



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 1199/2023

In the matter between:

MINISTER OF MINERAL RESOURCES AND ENERGY

Appellant

and

PETER BECKER

First Respondent

NATIONAL NUCLEAR REGULATOR

Second Respondent

CHAIRPERSON OF THE BOARD OF DIRECTORS

OF THE NATIONAL NUCLEAR REGULATOR

Third Respondent

Case no: 966/2023

And in the matter between:

NATIONAL NUCLEAR REGULATOR

First Appellant

CHAIRPERSON OF THE BOARD OF DIRECTORS

OF THE NATIONAL NUCLEAR REGULATOR

Second Appellant

and

PETER BECKER

First Respondent

MINISTER OF MINERAL RESOURCES AND ENERGY

Second Respondent

Case no: 1013/2023

And in the matter between:

PETER BECKER

Appellant

and

MINISTER OF MINERAL RESOURCES AND ENERGY

First Respondent

**NATIONAL NUCLEAR REGULATOR
CHAIRPERSON OF THE BOARD OF DIRECTORS
OF THE NATIONAL NUCLEAR REGULATOR**

Second Respondent

Third Respondent

Neutral citation: *Minister of Mineral Resources and Energy v Becker and Others* (Case no 1199/23); *National Nuclear Regulator and Another v Becker and Another* (Case no 966/2023); *Becker v Minister of Mineral Resources and Energy and Others* (Case no 1013/2023) [2024] ZASCA 106 (28 June 2024)

Coram: MOLEMELA P, SCHIPPERS and MEYER JJA and TLALETSI and KOEN AJJA

Heard: 17 May 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The time and date for hand-down is deemed to be 11h00 on 28 June 2024.

Summary: National Nuclear Regulator Act 47 of 1999 – Board of Directors of Regulator appointed by the Minister of Mineral Resources and Energy in terms of s 8(4) – Minister's power in terms of s 9(1) to discharge a director of the Board from office inter alia for misconduct.

Constitutional and Administrative Law - principle of legality and review under Promotion of Administrative Justice Act 3 of 2000 – whether Minister's discharge of Director for misconduct was unlawful, unconstitutional and invalid.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Mantame J, sitting as court of first instance):

1. The appeal of the Minister of Mineral Resources and Energy (Case no 1199/2023) is dismissed with costs, including those of two counsel where employed.
2. The appeal of the National Nuclear Regulator and the Chairperson of the Board of Directors of the National Nuclear Regulator (Case no 966/2023) is dismissed with costs, including those of two counsel where employed.
3. The cross-appeal of Mr Peter Becker (Case no 1013/2023) is dismissed with each party to pay their own costs.

JUDGMENT

Meyer JA and Tlaetsi AJA (Molemela P, Schippers JA and Koen AJA concurring):

[1] These are two appeals and a cross-appeal, with the leave of this Court, against the judgment of the Western Cape Division of the High Court, Cape Town, *per* Mantame J (the high court), delivered on 19 January 2023. Mr Peter Becker (Mr Becker), who was a Director of the National Nuclear Regulator, was discharged as a director by the Minister of Mineral Resources and Energy (the Minister) on 25 February 2022 in terms of s 9(1) of the National Nuclear Regulator Act 47 of 1999 (the Act).

[2] As a result, Mr Becker initiated review proceedings against the Minister, the National Nuclear Regulator and the Chairperson of the Board of Directors of the National Nuclear Regulator (jointly referred to as the Regulator). He challenged the Minister's decision on the grounds that it was unconstitutional and unlawful, and sought an order reviewing and setting aside the decision under the Promotion of Administrative Justice Act 3 of 2000 (PAJA) or the principle of legality.

[3] The high court made the following order:

- ‘1. The decision of the Minister taken on 25 February 2022 to discharge Mr Becker with immediate effect is declared unlawful, unconstitutional and invalid in terms of Section 172(1)(a) of the Constitution.
2. The reasons and decision[s] of the Minister taken on 25 February 2022 to discharge Mr Becker from his office as a Director of the Board is reviewed and set aside.
- 3 The first, second and third respondent[s] are ordered to pay costs of this application including the costs of two (2) Counsel.’

[4] The appellant in the first appeal, the Minister, seeks an order upholding the appeal with costs, including those of two counsel. The Regulator, the appellant in the second appeal, seeks identical relief. In the cross-appeal lodged by Mr Becker, he seeks an order that paragraphs 1 and 2 of the high court’s order ‘operate retrospectively’.

[5] The preamble to the Act reads:

‘To provide for the establishment of a National Nuclear Regulator in order to regulate nuclear activities, for its objects and functions, for the manner in which it is to be managed and for its staff matters; to provide for safety standards and regulatory practices for protection of persons, property and the environment against nuclear damage; and to provide for matters connected therewith.’

The Regulator was established as a juristic person in terms of s 3 of the Act.¹

[6] The objects of the Regulator are listed in s 5 of the Act. It reads:

‘The objects of the Regulator are to-

- (a) provide for the protection of persons, property and the environment against nuclear damage through the establishment of safety standards and Regulatory practices;
- (b) exercise regulatory control related to safety over-
 - (i) the siting, design, construction, operation, manufacture of component parts, and decontamination, decommissioning and closure of nuclear installations; and
 - (ii) vessels propelled by nuclear power or having radioactive material on Board which is capable of causing nuclear damage,
 through the granting of nuclear authorisations;

¹ Section 3 reads:

‘A juristic person to be known as the National Nuclear Regulator, comprising a Board, a chief executive officer and staff, is hereby established.’

- (c) exercise regulatory control over other actions, to which this Act applies, through the granting of nuclear authorisations;
- (d) provide assurance of compliance with the conditions of nuclear authorisations through the implementation of a system of compliance inspections;
- (e) fulfil national obligations in respect of international legal instruments concerning nuclear safety; and
- (f) ensure that provisions for nuclear emergency planning are in place.’

[7] The Regulator is governed and controlled, in accordance with the Act, by a Board of Directors. The Board must ensure that the objects of the Regulator referred to in s 5 are carried out; it also exercises general control over the performance of the Regulator’s functions.² The Board consists of the following directors appointed by the Minister: (a) one representative of organised labour; (b) one representative of organised business; (c) one person representing communities which may be affected by nuclear activities; (d) an official from the Department of Minerals and Energy; (e) an official from the Department of Environmental Affairs and Tourism; (f) not more than seven other directors; and (g) the Chief Executive Officer.³

[8] A director holds office for a period specified in the letter of appointment but not exceeding three years and may be reappointed upon expiry of that term of office.⁴ The Minister may at any time discharge a director of the Board from office if the director has repeatedly failed to perform his or her functions efficiently, or if, because of any physical or mental illness or disability, the director has become incapable of performing his or her functions, or of performing them efficiently, or for misconduct.⁵

[9] The Regulator’s role is thus to ensure safety in respect of all nuclear activities when they are undertaken. The stated policy of the government and the Department of Mineral Resources and Energy (the Department) is the extension of Koeberg’s lifecycle and the extension of nuclear energy as a component of the ‘energy mix’ in South Africa. The Board is not involved in determining governmental policy regarding the use of nuclear energy.

² Subsections 8(1) and (2).

³ Subsection 8(4).

⁴ Subsection 8(12)(b).

⁵ Subsection 9(1).

[10] On 10 June 2021, the Minister appointed Mr Becker as the non-executive director of the Board of the Regulator in terms of s 8(4)(a)(iii) of the Act as a person representing 'communities, which may be affected by nuclear activities'. At the time of his appointment and throughout his tenure as a director of the Board, Mr Becker held the position of spokesperson of the Koeberg Alert Alliance (the KAA), an organisation that is opposed to nuclear energy in general, and in particular, to the extension of the life-span of the Koeberg Nuclear Power Station in Cape Town. Mr Becker's appointment followed his nomination by civil society concerned about nuclear power in South Africa, for and on behalf of the KAA.

[11] The Board comprises individual directors, each of whom holds divergent views as to nuclear desirability in South Africa. However, nuclear safety is the statutorily prescribed imperative of the Board and the guiding factor which ought to inform each of the decisions that serves before the Board.

[12] On 30 June 2021, an article titled 'Thyspunt nuclear hearings distract from Koeberg problems' was published in Energize, an online publication (the Energize article). In essence, the article provided commentary in relation to Eskom's application to the Board for a license of a site located at Thyspunt, at which it intended to establish a nuclear power station. In the article Mr Becker is identified as the spokesperson for the KAA, and a newly appointed director of the Board. He is quoted as having said: 'It is disappointing to see money and time being spent on pursuing nuclear power for the Thyspunt site after the government had stated that there was no money to fund a new nuclear build.

...

The existing Koeberg plant is more of a concern, where reactor 1 was down since January due to an increasing leak rate of a steam generator within the containment building. The plant manager, Velaphi Ntuli was then suspended on 4 June 2021 and two weeks later reactor 1 was running again. Was the leak actually fixed in the short period or did the new acting plant manager override Ntuli's concerns? We call for transparency and that Ntuli be allowed to speak publicly about his decision not to restart the reactor.

...

We should be worrying about the safety of the existing plant at Koeberg, especially as it approaches the end of its design lifetime.

. . .

There are several issues that need to be addressed before the Koeberg plant can be considered safe by modern standards, and that will come with a significant cost, says Becker. Much like an old car, there comes a time when it is just not worth repairing it to the point where it is as safe as a new car. It was unwise to spend money refurbishing the plant before finding out what would have to be done to obtain a license to extend its life. We are probably going to have load shedding for the next 2 or 3 years. It will only make the situation worse to repeatedly shut down Koeberg for refurbishing work over that time. Eskom has said the refurbishing of Koeberg to allow the life extension would cost R20 billion. Based on other large Eskom projects, this is likely to double or even triple.'

[13] On 19 July 2021, Mr Becker sent an email to Mr Gino Moonsamy of the Regulator, which included this statement:

'This week I am hosting a meeting of civil society organisations in my capacity as rep on the Board. The goal is to collect the top concerns/questions relating to nuclear safety across organisations...'

The email was then sent to the Board's CEO, Dr Mzubani Tyobeka. His response queried whether Mr Becker, purportedly representing the Board without its mandate, was entitled to host a meeting with selected stakeholders. Dr Tyobeka also stated:

'...I have no doubt that Mr Becker is driven by good intentions, but those good intentions may be at odds with the principles of good corporate governance...'

[14] On 27 July 2021, Mr Becker sent an email to the chairperson, Mr Thapelo Motshudi, with the subject heading 'Request for guidance – incremental decisions'. He queried why Eskom would be spending money on replacing its steam generators at Koeberg in circumstances where it was uncertain whether the Board would approve the extension of the Koeberg plant beyond July 2024.

[15] At a Board meeting held on 29 July 2021, members of the Board questioned Mr Becker's potential conflict evidenced by his statements published in the Energize article and invited him to explain how he would manage situations where he had to take a position in civil society (as KAA spokesperson) which was opposed to the Board's processes. Mr Becker responded by stating, inter alia, that he had stated that his engagements had been in his capacity as their representative on the Board. Mr

Becker assured the Board that his statements to the media were not based on any confidential information which he had acquired by virtue of his status as a director.

[16] The Board took the view that Mr Becker's statements in the Energize article had to be withdrawn as they were an incorrect representation of what it does and of the decisions it makes. Mr Becker indicated that there might be an opportunity to amend the statements to remove the impression that the Board was pursuing a pro-nuclear power stance. It was resolved by the Board that an independent legal opinion should be obtained on the matter. As a result of the advice received, the chairperson addressed a letter to the Minister in which he was asked to act on the recommendations in the opinion.

[17] In a statement to the press on 18 August 2022, Mr Becker as spokesperson of the KAA, commented on speculation that Eskom had already concluded a contract to extend the life of the Koeberg nuclear power plant beyond 2024, in the absence of a public participation process having been conducted. The KAA expressed concern over the 'imbalance of power between Eskom and the Board, stating:

'The fact that the NNR receives about 75% of its revenue from application and authorisation fees, and the bulk of that is from Eskom, only adds to this concern. Without those fees, the NNR would not even be able to pay staff salaries.'

[18] On 14 October 2022, the Minister received a letter from Mr Becker in which he recorded his disagreement with the Board's legal opinion and the allegations upon which it is based. He requested that the Minister allow him an opportunity to make representations regarding the legal opinion.

[19] On 17 January 2022, the Minister received a legal opinion from Mr Becker's erstwhile attorneys, countering the legal opinion provided to the Board. On 18 January 2022, the Minister advised Mr Becker's attorneys that the allegations against Mr Becker were of a serious nature and could affect his continued presence on the Board. As a result, the Minister suspended Mr Becker with immediate effect, pending his final decision. Furthermore, Mr Becker was given the opportunity to provide written representations as to why he should not be discharged.

[20] On 16 March 2022, after Mr Becker's suspension, the Daily Maverick online news service published an article entitled 'Koeberg nuclear power plant rejuvenation: Protesters say silence is a killer'. In this article, Mr Becker as the spokesperson for the KAA, is quoted inter alia having said:

'This has a moral component, a society component, an intergenerational ethic component – this is not for a bunch of engineers to decide alone. That is why the community needs to be consulted, and the public needs to have their say.'

[21] On 8 February 2022, Mr Becker brought an urgent court application, challenging the lawfulness of the Minister's decision to suspend him. The urgent application was settled. On 8 February 2022, the Western Cape Division of the High Court made the settlement an order of court, inter alia providing time frames for the delivery of Mr Becker's written representations to the Minister regarding his discharge as a director, and for the taking of a decision by the Minister. Additionally, provision was made for the holding of no meetings of and the taking of no decisions by the Board or any of its sub-committees pending the decision of the Minister.

[22] Mr Becker made written submissions to the Minister on 10 February 2022. He expressed the view that the Minister had failed to specify the grounds for his discharge as contemplated in s 9(1) of the Act. On 15 February 2022, the Minister wrote to Mr Becker, setting out those grounds and providing him with a further opportunity to make representations. Mr Becker's representations were furnished to the Minister on 21 February 2022. In a letter dated 25 February 2022, the Minister informed Mr Becker of his decision to discharge him from the Board and provided reasons for his decision.

[23] The Minister's reasons were the following:

- 'a. As a director of the NNR, you have placed yourself in a position in which you have a personal interest, which conflicts with your duties to the NNR;
- b. You have publicly vocalised your opinions on nuclear activity and your opposition to the lifespan extension of Koeberg which is in conflict with the independent or neutral role and function of the NNR. There can be little doubt on how you would vote, were you still to be a member of the NNR Board, when the question of the lifespan extension for the Koeberg station comes before the NNR Board. You are thus not qualified to make a decision on the Board. Your continued involvement, when you are unable to bring an independent mind to bear on

decisions in relation to the safe operation and/or extension of Koeberg, because you have already indicated your position, amounts to misconduct, in my view;

c. You hosted meetings with civil society organisations either in your capacity as a member “on” or “of” the NNR Board and gave the impression that you are acting on behalf of the NNR Board, with no authority to do so;

d. You have acted in conflict with your obligations both in law and in contract; and

e. The conflict of interest that exists is material and fundamental as it is impossible for you to avoid or manage the actual conflict as well as the appearance of conflict. It would on the face of it appear that you have no hesitation to make the public aware of your conflict.’

[24] A director can only be removed in the limited circumstances mentioned in s 9(1) of the Act. The three listed grounds for discharging a director – failure to perform, incapacity or misconduct – are jurisdictional facts or preconditions for the lawful exercise of the Minister’s power.

[25] Where a statute specifies the existence of a jurisdictional fact for the exercise of the public power, ‘if the jurisdictional fact does not exist, then the power may not be exercised and any purported exercise of the power would be invalid’.⁶ It follows that if Mr Becker, objectively, was not guilty of misconduct, the Minister’s decision was unlawful. In our constitutional era, all jurisdictional facts are reviewable by the court on an objective basis as an integral part of the principle of legality. The mere say-so of the Minister that Mr Becker committed misconduct does not demonstrate that it is so. The Act does not provide that the Minister may discharge a member of the Board if, ‘in the opinion of the Minister’ the member has committed misconduct. A Board member may only be discharged for actual misconduct. To justify his decision, the Minister must demonstrate that his finding of misconduct was based on reasonable grounds.⁷ Even if the question of whether Mr Becker committed misconduct to some extent involves a value judgment, that does not immunise the Minister’s decision from judicial review. The Constitutional Court has expressly held that in relevant circumstances-

⁶ *South African Defence and Aid Fund v Minister of Justice* 1967 (1) SA 31 (C) at 34H, affirmed by the Constitutional Court in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 at fn 132 as the ‘leading authority on “jurisdictional facts” in our law’.

⁷ *Walele v City of Cape Town and Others* [2008] ZACC 11; 2008 (6) SA 129 (CC); 2008 (11) BCLR 1067 (CC) para 60.

‘. . . it does not follow from this that the decision and evaluation lies within the sole and subjective preserve of the President. Value judgments are involved in virtually every decision any member of the Executive might make where objective requirements are stipulated. It is true that there may be differences of opinion in relation to whether or not objective criteria have been established or are present. This does not mean that the decision becomes one of subjective determination, immune from objective scrutiny.’⁸

[26] For the reasons that follow, we are of the view that on an objective basis it has not been established that Mr Becker committed ‘misconduct’ as contemplated in s 9(1) of the Act. First, the Minister wrongly believed that the Board is supposed to advocate for nuclear activities. His state of mind is illustrated by what he stated at an ANC conference in May 2022. He was quoted as saying:

‘[T]hose who resist nuclear power while serving on the Board of the National Nuclear Regulator will be fired’

and

‘If you resist nuclear and you [are] a Board member, I fire you, simple. You can’t be in a Board of something you’re not advocating for’.

The Minister did not make these statements in the abstract or in general; it was his explanation of why he ‘fired’ Mr Becker. However, the Board’s functions are not to advocate either for or against nuclear activities. Its function is to ensure that nuclear activities are undertaken in a safe manner.

[27] Second, the Minister wrongly believed any director who opposes nuclear activities can be discharged for misconduct. He plainly believed that he is entitled to discharge a director who ‘resists nuclear’ or who does not ‘advocate for’ nuclear. He was wrong. Resisting or advocating for nuclear energy – even publicly – is not misconduct for purposes of s 9 of the Act. It could never be, since the role of the Board is concerned with the safety of a specific proposed nuclear activity, not the desirability of nuclear activity in general.

[28] Third, the Minister wrongly conflated nuclear desirability and nuclear safety. In the reasons for his decision to discharge Mr Becker as a director of the Board, the

⁸ *Democratic Alliance v President of South Africa and Others* [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC) para 23.

Minister stated that the KAA 'is opposed to any new nuclear plants being established, as well as the extension of the life of Koeberg', and Mr Becker 'hold[s] those same views'. The Minister stated that Mr Becker would be unable to 'make an objective decision, when presented with objective, scientific evidence in respect of the extension of the life of Koeberg', and therefore any decision he would make in that regard 'will be prejudiced as [Mr Becker had] already indicated [his] views'.

[29] This statement is unfounded. Mr Becker fully explains in his replying affidavit that he is able to disentangle his views concerning the desirability of nuclear activities from an evaluation of a specific activity's safety. Mr Becker is well entitled to hold and maintain his views about the desirability of nuclear activities while being a member of the Board. So are the other Board members. For example, the Minister's representative on the Board, Mr Maphoto, plainly has strong views in favour of the desirability of nuclear power. The Board itself and its chair have also adopted a pro-nuclear stance, which was also included in their annual report presented to Parliament in 2022. The Minister says that Mr Maphoto and the other Board members can distinguish between nuclear desirability and nuclear safety and can advocate for nuclear without a conflict of interest arising. Yet, the Minister is unable to appreciate that the rule is the same for a person who resists nuclear activities, like Mr Becker. This is arbitrary and irrational decision-making.

[30] Fourth, the Minister wrongly believed that he could discharge a director in anticipation of misconduct by that director. The Minister contends that he was entitled to reach a conclusion that Mr Becker was guilty of misconduct, on the basis of conduct that Mr Becker would commit in the future. This is no ground for a finding of misconduct. In this case, the Minister speculated that Mr Becker would bring a biased mind to bear on future decisions of the Board. He based this speculation on Mr Becker's conduct and legitimate opinions – including what he said to the press – pertaining to questions of the desirability of nuclear power. The Minister's reasoning is thus a *non-sequitur*. If holding such views is not misconduct, as the Minister accepts in his affidavit, then the fact that they are held cannot be used to draw an inference that misconduct will be committed in the future.

[31] As a matter of fact, Mr Becker was suspended and then discharged by the Minister before he even had an opportunity to participate in any decision-making by the Board relating to an application for a license for a nuclear installation or anything related to nuclear power. Mr Becker was never given any opportunity to demonstrate his ability to participate in decisions about the safety of nuclear activities in an unbiased fashion. Furthermore, if the Minister was correct that Mr Becker's views about nuclear desirability justified discharging him, then the same would necessarily apply to the other directors who have expressed favourable views about nuclear energy. On the Minister's approach, they too would not be able to exercise a proper judgment about the safety of a proposed nuclear activity, because they favour nuclear power. This demonstrates the fallacy in the Minister's contentions.

[32] Fifth, the Minister wrongly believed that the disclosure of a director's views on the desirability of nuclear power constitutes misconduct. In his reasons for discharging Mr Becker, the Minister explicitly records his view that Mr Becker had 'publicly vocalised [his] opinions on nuclear activity . . . conflict with the neutral role and function of the Regulator' and that 'because [Mr Becker had] already indicated [his] position' this 'amounts to misconduct'. However, the Minister has repeatedly stated that it is permissible for directors to hold personal views opposed to or in favour of nuclear energy. What is prohibited, the Minister now says in his affidavit, is the public expression of those views by directors on the Board. It appears that the Minister believes that a director can hold views on the desirability of nuclear power, as long as those views are not disclosed. But, the Minister again did not apply this standard to members of the Board who publicly advocate for nuclear energy such as Mr Maphoto.

[33] Sixth, the Minister erroneously based his decision on the wrong facts. His decision is premised on two fundamental factual errors: First, the Minister said that he decided to discharge Mr Becker because he had met with civil society and had 'given the impression that [he was] acting on behalf of the NNR Board, with no authority to do so'. However, Mr Becker explains that when he met with representatives of civil society (in discharging his duties as director) he did not do so as a representative of the Board, and he gave no such impression. He explains that he met with civil society as their representative 'on' the Board. Mr Becker's version is corroborated by affidavits of two persons who attended the meeting. Neither Mr Becker's version, nor its

corroboration in the supporting affidavits is denied by the Minister in his affidavit. The Minister could not deny Mr Becker's version, as he did not attend the meeting and has no personal knowledge of what was discussed. The Minister's second factual error was his belief, expressed in the Newz Room Africa interview, that Mr Becker 'led a march' against a decision of the Board. Mr Becker denies this. His denial is not addressed by the Minister. The Minister produces no evidence to explain his belief.

[34] Seventh, the Minister unfairly made up his mind before Mr Becker made representations concerning his discharge. The process, therefore, was procedurally unfair and irrational. On 3 February 2022, before the representations were made or were due, the Minister was interviewed on Newz Room Africa. He said this:

'But it is simple, if you are an anti-nuclear activist. You can't sit on the Board of nuclear, and get all the details of the plans and go and plan a program against that entity. It is not allowed.' Thus, the representations process was a sham.

[35] In his answering affidavit, the Minister admits making this comment at the time he did, but denies that he prejudged Mr Becker's case. He says that he was merely expressing a 'prima facie view'. He says that he could have been convinced otherwise by Mr Becker's representations. But those contentions are not borne out by the facts. What the Minister said is not consistent with the expression of a preliminary view. He was expressing a firm view that Mr Becker was disqualified from being a director on the Board: '. . . it is simple ... It is not allowed'. The irresistible inference is that the Minister ignored Mr Becker's representations.

[36] After Mr Becker had been discharged as a director, the Minister made further public comments, which confirm that he had a fixed view with a predetermined outcome. The Minister said: 'If you resist nuclear and you [are] a Board member, I fire you, simple. You can't be in a Board of something you're not advocating for'. The Minister does not deny making these statements. He attempts to justify them by contending that he 'did not intend to suggest that members of the Board would be removed for holding personal views on the desirability of nuclear which were different from those of the Government'. But this is clearly not so: his statement is unequivocal that one who is critical about the desirability of nuclear energy will be 'fire[d]'.

[37] The appeals of the Minister and that of the Regulator, therefore, fall to be dismissed with costs, including those of two counsel. This brings us to Mr Becker's cross-appeal against the failure of the high court to set aside the Minister's decision prospectively from now. What Mr Becker seeks is for the high court's declaration that the Minister's decision to discharge him was unlawful, unconstitutional and invalid to operate from the date of this order so that he could serve the balance of his term for which he had been appointed as a director of the Board.

[38] In his letter of appointment, the Minister appointed Mr Becker for a three-year term commencing in June 2021. In terms of s 8(12)(b) '[a] director . . . holds office for a period specified in the letter of appointment but not exceeding three years and may be reappointed upon expiry of that term of office'. Mr Becker was nominated by communities which may be affected by nuclear activities, and he was appointed by the Minister as a non-executive director on the Board of the Regulator to represent those communities.

[39] The relief sought by Mr Becker in his cross-appeal is, in our view, legally unsustainable. Mr Becker's three-year term on the Board expired on 5 June 2024. It is not known whether those communities which may be affected by nuclear activities would want Mr Becker to again represent them on the Board, or whether they would prefer to nominate someone else. There was no evidence placed before the high court that the communities which may be affected by nuclear activities would want Mr Becker to represent them on the Board of the Regulator further and that he would be the person who would carry their nomination. Mr Becker's cross-appeal, therefore, must also fail. The *Biowatch* rule applies here. Each party should bear its own costs in respect of Mr Becker's appeal.⁹

[40] In the result, the following order is made:

1. The appeal of the Minister of Mineral Resources and Energy (Case no 1199/2023) is dismissed with costs, including those of two counsel where employed.

⁹ *Nu Africa Duty Free Shops (Pty) Ltd v Minister of Finance and Others* [2023] ZACC 31; 2023 (12) BCLR 1419 (CC); 2024 (1) SA 567 (CC) paras 149 and 279-284.

2. The appeal of the National Nuclear Regulator and of the Chairperson of the Board of Directors of the National Nuclear Regulator (Case no 966/2023) is dismissed with costs, including those of two counsel where employed.

3. The cross-appeal of Mr Peter Becker (Case no 1013/2023) is dismissed with each party to pay their own costs.

P A MEYER
JUDGE OF APPEAL

P TLALETSI
ACTING JUDGE OF APPEAL

Appearances

For the Minister of Mineral Resources:

Instructed by:

D Borgstrom SC with C Cawood

State Attorney, Cape Town.

State Attorney, Bloemfontein.

For the National Nuclear Regulator and the
Chairperson of the Board of Directors of the

National Nuclear Regulator:

Instructed by:

I Jamie SC with L Stansfield

State Attorney, Cape Town

State Attorney, Bloemfontein.

For Mr Peter Becker:

Instructed by:

G.M Budlender SC with M.N de Beer

Macroberts Attorneys Inc., Pretoria

Claude Reid Attorneys, Bloemfontein.