



## CONSTITUTIONAL COURT OF SOUTH AFRICA

### **Areva NP Incorporated v Eskom Holdings SOC Ltd and Another; and Westinghouse Electric Belgium Société Anonmye v Areva NP Incorporated & Another**

**CCT 20/16 & CCT 24/16  
Date of hearing: 18 May 2016**

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#### **MEDIA SUMMARY**

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*The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.*

On Wednesday 18 May 2016 at 10h00, the Constitutional Court will hear two applications for leave to appeal and an application to cross-appeal against a judgment and order of the Supreme Court of Appeal (SCA) concerning a dispute about a tender awarded to Areva NP Incorporated (Areva) by Eskom. The disputed tender was for the replacement of six steam generators at the Koeberg nuclear power station (Koeberg) in the Western Cape. Areva and Eskom are appealing against the decision of the SCA to set aside the awarding of the tender to Areva. The unsuccessful bidder, Westinghouse Electric Belgium Societe Anonyme (Westinghouse), also seeks leave to cross-appeal against that part of the SCA order which remitted the matter back to Eskom for reconsideration. Westinghouse is claiming substitution in terms of section 8(1) of the Promotion of Administrative Justice Act No 3 of 2000 (PAJA) in the place of Areva as the successful bidder.

Koeberg is the only nuclear power station in Africa and comprises two units, each with three steam generators. Eskom realised the need to replace the steam generators which are prone to “Inter Granular Stress Corrosion Cracking” as early as 2010. It had considered that by 2018 they would all need to be replaced as a nuclear safety priority. As a result, in June 2012, Eskom called for expressions of interest to replace the six steam generators. The replacement of the generators would cost R5 billion. A non-negotiable requirement of the tender was that the successful bidder would meet the resultant 2018 shutdowns referred to as the “X23 outages”.

Eskom's procurement policies are implemented through a variety of committees. Both Areva and Westinghouse were successful in the initial stages of the tender and, as a result, they both received an invitation to tender on 13 August 2012. Over the period 19 July 2014 to 7 August 2014 various bodies within Eskom considered the merits of the two offers. On 28 July 2014, one committee recommended that part of the contract be awarded to Westinghouse. In the alternative, it recommended that the award be made to Areva, with a higher contract and contingency value. Despite this recommendation, on 12 August 2014, the committee taking the final decision resolved that the contract would be awarded to Areva, having regard to the advice given to it by a Consultant. This resolution was adopted through a secret ballot. On 13 August 2014, the Minister of Public Enterprises was given a letter in which Eskom outlined its decision-making process, which included six vital strategic considerations and which Eskom took into account in deciding who to award the tender to. On 15 August 2014, the Minister wrote a letter to Eskom endorsing its decision and giving it the go ahead with the placement of the contract with Areva.

Dissatisfied with Eskom's decision, Westinghouse, on 29 September 2014, brought an urgent review application, in the High Court of South Africa, Gauteng Local Division, Johannesburg (High Court). Westinghouse attacked the tender process and sought an order setting aside the award and directing Eskom to award and conclude the contract with it instead of Areva. Areva opposed the application.

The High Court held in favour of Areva that a review under PAJA was not justified. On appeal, the SCA noted that Eskom and Areva had in fact entered into the envisaged contract and that the work was proceeding with the view of meeting the 2018 deadline. The SCA however held that proper compliance with the procurement process was necessary for the process to be lawful and that the final committee's failure to inform both Areva and Westinghouse of its factoring of strategic considerations and inclusion in the bid evaluation criteria was fundamentally unfair and set the High Court decision aside. As a result, the SCA ordered Eskom to reconsider its decision.

In this Court, Areva and Eskom have both filed separate applications seeking leave to appeal against the judgment of the SCA.