligations under ERA. Consequently, should the first respondent's impugned decisions be

reviewed and set aside, the second respondent's impugned decision has no effect. In view of the obligation by the Minister to determine the IRP in conjunction with the second respondent, and thereafter to publish it, the IRP is not a decision by an organ of state and hence not subject to a review under PAJA.

[18] The real issue to be determined thus relates to whether the impugned decisions are reviewable under section 1(c), read with section 172,[4] of the Constitution.

[19] When giving effect to Ministerial conduct, the important issue to be determined is whether the impugned conduct was inconsistent with the Constitution and the Rule of Law. If it is so found, this court may determine whether the impugned conduct was in conflict with the principle of legality.

[20] The applicants have, in their heads of argument, predicated the issue to be determined in these proceedings "on whether, on the facts in this case, the Minister and NERSA reached decisions on new coal-fired power in a manner that was inconsistent with their constitutional and statutory obligations".

[21] It was submitted on behalf of the applicants that, in complying with its constitutional obligations, the Minister was obliged to conduct public participation forums. The first and second respondent appear to have conceded that obligation upon the Minister and have submitted that full compliance therewith occurred. The second respondent indicated in its papers that it had in fact conducted public participation forums. Further in this regard, the first and second respondents indicated in their papers that consultations where held with representatives of the

[4] *Affordable Medicines Trust et al v Minister of Health et* 2006(3) SA 247 (CC)

applicants since 2016 when draft IRPs were in progress. In respect of the 2019 IRP, the first and second respondents submitted that public participations

were called for and conducted, albeit on a limited level due to the Covid-19 restrictions in force at the time. The applicants' response thereto was that such participation did not comply with the standard required, in particular where the published 2019 IRP diverted in a material manner from the 2018 document. The latter difference was with reference to the increased coal-fired power requirement of an additional 1500 megawatts that called for the erection of more new coal-fired power stations than previously intended. That decision did not form part of the draft IRP that was advertised, and accordingly no public input thereto could have been obtained. Again, no facts or assessment in respect of the impact upon the environment and the health of the nation, and in particular that of children were contained in the record supplied by the first and second respondents.

[22] The applicants, under the provisions of Rule 53 of the Uniformed Rules of Court, called for the record relating to the first and second impugned decisions. The said respondents were slow in providing the required record and were compelled to provide more complete records. Their response to the compelling order did not take the matter further. According to the applicants, there were insufficient documents made available. In particular, the record did not reflect any considerations to the effect of the impugned decisions upon the rights, in particular that of children, and future generations. In this regard, the applicants contended that the introduction of the additional 1500 megawatts new coal-fired power into the grid would have a negative effect on the environment and the health of the nation, and in particular that of children and future generations. The assessments of the impact on the environment and the health of the nation were not addressed in the Rule 53 record. It was clearly lacking in particularity.

[23] Further in this regard, the applicants contended that the impact upon the rights of children and future generations under section 24[5] and

specifically section 28(2) of the Constitution was clearly not considered, or adequately addressed. No supportive evidence or facts were supplied, either in the IRP or the first and second respondent's evidence. The applicants accordingly contended that the first and second applicants flouted their constitutional obligations towards children when taking the said decisions. When considering the rights of children, those rights are of paramount interest.

[24] The respondents were at a loss and hard pressed to show that adequate and appropriate consideration was given to the provisions of sections 24 and 28 of the Constitution in respect of the impugned decisions.[6] A bald allegation was made to that effect by the first and second respondents. In view of the *Pridwin* decision, *supra*, that bald allegation has no evidentiary value and stands to be rejected. The Rule 53 record submitted by the respondents do not show adequate evidence, if at all, of their deliberations on any participation by representatives on behalf of the applicants, or at all, in respect of the effect on the constitutional rights of children.

[25] The Rule 53 record, as well as the first and second respondents' evidence, is ominously silent on any considerations given to the effect that the additional 1500 megawatt new coal-fired power will have on the environment and the health of the nation, in particular that of children. A clear indication that the first and second respondents did not comply with their constitutional obligations in that regard.

[26] It follows that, in the absence of proof of the consideration of the effect of the decision the to permit an additional 1500 megawatts of new coal-fired power to the grid on children, it stands to be reviewed on the

[5] *Eskom Holdings ZOC Ltd v Vaal River Development Association (Pty) Ltd et al* [2022] SACC 44 (CC); see also *Teddy Bear Clinic for Abused Children et al v Minister of Justice and Constitutional Development et al* 2014(2) SA 168 (CC)
[6] See in this regard the principle laid down in *AB et al v Pridwin Preparatory School et al* 2020(5) SA 327 (CC) at [140]

principle of legality. There has been no compliance with the first respondent's obligations under the Constitution.

[27] The first and second respondents contended that the Constitution provides for a limitation of rights, and accordingly, the decision to the additional 1500 megawatts of new coal-fired power to be included in the IRP to enable the grid to be stable and its integrity to be sustained, warrants a limitation of rights. However, the respondents contended that there was no limitation of rights by the said impugned decisions. There is no merit in that contention. From the foregoing, it is clear that the said impugned decisions would impact negatively on the rights of children under section 24 and 28 of the Constitution in the absence of cogent facts to the contrary. In that regard, the first and second respondents, who bore the onus, did not discharge the obligation to show that, in the event that there would be limitations of the said rights, that such limitations were reasonable and justifiable.[7]

[28] In so far as the decision by the second respondent to concur with the first respondent's impugned decisions constituted an administrative decision, it would be reviewable under PAJA. The said decision similarly did not comply with the second respondent's obligations under the Constitution in respect of the rights of children to the extent that the pled compliance with public consultations were inadequate under the particular circumstances. A mere lip service was paid thereto. Again the lack of particularity of facts and supportive evidence points to a disregard of the second respondent's obligations under the Constitution.

[29] It follows that the first respondent's impugned decisions stand to be set aside.

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[7] See *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders* 2005 SA 280 (CC)

[30] Consequently, the second respondent's decision to concur with the first respondent's decisions cannot be upheld and stands to be reviewed and set aside.

[31] The participation of the two *amici curiae* in these proceedings were helpful.

[32] The applicants seek condonation for the delay in launching this application in so far as it was required to launch it in terms of the time periods specified in PAJA, alternatively under the principle of legality. A comprehensive explanation for the delay was enumerated in the founding affidavit. The respondents did not adversely oppose the application for condonation. It follows that condonation be granted as requested.

I grant the following order:

1. The Centre for Child Law and the Vaal Environmental Justice Group are joined to this application as *amici curiae;*

2. To the extent necessary, the applicants' delay in bringing the review application in terms of the Promotion of Administrative Justice Act, 3 of 2000, alternatively the constitutional principle of legality, is condoned and/or the 180-day time period under PAJA is extended so as to terminate one day after the institution of this application;

3. The constitutional challenge to the decisions of the first and second respondents to include in the 2019 IRP an additional 1500 megawatts new coal-fired power is upheld;

4. The following decisions are declared to be inconsistent with the Constitution of the Republic of South Africa, 1996, and unlawful and invalid:

(a) The determination published by the Minister of Mineral Resources and Energy on 25 September 2020 in GN 1015 in Government Gazette No 43734, to the extent that this includes provision for 1500 megawatts of new coal-fired power;

(b) The concurrence published by the National Energy Regulator of South Africa on or about 10 September 2020, to the extent that this supported the Minister's determination in respect of 1500 Megawatts of new coal-fired power;

(c) The Integrated Resource Plan 2019, published on 18 October 2019 as GN 1360/2019 in the Government Gazette 42784, to the extent that it makes provision for 1500 Megawatts of new coal-fired power.

5. The decisions referred to in 2 above are reviewed and set aside to the extent that they make provision for 1500 megawatts of new coal-fired power;

6. The costs of this application are to be paid, jointly and severally, by the first and second respondents, such costs to include the costs of two counsel where so employed.

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C J VAN DER WESTHUIZEN
JUDGE OF THE HIGH COURT

On behalf of Applicants: Adv S Baloyi SC
Adv C McConnachie

	Adv T Pooe
Instructed by:	Centre for Environmental Rights
On behalf of 1st Respondent:	Adv MPD Chabedi SC
	Adv M Bronkhorst
Instructed by:	State Attorney, Pretoria
On behalf of 2nd Respondent:	Adv. B Makola SC
	Adv P Sokhela
	Adv Z Nako
Instructed by:	Mchunu Attorneys
1st Amicus Curiae:	Adv M Courtenay
Instructed by:	Centre for Child Law
2nd Amicus Curiae:	Adv R Kruger
Instructed by:	Section 27
Judgment reserved on:	10 October 2024
Judgment delivered on:	04 December 2024