IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Case No: 19529/2015

In the matter between:

EARTHLIFE AFRICA - JOHANNESBURG	**First Applicant**
SOUTHERN AFRICAN FAITH COMMUNITIES' ENVIRONMENT INSTITUTE	**Second Applicant**

and

THE MINISTER OF ENERGY	**First Respondent**
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	**Second Respondent**
THE NATIONAL ENERGY REGULATOR OF SOUTH AFRICA	**Third Respondent**
SPEAKER OF THE NATIONAL ASSEMBLY	**Fourth Respondent**
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	**Fifth Respondent**

HEADS OF ARGUMENT FOR FIRST AND SECOND RESPONDENT

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INTRODUCTION

1. This application is all about the attempts by avowed anti-nuclear lobbyists to derail the nuclear programme and policy of the Government for the industrial development of South Africa on any ground, based on their own narrative which they advance without any regard for the *Plascon-Evans* rule[1] and without any regard for the principle that in a review application it is the duty of the applicant to establish its cause of action and/or its grounds for review[2] by way of primary

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1 See *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C: in essence the general rule is that (subject to certain exceptions which find no application in this matter), where in motion proceedings disputes of fact have arisen on the affidavits, final relief may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such a final order.

2 See *MEC for Public Works, Roads and Transport, Free State v Morning Star Minibus Hiring Services (Pty) Ltd* 2003 (4) SA 429 (O) para [7.1]; *Davies v Chairman, Committee of the JSE* 1991 (4) SA 43 (W), confirming the principle that there was no *onus* on the body whose conduct was the subject-matter of review to justify its conduct and, on the contrary, the *onus* rested upon the applicant for review to satisfy the court that good grounds existed to review the conduct complained of; *Momoniat v Minister of Law and Order; Naidoo v Minister of Law and Order* 1986 (2) SA 264 (W) 273F (describing this onus to be discharged is a formidable one); *Administrator, Transvaal, and Firs Investments (Pty) Ltd v Johannesburg City Council* 1971 (1) SA 56 (A) 86A-C; *Johannesburg City Council v Administrator, Transvaal and Mayofis* 1971 (1) SA 87 (A) 100A-B; *Geidel v Bosman NO* 1963 (4) SA 253 (T) 255H; *Union Government v Fakir* 1923 AD 466 at 470 (own underlining added):

> "*The fact that an order purports to be done under the Act will not exclude the interference of the courts, where there was no jurisdiction to deal with the matter at all or where it has been dealt with not bona fide but fraudulently. But to justify our interference fraud or absence of jurisdiction must be alleged and proved or must appear from the papers. That is the point upon which I cannot agree with the attitude of the Provincial Division. It was said in the judgment that "the Court must first of all find out as to whether what purports to be done under the Act has actually been done under the Act", and again that "when any case of this sort is brought before the Court, the Court should at least be satisfied that the officer who acted, had jurisdiction to act and that he acted bona fide". <u>That seems to lay down that instead of being satisfied that the action of the Department is wrong (in the sense already indicated) before interfering the court must be satisfied that it is right before refusing to interfere</u>.*"

facts:[3] one cannot raise speculation to the level of fact and thereafter raise arguments based on the speculation.[4]

2. In summary the Applicants seek the following relief on motion proceedings, in addition to a punitive order for costs, namely:

2.1 an order that the decision of the President[5] to approve the Russian Treaty,[6] the decision of the Minister[7] to sign it and the decision of the Minister to table it before Parliament in terms of section 231(3) of the Constitution be declared unconstitutional and unlawful, and are reviewed and set aside;[8]

2.2 an order that the decision of the Minister to table the American Treaty and the South Korean Treaty before Parliament in terms of section 231(3) of the Constitution be declared unconstitutional and unlawful, and is

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3 See *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) 324E:

> "*A distinction is drawn between primary facts and secondary facts.*
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> > *'Facts are conveniently called primary when they are used as the basis for inference as to the existence or non-existence of further facts, which may be called, in relation to primary facts, inferred or secondary facts.'*
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> *See Willcox and others v Commissioner for Inland Revenue 1960 (4) SA 599 (A) at 602A. In the absence of the primary fact, the alleged secondary fact is merely a conclusion of law. Radebe and others v Eastern Transvaal Development Board 1988 (2) SA 785 (A) at 793D.*"

4 See *Van Zyl v Government of Republic of South Africa* 2008 (3) SA 294 (SCA) par [10].

5 cited as the Second Respondent herein.

6 See Record p. 286-299 (annexure 'PL 24.4').

7 cited as the First Respondent herein.

8 See Record p. 359-360 (prayer 1(a), 1(b) and 1(c) of the Amended Notice of Motion).

reviewed and set aside;[9]

2.3 an order declaring that, in terms of section 34 of the Electricity Regulation Act 4 of 2006,[10] the Minister and the National Energy Regulator of South Africa[11] are first required, in consultation,[12] and in accordance with procedurally fair public participation processes, to have determined that:

2.3.1 new generation capacity is required and that the electricity must be generated from nuclear power and the percentage thereof; and

2.3.2 the procurement of such nuclear new generation capacity must take place in terms of a procurement system that is fair, equitable, transparent, competitive and cost-effective, which must be specified;

before the commencement of any procurement process for nuclear new generation capacity (being at the latest before the appointment of a bid specification committee or persons tasked with drawing up the invitation to bid) and/or the exercise of any powers under section 34(2) of the ERA

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9 See Record p. 360 (prayer 2(a) and 2(b) of the Amended Notice of Motion).

10 hereinafter referred to as the ERA.

11 cited herein as the Third Respondent and hereinafter referred to as NERSA.

12 It is trite law that the phrase "*in consultation with*" (as contrasted with the phrase "*after consultation with*") means that the Minister and NERSA must have consensus: see *MacDonald v Minister of Minerals and Energy* 2007 (5) SA 642 (C) para [18].

in relation to the procurement of nuclear new generation capacity;[13]

2.4 an order declaring that the 2013 determination made under section 34(1) of the ERA (and gazetted on 21 December 2015 in Government Notice 1268)[14] by the Minister with the concurrence of NERSA, is unlawful and unconstitutional, and is reviewed and set aside;[15] and

2.5 an order setting aside any Request for Proposals yet to be issued by the Department of Energy[16] pursuant to the 2013 determination.[17]

3. At the outset we point out that the argument for the Applicants, other than being based on their own narrative and interpretation of past events which they present as fact, departs from a number of false assumptions and is replete with emotional adjectives and adverbs.

4. We will first deal with the preliminary objection of non-joinder and then with the merits (addressing the issues pertaining to the validity of the decisions to approve, sign and table the Russian Treaty,[18] the issues pertaining to the validity of the decisions to table the American and South Korean Treaty,[19] the issues

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13 See Record p. 360-361 (prayer 3 of the Amended Notice of Motion).

14 See Record p. 479-480 (annexure 'PL 42').

15 See Record p. 361 (prayer 4(a) of the Amended Notice of Motion).

16 hereinafter referred to as the Department.

17 See Record p. 361 (prayer 4(b) of the Amended Notice of Motion).

18 See paragraph 2.1 above.

19 See paragraph 2.2 above.

pertaining to the proper interpretation of section 34 of the ERA,[20] the issues pertaining to a review of the 2013 determination[21] and the issues pertaining to a review of the Request for Proposals yet to be issued[22] separately).

NON-JOINDER[23]

5. At the outset we wish to make clear that this objection, of a material non-joinder of an essential party, is based on the case as advanced by the Applicants[24] and is thus of a preliminary nature - accepting for the moment and only for the purpose of this objection the allegations by the Applicants but without thereby conceding anything else, and specifically not conceding that the interpretation and construction of an international agreement or treaty is an issue which is or should be justiciable before a domestic court.

6. The legal position with regard to joinder of necessity (as distinguished from joinder of convenience) is neatly, and in our respectful submission correctly, summarised by the learned authors Herbstein & Van Winsen:[25]

"A third party who has, or may have, a direct and substantial

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20 See paragraph 2.3 above.

21 See paragraph 2.4 above.

22 See paragraph 2.5 above.

23 See Record p. 633-634, p. 766-777 (para 8, 72-79 of answering affidavit).

24 The Applicants reduce the Russian Treaty, which is an international agreement, to an ordinary commercial contract. See in this regard Myeni *Public International Law* (2013) 325-326 on the distinction between a treaty and a contract.

25 *The Civil Practice of the High Court and the Supreme Court of Appeal of South Africa: Volume 1* (2009) 215 (footnotes omitted).

interest in any order the court might make in proceedings or if such an order cannot be sustained or carried into effect without prejudicing that party, is a necessary party and should be joined in the proceedings, unless the court is satisfied that such person has waived the right to be joined. Such a person is entitled to demand joinder as a party as of right and cannot be required to establish in addition the joinder is equitable or convenient. In fact, when such a person is a necessary party in this sense a court will not deal with the issues without a joinder being effected and no question of discretion or convenience arises."

7. It is not merely a question of whether or not relief is being pursued against such third party[26] or only under domestic law[27] - the yardstick is:

7.1 whether that third party has a direct and substantial interest in any order the court might make in proceedings; or

7.2 if such an order cannot be sustained or carried into effect without prejudicing that party;

in either event of which that third party is a necessary party that must be joined in the proceedings (a point that should be raised *mero motu* by the court).[28]

8. Turning now to the various orders pursued by the Applicants as mentioned in **paragraph 2 above**, we point out the following:

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[26] See para 288.1 of the Applicants' Heads of Argument.

[27] See para 288.2 of the Applicants' Heads of Argument.

[28] See *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) 649, 659.

8.1 The first order, in respect of the Russian Treaty,[29] is for an order that the decisions to approve it, to sign it and to table it before Parliament be declared unconstitutional and unlawful, and are reviewed and set aside - in substance this is an order to invalidate the Russian Treaty by nullifying the conduct of the South African Government to enter therein and conclude it with the Russian Government.

8.2 This first order is also premised upon a particular interpretation and construction of the Russian Treaty[30] so that, in order to come to a decision, the Court has to make a finding on the meaning and legal effect of the Russian Treaty.

8.3 There can be no doubt that, on the case as advanced by the Applicants, the Russian Government has a direct and substantial interest in the first order and furthermore that order cannot be sustained or carried into effect without prejudicing the Russian Government - a specific interpretation and construction is advanced with a view to invalidate a treaty that is regarded as valid and binding between the parties thereto.

8.4 In this regard it is with respect trite law that when the relief claimed involves a decision on the validity of a contract, the decision should not

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29 See Record p. 359-360 (prayer 1(a), 1(b) and 1(c) of the Amended Notice of Motion).

30 See Record p. 76-85 (para 151-155 of the founding affidavit); p. 86-80 (para 160 of the founding affidavit); p. 385 (para 39 of the supplementary affidavit); p. 1360-1361 (para 42-43 of the replying affidavit).

be given in the absence of the other contracting party because that other contracting party is a necessary party that must be joined.[31]

8.5 The second order, in respect of the American Treaty and the South Korean Treaty, seeks to have the tabling of these two Treaties declared unconstitutional and unlawful, and also be reviewed and set aside[32] - this is also in substance an attempt to invalidate the two Treaties by nullifying the tabling thereof which, according to the Applicants, is a formal requirement for making them binding upon the South African Government[33] or which in the event of tabling outside of a reasonable time would invalidate them.[34]

8.6 By the same token these two Governments are also necessary parties.

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31 See Herbstein & Van Winsen The *Civil Practice of the High Court and the Supreme Court of Appeal of South Africa: Volume 1* (2009) 219; *Abrahamse v Cape Town City Council* 1953 (3) SA 855 (C), confirmed on appeal in *Abrahamse v Cape Town City Council* 1954 (2) SA 178 (C) - dealing with an application to have a contract for hiring a venue, entered into by the local authority and a third party, declared *ultra vires* and invalid but without bringing the third party to the contract before court; *Schroeder v Vakansieburo (Edms) Bpk* 1970 (3) SA 240 (T) - dealing with an attempt to have a contract of cession rectified without joining the parties to that cession, with the court ruling that all parties affected by the alleged error had to be formally joined as a matter of substantive law, and it did not avail the plaintiff to plead that some of the parties had waived their right to be joined or that none of the rights would be prejudicially affected; *Toekies Butchery (Edms) Bpk v Stassen* 1974 (4) SA 771 (T) - dealing with the matter where a sub-lessor sought an order against a sub-lessee that the purported cancellation of the main lease was invalid but without joining the lessor, with the court ruling that the failure to join an interested third party cannot be justified on the ground that any decision in the proceedings would not be binding upon such third party.

32 See Record p. 360 (prayer 2(a) and 2(b) of the Amended Notice of Motion).

33 See Record p. 11, 43, 57 and 94-95 (para 7, 89, 112, 114 and 177 of the founding affidavit).

34 See para 243, 245 and 248 of the Applicants' Heads of Argument.

8.7 The third order, dealing with the proper interpretation of section 34 of the ERA,[35] is also relevant: in substance the proposition advanced by the Applicants is that absent compliance with the requirements of that section as interpreted by the Applicants, the South African Government had no legislative authority to enter into these nuclear-related treaties and that this non-compliance provides another reason for the invalidity of especially the Russian Treaty (or, at the very least, a basis upon which their implementation must be suspended) - also in this regard the other parties to these Treaties have a direct and substantial interest in this order or alternatively such an order cannot be sustained or carried into effect without prejudicing the Russian Government, the Government of the United States of America, the Government of South Korea, the Government of China and the Government of France.

9. We therefore respectfully submit that, in terms of the existing positive law of this country and upon the case as advanced by the Applicants, the other parties to these treaties are necessary parties to these proceedings and they should have been joined of necessity.

10. In this regard it is also important to take note that the comity of nations[36] is just

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35 See Record p. 360-361 (prayer 3 of the Amended Notice of Motion).

36 In the Preamble of the Constitution it is stated that the people of South Africa, through their freely elected representatives, adopt the Constitution as the supreme law of the Republic so as to, *inter alia* build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

as applicable in South Africa as it is to other sovereign States:[37] we respectfully submit that in terms of that comity, no decision on the validity or even the interpretation of a treaty (or international agreement) should be taken by a domestic court in the absence of the other national party thereto.[38]

11. In the result we therefore respectfully submit that this application be postponed indefinitely, at the costs of the Applicants (such costs to include the cost of three counsel), so that the Applicants can take the necessary steps to affect the joinder of these necessary parties.

RUSSIAN TREATY

12. In the alternative and in the event of the objection of a material non-joinder of necessary parties not being upheld, then we respectfully submit that:

12.1 **firstly**, an international agreement such as the Russian Treaty is not or should not be justiciable by a domestic court; and

12.2 **secondly** and in the event of the Court holding that it is or should be justiciable, the Russian Treaty is upon a proper interpretation and construction thereof not an actual procurement contract but a valid

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37 See *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) 334D-E

38 See *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) 330D-335B (on the doctrine of judicial restraint in this regard).

international agreement between two sovereign states to cooperate on an executive level in the particular field of nuclear energy and nuclear industry.

13. The Russian Treaty is an international agreement between two sovereign states (namely the Republic of South Africa and the Russian Federation) which has not been incorporated into the municipal law of South Africa.[39]

International agreements non-justiciable

14. In *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa*[40] the court concluded, after a thorough analysis and discussion of the law, that:

14.1 a domestic court can take cognisance of an international agreement, as well as the contents thereof, on the level of fact, just as it can take cognisance of any fact properly proved before it;

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39 See section 231(4) of the Constitution:

> "*(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.*"

This provision presents a departure from the Interim Constitution and a return to *Pan American World Airways Incorporated v SA Fire and Accident Insurance* Co Ltd 1965 (3) SA 150 (A): see Dugard *International Law: A South African Perspective* (2011) 55. Article 2 of the *Vienna Convention on the Law of Treaties (1969)* defines a treaty to mean an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

40 1999 (2) SA 279 (T) 329J-330C (per Joffe J).

14.2 a domestic court, however, may not interpret or construe an international agreement nor may it determine the legal consequence arising therefrom; and

14.3 a domestic court may not determine the true agreement allegedly concluded between the Republic of South Africa and another sovereign state.

On this basis it was held that a domestic court was unable to construe the agreements between the Republic of South Africa and the Government of the Lesotho, nor was it able to determine the true agreement between them: in that case the allegation was that upon a proper construction of that international agreement, it showed some conspiracy between these two sovereign states.

15. In the first place the rights and obligations of a subject of the State are not affected by such a treaty which is not embodied in our municipal law:[41] in this regard we also refer to an English decision by the House of Lords in *Maclaine Watson & Co Ltd v Department of Trade and Industry and related appeals;*

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[41] See *Minister of the Interior v Bechler and Others; Beier v Minister of the Interior and Others* 1948 (3) SA 409 (A); *Pan American World Airways Incorporated v SA Fire and Accident Insurance* Co Ltd 1965 (3) SA 150 (A) at 161B-D; *Maluleke v Minister of Internal Affairs* 1981 (1) SA 707 (B) at 712H; *Tshwete v Minister of Home Affairs* 1988 (4) SA 586 (A) at 606E-F; *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) 327E-J; *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) 374J-375A (per Ngcobo CJ:

> "... *An international agreement that has not been incorporated in our law cannot be a source of rights and obligations.*"

Maclaine Watson & Co Ltd v International Tin Council:[42]

15.1 In this matter the Court of Appeal[43] recognised a council created by a treaty as a body corporate with legal capacity for the purposes of the municipal and that the principle of non-justiciability must give way - the House of Lords did not agree.

15.2 Lord Tempelman held as follows (own underlining added):[44]

> "*International law regulates the relations between sovereign States and determines the validity, the interpretation and the enforcement of treaties.*"

15.3 Lord Oliver of Aylmerton stated the following (own underlining added):

> "'*It is axiomatic that municipal courts have not and cannot have the competence to adjudicate on or to enforce the rights arising out of transactions entered into by independent sovereign States between themselves on the plane of international law.*"[45]
>
> "*So far as individuals are concerned, it is res inter alios acta from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations; and it is outside the purview of the Court not only because it is made in the conduct of foreign relations, which are a*

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42 [1989] 3 All ER 523 (HL), approved in *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) 328C-329I

43 See *Maclaine Watson & Co Ltd v Department of Trade and Industry and related appeals; Maclaine Watson & Co Ltd v International Tin Council* [1988] 3 All ER 257 (CA).

44 at 526j.

45 at 544e.

prerogative of the Crown, but also because, as a source of rights and obligations, it is irrelevant."[46]

He went on to hold as follows:

"*It must be borne in mind, furthermore, that the conclusion of an international treaty and its terms are as much matters of fact as any other fact. That a treaty may be referred to where it is necessary to do so as part of the factual background against which a particular issue arises may seem a statement of the obvious. But it is, I think, necessary to stress that the purpose for which such reference can legitimately be made is purely an evidential one. Which States have become parties to a treaty and when and what the terms of the treaty are, are questions of fact. The legal results which flow from it in international law, whether between the parties inter se or between the parties or any of them and outsiders are not and they are not justiciable by municipal courts.*"[47]

16. In the second place this is an appropriate matter for a court to exercise its inherent jurisdiction by exercising judicial restraint and refuse to entertain this matter, notwithstanding it having the jurisdiction to do so under the present constitutional dispensation, in view of the involvement of a foreign State:[48]

16.1 In the United States of America an "*Act of State doctrine*" is recognised, which is to the effect that the courts of one sovereign State do not, as a

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46 at 545a.

47 at 545f.

48 See *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) 334D-E; *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para [91]; Dugard *International Law: A South African Perspective* (2011) 71-79.

rule, question the validity or legality of the official acts of another sovereign State.[49]

16.2 The basis for the doctrine was stated as follows in *Oetjen v Central Leather Co*:[50]

> "*The principle that the conduct of one independent government cannot be successfully questioned in the courts of another . . . rests at last upon the highest considerations of international comity and expediency. To permit the validity of the acts of one sovereign State to be re-examined and perhaps condemned by the courts of another would very certainly "imperil the amicable relations between governments and vex the peace of nations*"'.

16.3 In *Baker v Carr*[51] the Supreme Court listed several factors that make a case non-justiciable because of the political question doctrine:

(1) a textually demonstrable constitutional commitment of the issue to a coordinate political department;

(2) a lack of judicially discoverable and manageable standards for resolving it;

(3) the impossibility of deciding, without an initial policy of determination of a kind clearly for non-judicial discretion;

(4) the impossibility of the courts undertaking independent resolution

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49 See *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) 330D- 332F.

50 246 US 297 (1918) 303-4; 726 (62 L ed 2d) 819.

51 (1986) 369 U.S 186 at 217; Fuller *Biehler on International Law: An Irish perspective* (2013) 191-192 fn 85.

without expressing lack of the respect due to coordinate branches of government;

(5) an unusual need for unquestioning adherence to a political decision already made; or

(6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

16.4 These policy considerations are just as applicable in the South African context: impugning the validity of the Russian Treaty or giving it an interpretation with which the Russian Government does not agree, would very certainly imperil the amicable relations between governments, vex the peace of nations and cause embarrassment.

16.5 In England a venerable principle of judicial restraint is recognised on the basis that it must be very particular case indeed, even if such a case could exist, that would justify a domestic court in interfering with a foreign Sovereign in that domestic court.[52]

16.6 The English Courts preferred to consider this principle not as a variety of an Act of State doctrine but as one for judicial restraint or abstention.[53]

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52 See *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) 332-G-334-C; *Duke of Brunswick v King of Hanover* (1848) 9 ER 993 (HL) 1000.

53 See *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) 333E, quoting from *Buttes Gas & Oil Co v Hammer and Another (Nos 2 and 3); Occidental Petroleum Corpn and Another v Buttes Gas & Oil Co and Another (Nos 1 and 2)* [1981] 3 All ER 616 (HL).

16.7 The basis for this principle of judicial restraint appears from the reasoning of Lord Wilberforce in *Buttes Gas & Oil Co v Hammer and Another (Nos 2 and 3); Occidental Petroleum Corporation and Another v Buttes Gas & Oil Co and Another (Nos 1 and 2)* (own underlining added):[54]

> *"It would not be difficult to elaborate in these considerations, or to perceive other important interstate issues and/or issues of international law which would face the Court. They have only to be stated to compel the conclusion that these are not issues in which a municipal court can pass. Leaving aside all possibility of embarrassment in our foreign relations (which it can be said have not been drawn to the attention of the Court by the Executive), there are, to follow the Fifth Circuit Court of Appeals, no judicial or manageable standards by which to judge these issues, or, to adopt another phrase (from a passage not quoted), the Court would be in a judicial no man's land: the Court would be asked to review transactions in which four foreign States were involved, which they had brought to a precarious settlement, after diplomacy and the use of force, and to say that at least part of these were "unlawful" under international law. I would just add, in answer to one of the respondents' arguments, that it is not to be assumed that these matters have now passed into history, so that they now can be examined with safe detachment."*

Again these policy considerations are just as applicable in the South African context: impugning or interpreting the Russian Treaty creates the distinct possibility of embarrassment in the foreign relations of the Republic of South Africa and the Court would venture into a judicial no-

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54 [1981] 3 All ER 616 (HL) 633d-f; applied in *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) 334A-F.

man's land where there are no judicial or manageable standards by which to judge these issues; after all, the Court would then be asked to review a transaction in which foreign States were involved; in which they negotiated at diplomatic level and in the realm of international relations; and in which diverse, complex and poly-centric matters of international politics would have influenced the outcome.

16.8 In *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa*[55] the court held as follows (own underlining added):

> "*The basis of the application of the act of State doctrine or that of judicial restraint is just as applicable to South Africa as it is to the USA and England. The comity of nations is just as applicable to South Africa as it is to other sovereign States. The judicial branch of government ought to be astute in not venturing into areas where it would be in a judicial no-man's land. It would appear that in an appropriate case, as an exercise of the Court's inherent jurisdiction to regulate its own procedure, the Court could determine to exercise judicial restraint and refuse to entertain a matter, notwithstanding it having jurisdiction to do so, in view of the involvement of foreign States therein.*"

In our respectful submission these principles are equally applicable to the present matter.

16.9 Under the present constitutional dispensation the Constitutional Court has recognised the concept of substantive non-justiciability (as distinct from

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55 1999 (2) SA 279 (T) 334D-F (per Joffe J).

the procedural concept concerned with standing, ripeness and mootness):

16.9.1 Loots[56] explains the following (footnotes omitted but own underlining added):

> "*Whereas procedural justiciability concerns the identity of the person bringing the claim and the timing of the claim, substantive justiciability concerns the subject matter of the claim, and whether it is competent for the courts to decide claims of that sort. There are some issues that are not appropriately decided by the courts at all: for example, whether a foreign state should be recognised or not. Such decisions are clearly the prerogative of the executive, and their justiciability is typically dealt with in terms of a political question doctrine, or some other doctrine falling under the more general doctrine of separation of powers.*"[57]

16.9.2 With regard to section 195 of the Constitution, for example, the Constitutional Court in *Britannia Beach Estate (Pty) Ltd v Saldanha Bay Municipality*[58] held that, although the

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56 See Woolman and others *Constitutional Law of South Africa* (second edition: revision 6) chapter 7 "*Standing, Ripeness and Mootness*" by Loots.

57 See *Ngxuza v Secretary, Department of Welfare, Eastern Cape Provincial Government* 2001 (2) SA 609 (E) 626G-H, where Froneman J (as he then was) wrote:

> "*The nature and extent of a Court's assessment of the justiciability of a constitutional issue is, I think, intimately related to the extent to which it judges that those issues can adequately and better be dealt with by other democratic means.* "

58 2013 (11) BCLR 1217 (CC).

values referred to in section 195 of the Constitution were part of the values that underlay the Constitution, they did not give rise to independent rights outside those set out in the Bill of Rights;[59] section 195 of the Constitution provides valuable interpretive assistance but it does not, however, found a right to bring an action - democratic accountability as a fundamental value of the Constitution does not generally provide the basis for fashioning individual rights outside those specifically enumerated in the Constitution and other relevant legislation.

16.10 We respectfully submit that, as far as foreign relations and international agreements are concerned, the proper mechanism for democratic accountability is political accountability by the National Executive to the Parliament[60] and political accountability to the electorate - the courts cannot be used to indirectly govern the foreign relations of this country where the majority of the electorate has given the Government of the Day

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59 See also, in respect of section 1 of the Constitution, *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO)* 2004 (5) BCLR 445 (CC) par [21]:

> "*[21] The values enunciated in section 1 of the Constitution are of fundamental importance. They inform and give substance to all the provisions of the Constitution. They do not, however, give rise to discrete and enforceable rights in themselves. This is clear not only from the language of section 1 itself, but also from the way the Constitution is structured and in particular the provisions of Chapter 2 which contains the Bill of Rights.*"

60 See section 92(2) of the Constitution:

> "*(2) Members of the Cabinet are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions.*"

and/or the National Executive a mandate to govern and implement the policies of the political party in power.

17. In the third place it is not conducive for international relations between foreign states to have one stance adopted by the Executive Branch of the Republic of South Africa (namely, that the Russian Treaty is valid) and another stance adopted by the Judicial Branch of the Republic of South Africa (namely that the Russian Treaty is invalid):

17.1 In general a State should not speak with two voices and, by the same token, an attack on the validity of the Russian Treaty in a domestic court is an affront to the international principle of the equal sovereignty of States.

17.2 In support of our submission the following remarks by this Court in *Kolbatschenko v King NO*[61] are apposite (own underlining added):

> "*... South African Courts have refused to evaluate decisions or actions in the realm of foreign relations involving issues of a 'high executive nature'. Thus, for example, matters such as the recognition by the South African Government of a foreign State or of a foreign government, or of the status of diplomatic representatives of a foreign State, have generally been regarded as non-justiciable (see, for example, Inter-Science Research and Development Services (Pty) Ltd v Republica Popular de Moçambique 1980 (2) SA 111 (T) at 117D-G). Such decisions usually*

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61 2001 (4) SA 336 (C) 356G-357B.

involve the relationship between the South African state and the foreign State concerned, directly affecting the interests of such States as States, and are often of so 'political' a nature that the Courts have 'no judicial or manageable standards' by which to judge them (per Joffe in Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others (supra at 334F-G), citing the judgment of Lord Wilberforce in Buttes Gas and Oil Co v Hammer and Another (Nos 2 and 3); Occidental Petroleum Corpn and Another v Buttes Gas and Oil Co and Another (Nos 1 and 2) [1981] 3 All ER 616 (HL) at 633a-f). This type of decision, which falls four-square within the political arena, would include matters such as the making, or the determination of the existence, of treaties between South Africa and foreign States, the declaration of war and the making of peace. In such cases, it is indeed undesirable that the State should 'speak with two voices' and the latitude extended by the Judiciary to the Executive in such matters will be correspondingly large."

17.3 This is especially so where these proceedings are taking place in the absence of the other State Party to the Russian Treaty.

18. In the fourth place the subject matter and nature of international agreements, falling within the functional area of foreign affairs, are such that the President and the National Executive have a special responsibility for and particular expertise therein, leaving them free to take into account any matter considered relevant to what is a policy decision relating to foreign affairs and it is not for the courts to determine what matters are appropriate or relevant for that purpose: in this regard the National Executive enjoys a wide discretion and a substantial

margin of appreciation.[62]

19. On the basis of non-justiciability and/or judicial restraint, we respectfully submit that the relief pursued by the Applicants in respect of declaring the decisions to approve and sign the Russian Treaty unconstitutional and unlawful, and having it reviewed and set aside, should be dismissed with an appropriate order for costs.

Russian Treaty not a procurement contract

20. If the Court should find that the Russian Treaty is indeed justiciable by a domestic court in the Republic of South Africa and/or that this is not a matter for the exercise of judicial restraint, then we submit in the alternative that the Russian Treaty is not a kind of procurement contract nor other contract cognisable in terms of the domestic law of contract with any effect on the rights, obligations and legitimate interests of any member of the public - it is an international framework agreement for cooperation between sovereign States.

21. The attack of the Applicants on the alleged unconstitutionality and/or

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62 See *Geuking v President of the Republic of South Africa* 2003 (3) SA 34 (CC) para [27]:

> "*[27] The President in deciding whether to consent to the surrender of a person under s 3(2) must be free to take into account any matter considered relevant to what is a policy decision relating to foreign affairs. It is not for the courts to determine what matters are appropriate or relevant for that purpose. The courts could intervene only if the President were to abuse the power vested in him or use it in a manner contrary to the provisions of the Constitution.*"

See also *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC) para [144].

unlawfulness of the decision to approve and sign the Russian Treaty is premised upon an interpretation and theory that this international agreement was in truth already a procurement of nuclear power plants with immediate effect: the so-called "*true agreement*" allegedly shows a final decision to proceed with procuring these nuclear power plants and binding undertakings or a commitment in this regard.[63]

22. We respectfully submit that the Russian Treaty, being an international agreement, must be interpreted in accordance with the *Vienna Convention on the Law of Treaties (1969)*: this brings article 31[64] and article 32[65] thereof into

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63 See for example Record p. 9, p. 12 and p. 76-85 (para 4-5, 7.1 and 151-155 of the founding affidavit); p. 795 (para 98.4 of the answering affidavit).

64 Article 31 of the *Vienna Convention on the Law of Treaties (1969)* provides as follows:

> "***Article 31. General rule of interpretation***
> *1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*
> *2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:*
> *(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;*
> *(b) any instrument which was made by one or more parties in connection with the conclusion of thetreaty and accepted by the other parties as an instrument related to the treaty.*
> *3. There shall be taken into account, together with the context:*
> *(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*
> *(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;*
> *(c) any relevant rules of international law applicable in the relations between the parties.*
> *4. A special meaning shall be given to a term if it is established that the parties so intended.*"

65 Article 32 of the *Vienna Convention on the Law of Treaties (1969)* provides as follows:

> "***Article 32. Supplementary means of interpretation***
> *Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application*

play - as a general rule an interpretation in good faith in accordance with the ordinary meaning to be given to the terms of the Treaty in their context and in the light of its object and purpose is called for and in certain exceptional instances the *travaux préparatoires* may also be considered.[66]

23. The articles of the Russian Treaty make it clear that it is a bi-lateral international agreement providing for cooperation between two sovereign States and that it is not, and never was intended to be, a "*binding agreement in relation to the procurement of new nuclear reactor plants (including in respect of South Africa's liability consequent on such procurement) from a particular country*"[67] in terms of or cognisable by the domestic law of the Republic of South Africa - the only purpose of that co-operation is to create the conditions for or environment in which the establishment of a self-sufficient nuclear programme can be pursued and/or nuclear procurement can become an option yet to be decided upon in future without breaching international law .[68]

24. The contents of the Russian Treaty are conveniently discussed and analysed

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of article 31, or to determine the meaning when the interpretation according to article 31:
(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable."

66 See Boas *Public International Law* (2012) 63-65 (on the interpretation of treaties). We respectfully submit that the same result should follow if the approach set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) par [18] is followed.

67 See Record p. 12 (para 7.1 of the founding affidavit).

68 See Record p. 748 (para 52.22 of the answering affidavit).

fully in the answering affidavit[69] but we wish to draw attention to the following:

24.1 The use of the phrase "*strategic partnership*" therein is of no moment because it is a term of art describing a diplomatic relationship between sovereign states: both the Government of Russia and the Government of the People's Republic of China are strategic partners of the Republic of South Africa in this diplomatic sense.[70]

24.2 The dispensation with regard to civil liability in respect of nuclear damage is, firstly, already part of our national law;[71] secondly, is already part of international law;[72] and thirdly, is not unique to the Russian Treaty but was also provided for expressly in the French Treaty (also as the outcome of specific international negotiations).[73]

25. The interpretation or construction of the Russian Treaty, as advanced by the Applicants, is the foundation of their case; once that falls away, we respectfully

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69 See Record p. 720-748 (para 52 of the answering affidavit).

70 See Record p. 637, 711-712, 720, 725-726, 726, 759 and 905-906 (para 11.3, 49.1, 51.7, 52.7, 52.8, 59 and 127.20 of the answering affidavit).

71 See section 29-34 of National Nuclear Regulator Act 47 of 1999; Neethling and others *The Law of Delict* (2006) 345-346 (pointing out in fn 169 that the legislature clearly wished to regulate liability for nuclear damages completely in this legislation, outside of the general principles of delict); Kgomo *Is the legal regime for civil liability for nuclear damage in South Africa adequate?* (2013: LLM Thesis, University of Dundee); Record p. 658-659 and 732-745 (para 24.11.4 and 52.18 of the answering affidavit).

72 See Birnie and others *International Law & the Environment* (2009) 488-534 (chapter 9, dealing with nuclear energy and the environment); Sands and others *Principles of International Environmental Law* (2012) 737-745 (the section on civil liability for environmental damage under international law, caused by nuclear installations).

73 See Record p. 244 (article 11 of the French Treaty on civil nuclear liability). There is no blueprint or standard model for international agreements of this nature.

submit that everything else comes tumbling down.

26. Once the Russian Treaty is properly interpreted or constructed, simply as an international framework agreement for cooperation between two sovereign States in the field of nuclear energy and the field of nuclear industry, the following becomes apparent:

26.1 Firstly, the approval and signing of the Russian Treaty is authorised by section 231(1) of the Constitution.[74]

26.2 Secondly, the approval and signing of the Russian Treaty was objectively rational and that decision was taken for the following reasons (in line with all the policy documents and media statements that went before):[75]

26.2.1 to take a step forward in a policy direction, already adopted by the Government some years ago, in favour of establishing a self-sufficient nuclear industry for the industrialisation and development of the Republic of South Africa (alleviating poverty) and already given recognition in a number of statutes as well as other instruments;

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74 Section 231(1) of the Constitution provides as follows:
"*(1) The negotiating and signing of all international agreements is the responsibility of the national executive.*"

75 See Record p. 630-631, 632, 653, 662-663, 670-671, 671-672, 689, 702, 710 and 753 (para 5, 7.1, 24.3, 24.13, 29.6, 29.8, 34.4, 42.3, 47.3 and 55.2 of the answering affidavit).

26.2.2 to allow the Republic of South Africa to discharge its international obligation to reduce CO_2 emissions (generated especially from coal-driven power stations in the electricity supply industry) in line with its international obligations;

26.2.3 to ensure security of energy supply by way of a broader energy mix;

26.2.4 to align the energy industry with the beneficiation strategy (to create jobs and add value to the natural resources of South Africa); and/or

26.2.5 to promote industrialization and localisation and also leapfrogging South Africa into the knowledge economy and massive industrial development.

26.3 The test for rationality in this context requires that a decision be rationally connected to the purpose for which it was taken: the exercise of such power must be rationally related to the purpose for which the power was given and it is not a proportionality test nor is it a question of substantive reasonableness;[76] as was held by the Constitutional Court in *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte*

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[76] See *Affordable Medicines Trust v Minister of Health of Republic of South Africa* 2006 (3) SA 247 (CC) para [49], [75] and [77]; *Masetlha v President of the Republic of South Africa* 2008 (1) BCLR 1 (CC) par [80]; *Minister of Defence and Military Veterans v Motau* 2014 (8) BCLR 930 (CC) par [69].

President of the Republic of South Africa (own underlining added):[77]

> *"... the setting of the rationality standard did not mean that the Courts could or should substitute their opinions as to what was appropriate for the opinions of those in whom the power had been vested. As long as the purpose sought to be achieved by the exercise of public power was within the authority of the functionary, and as long as the functionary's decision, viewed objectively, was rational, a Court could not interfere with the decision simply because it disagreed with it or considered the power to have been inappropriately exercised."*

26.4 This decision was with respect rationally taken in pursuit of amicable international relations with the Russian Government and/or in pursuit of a self-sufficient and globally-competitive nuclear programme (based on a rationally-selected preference for Pressurised Water Reactor Technology that would secure the supply of electricity by ensuring a flexible mix of sources of supply, that would reduce the emissions of greenhouse gas, and that would grow industry and the economy to eradicate poverty) for which the conditions or an environment, that would allow the establishment thereof in accordance with international law, first had to be created.[78]

26.5 In this context the alarmist claim by the Applicants, of a final financial commitment that would cripple the economy of South Africa for generations to come together with the environmental impact of nuclear

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77 2000 (2) SA 674 (CC) par [90].

78 See Record p. 783-784 (para 87.2 of the answering affidavit).

energy, is with respect false and unfounded:[79] in the answering affidavit the President and the Minister make it abundantly clear that the rolling out of the nuclear programme takes place in a phased manner, allowing the State the option of not proceeding with nuclear procurement if it turns out not to be financially or otherwise viable.[80]

26.6 Thirdly, given the true nature and subject matter of the Russian Treaty there was with respect no reason that required a process of public participation in the negotiation, approval and signing thereof: international relations by their very nature are confidential and the National Executive had no reason to share that process with any other party;[81] we are also not aware of any precedent requiring public participation in conducting foreign relations.[82]

26.7 In the premise we submit that the negotiation, approval and signing of the Russian Treaty complied fully with the doctrine of legality.

27. Once the Russian Treaty is properly interpreted or constructed, simply as an

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79 See Record p. 9 (para 4 and 5 of the founding affidavit).

80 See Record p. 693-694 (para 38 of the answering affidavit).

81 See *Van Zyl v Government of the Republic of South Africa* 2008 (3) SA 294 (SCA) par [55] (at 311F):

> " *In any event, government had sufficient reason for not disclosing the policy considerations: international relations by their very nature are confidential.*"

82 See Botha "*Treaty making in South Africa: A reassessment*" 25 (2000) South African Yearbook of International Law 69-96, especially p. 81-82 (pointing out there is no statutory, constitutional or otherwise, provision demanding wide-ranging consultation in the process of treaty making).

international framework agreement for cooperation between two sovereign States in the field of nuclear energy and the field of nuclear industry, the following also become apparent:

27.1 Section 217 of the Constitution finds no application to the Russian Treaty because:

27.1.1 it is an international agreement which is either not justiciable before a domestic court or in respect of which a domestic court should exercise judicial restraint;[83] and/or

27.1.2 it is not at all a contract for goods and/or services as contemplated by section 217 of the Constitution,[84] which in our respectful submission contemplates a procurement contract concluded in the exercise of the procurement power of the State in terms of and under the domestic law (more specifically, in terms of and under the national law of contract and/or the national administrative law and/or the national public finance management law) so that valid and binding rights and obligations enforceable in domestic courts are created: the primary concern of this provision is

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83 See paragraph 14-19 above.

84 Note that section 217 of the Constitution uses different terminology than the terminology used in section 231 thereof: the one section refers to a "*contract*" and the other to an "*international agreement*", indicating that different concepts are contemplated.

to regulate the spending power of the Republic of South Africa vis-á-vis its subjects and not to regulate international relations; and

27.1.3 it is a framework agreement which thus does not "*contract for goods and services*" but contemplates future contracts to be entered into under the umbrella thereof and also in accordance with section 217 of the Constitution.[85]

27.2 The Russian Treaty also did not compromise or fetter any future nuclear procurement process in any respect at all:

27.2.1 The argument for the Applicants in this regard is based on their interpretation and construction of the Russian Treaty, which is not correct; in essence the Russian Treaty is no different from any of the other Treaties - a framework for international cooperation.

27.2.2 We repeat **paragraph 24.1 above**: nothing turns on the recognition of the Government of the Russian Federation as a strategic partner in the Russian Treaty (on the plane of international relations and diplomacy).

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[85] See Record p. 288, 290, 292 and 293 (article 2, 4.1, 7, 8 and 10 of the Russian Treaty).

27.2.3 Despite the publicised vendor parade with the Russian Government on 23 October 2014, all the other countries attended vendor parades thereafter:[86] clearly none of them harboured any suspicion or fear that the future nuclear procurement process has been compromised or that the South African Government had already fettered its procurement powers, or else they would not have wasted the time to attend.

27.3 Section 34 of the ERA also finds no application to the Russian Treaty because it is not only an international agreement but, upon a proper and correct interpretation, it is also not any kind of a procurement step or domestic contract, and no determination in terms of section 34(1) of the ERA is required as a jurisdictional condition for a treaty:[87] such an interpretation flies directly in the face of section 231(1) of the Constitution and is, in view of the supremacy clause in section 2 thereof, untenable.

28. On the basis of the proper interpretation or construction of the Russian Treaty and the doctrine of legality as well as any other constitutional or legal requirements, having regard to the wide margin of appreciation for the National Executive in this regard,[88] we respectfully submit that the relief pursued by the

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86 See Record p. 755-762 (para 57-63 of the answering affidavit).

87 See Record p. 412 (para 87 of the supplementary affidavit).

88 See *Kaunda v President of the Republic of South Africa (2)* 2004 (10) BCLR 1009 (CC) para [244]-[245] (per O'Regan J, footnotes omitted):

"*[244] It is clear from the existing jurisprudence of this Court that all*

Applicants in respect of declaring the decision to approve and sign the Russian Treaty unconstitutional and unlawful, and having it reviewed and set aside, is without any merit and should be dismissed with an appropriate order for costs.

TABLING OF RUSSIAN TREATY

29. We also submit that the decision of the Minister to table the Russian Treaty in Parliament in terms of section 231(3) of the Constitution is beyond reproach.

30. In the first place we respectfully submit that the Applicants have no standing to claim this relief.

30.1 If by reason of a ministerial decision an international agreement is tabled in Parliament in terms of the wrong section or procedure, then it is with respect a matter for Parliament to take it up with the Minister.[89]

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exercise of public power is to some extent justiciable under our Constitution, but the precise scope of the justiciability will depend on a range of factors including the nature of the power being exercised. Given that the duty to provide diplomatic protection can only be fulfilled by government in the conduct of foreign relations, the executive must be afforded considerable latitude to determine how best the duty should be carried out.
[245] Like other powers of the executive, the power must be exercised lawfully and rationally. It may be subject to other requirements as well, but in any proceedings in which the exercise of the power is challenged, a court will bear in mind that foreign relations is a sphere of government reserved by our Constitution for the executive and it will accordingly "be careful not to attribute to itself superior wisdom" in relation to it."

89 See *Metal and Allied Workers Union v State President of the Republic of South Africa* 1986 (4) SA 358 (D) 364B-E (per Didcott J, as he then was), dealing with the argument that certain emergency regulations were invalid because they were not tabled before Parliament either in time or at all:

" *It is, of course, clear that the whole purpose of the tabling, and*

30.2 Under section 92 of the Constitution the members of the National Executive are, collectively and individually, accountable to Parliament for the exercise of their powers and the performance of their functions: no right, interest or expectation on the part of the Applicants is affected thereby in whatsoever respect, and definitely not adversely.

30.3 Whether the correct or incorrect tabling process was followed with the Russian Treaty is thus not a matter concerning the Applicants:[90] it is for Parliament to make such a call and to question the Minister if Parliament was of the view that there was some dereliction of duty.

31. In the second place we respectfully submit in the alternative that the decision of

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the only purpose of the tabling, is to inform the Members of Parliament of the regulations so that they may, if so minded, move or consider the moving of an annulling resolution.

The view which I take of this sub-section, with some hesitation because I recognise the force of the argument to the contrary, is that it is conceived for the benefit of, and enforceable by, no one but the Members of Parliament. When I refer to the Members of Parliament I am, of course, conscious of the fact that they are public representatives. When I speak of them I do so not in their personal capacities, but in their capacities as public representatives. But even with that gloss, it is to my mind for the Members of Parliament, as public representatives, to deal with the matter, on the assumption that there has been a failure to comply with the tabling requirements.

Bearing in mind that Parliament applied its mind to the very question of nullity and provided a machinery for achieving it, without at the same time saying anything to suggest that the consequence of non-tabling would be an automatic nullity, I find myself unable to come to the conclusion that such is the result according to the correct interpretation of the subsection, and I consider that the second point fails too."

90 See *Bushbuck Ridge Border Committee v Government of the Northern Province* 1999 (2) BCLR 193 (T), where Kirk-Cohen J upheld an exception on the basis that a failure to table a bill in Parliament was not an administrative act giving rise to a cause of action at common law or in terms of the Interim Constitution.

the Minister to table the Russian Treaty under section 231(3) of the Constitution is not justiciable in a domestic court and/or that a domestic court should exercise judicial restraint in this regard.[91]

32. In the third place and in the further alternative, we respectfully submit that the Russian Treaty is, upon a proper interpretation and construction thereof, not a "*procurement contract*" with immediate financial implications as portrayed by the Applicants and was tabled in terms of the correct procedure under section 231(3) of the Constitution.

32.1 The Constitutional Court has pointed out that it is important that the provisions of section 231 of the Constitution should not be applied in a formalistic manner that will impair the ability of the National Executive to function.[92]

32.2 We respectfully submit that section 231 of the Constitution draws a distinction between two categories of international agreements,[93] namely:

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91 See paragraph 14-19 above.

92 See *President of the Republic of South Africa v Quagliani; President of the Republic of South Africa v Van Rooyen; Goodwin v Director-General, Department of Justice and Constitutional Development* 2009 (4) BCLR 345 (CC) 356C.

93 See Schneeberger "*A labyrinth of the tautology: The meaning of the term international agreement and its significance for South African law and treaty making practice*" 26 (2001) South African Yearbook of International Law 1-40, especially p. 5; Botha "*Treaty making in South Africa: A reassessment*" 25 (2000) South African Yearbook of International Law 69-96, especially p. 71-80 (two species of international agreements are identified).

32.2.1 the first category of international agreements of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession; and

32.2.2 the second category of all other international agreements: (1) those that are not of a technical, administrative or executive nature; (2) those which require either ratification[94] or accession;[95] and (3) all others not covered by the first category.

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94 See article 14 of the *Vienna Convention on the Law of Treaties (1969)*:

"***Article 14. Consent to be bound by a treaty expressed by ratification, acceptance or approval***

1. The consent of a State to be bound by a treaty is expressed by ratification when:

(a) the treaty provides for such consent to be expressed by means of ratification;

(b) it is otherwise established that the negotiating States were agreed that ratification should be required;

(c) the representative of the State has signed the treaty subject to ratification; or

(d) the intention of the State to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiation.

2. The consent of a State to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification."

95 See article 15 of the *Vienna Convention on the Law of Treaties (1969)*:

"***Article 15. Consent to be bound by a treaty expressed by accession***

The consent of a State to be bound by a treaty is expressed by accession when:

(a) the treaty provides that such consent may be expressed by that State by means of accession;

(b) it is otherwise established that the negotiating States were agreed that such consent may be expressed by that State by means of accession; or

(c) all the parties have subsequently agreed that such consent may be expressed by that State by means of accession."

The first category of international agreements binds the Republic of South Africa when entered into by the National Executive without requiring approval by Parliament;[96] the second category of international agreements binds the Republic of South Africa only if it has been approved by resolutions in Parliament.[97]

32.3 According to article 14 and article 15 of the *Vienna Convention on the Law of Treaties (1969)*, the test for whether an international agreement requires either ratification or accession does not depend upon the subject matter or contents of the international agreement but on the consensus of the State Parties to that international agreement:[98] applying those provisions to the Russian Treaty, it is clearly not an international agreement requiring ratification or accession.

32.4 Schneeberger[99] states the following with regard to the first category of international agreements:

> "*Technical, administrative and executive agreements are therefore all those agreements which do not fall within the ambit of section 231(2) - ie they do not require ratification or accession; they have no legislative or extra-budgetary implications; and they are usually bilateral. Normally these*

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96 See section 231(3) of the Constitution.

97 See section 231(2) of the Constitution.

98 See Dugard *International Law: A South African Perspective* (2011) 54-55 - it is a matter of the intention of the parties.

99 "*A labyrinth of the tautology: The meaning of the term international agreement and its significance for South African law and treaty making practice*" 26 (2001) South African Yearbook of International Law 1-40 at p. 5.

agreements are routine agreements for which a single government department is responsible for implementation. This encompasses the vast majority of agreements which South Africa has concluded since 1994."

She carries on in a footnote[100] to add the following (own underlining added):

"*These types of agreements cover the gamut of international relations. Common agreements of this kind would include agreements establishing commissions of cooperation or agreements on cooperation in specific fields such as trade and development, arts and culture, science and technology, sports or defence.*"

The Russian Treaty falls within this category of a technical, administrative and executive agreement, not requiring ratification or accession.

32.5 Article 12[101] and article 13[102] of the *Vienna Convention on the Law of*

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100 fn 12 on p. 5.

101 See article 12 of the *Vienna Convention on the Law of Treaties (1969)*:

"***Article 12. Consent to be bound by a treaty expressed by signature***

1. The consent of a State to be bound by a treaty is expressed by the signature of its representative when:

(a) the treaty provides that signature shall have that effect;

(b) it is otherwise established that the negotiating States were agreed that signature should have that effect; or

(c) the intention of the State to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation.

2. For the purposes of paragraph 1:

(a) the initialling of a text constitutes a signature of the treaty when it is established that the negotiating States so agreed;

(b) the signature ad referendum of a treaty by a representative, if confirmed by his State, constitutes a full signature of the treaty."

102 See article 13 of the *Vienna Convention on the Law of Treaties (1969)*:

"***Article 13. Consent to be bound by a treaty expressed by an***

Treaties (1969) cater for the conclusion and entry into force of international agreements falling within the first category: in this respect article 17.1 of the Russian Treaty stipulates that it shall enter into force on the date of the receipt through diplomatic channels of the final written notification of the completion by the Parties of internal government procedures necessary for its entry into force.[103]

32.6 The Russian Treaty is an international agreement of a technical, administrative or executive nature and a bi-lateral one which does not require either ratification or accession (as is the case with multi-lateral treaties); as a treaty it has no legislative or extra-budgetary implications *per se* and it is in essence an international agreement on an executive level of cooperation between the two State Parties in two specific fields, namely the field of nuclear power and the field of nuclear industry.[104]

32.7 In the result we submit that the Russian Treaty was tabled in terms of the correct procedure under section 231(3) of the Constitution.

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exchange of instruments constituting a treaty
The consent of States to be bound by a treaty constituted by instruments exchanged between them is expressed by that exchange when:
(a) the instruments provide that their exchange shall have that effect; or
(b) it is otherwise established that those States were agreed that the exchange of instruments should have that effect."

103 See Record p. 297 (article 17.1 of the Russian Treaty).

104 See Record p. 639-640 and 891-893 (para 12.3 and 125.106 of the answering affidavit).

33. The case for the Applicants is founded on the following propositions:[105]

33.1 that the tabling of the Russian Treaty under section 231(3) of the Constitution made that international agreement binding upon the Republic of South Africa without Parliamentary approval;

33.2 that the Russian Treaty was the type of international agreement which required Parliamentary approval under section 231(2) of the Constitution:

33.2.1 because of its content and extent as discussed by the Applicants;

33.2.2 because of the financial commitments being made to Russia therein;

33.2.3 because the Russian Treaty is intended to take precedence over any subsequent agreement;

33.2.4 because the Russian Treaty may preempt the procurement process or at least create a perception of favouritism;

33.2.5 because tabling for Parliamentary approval would have

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105 See Record p. 90-92 (para 161-168 of the founding affidavit); p. 387-392 (para 40-50 of the supplementary affidavit); p. 788-789 (para 96 of the answering affidavit).

allowed for a debate in Parliament and would have created an opportunity for public participation; and

33.3 that the Minister acted irrationally in ignoring the advice of the State Law Advisor that the Russian Treaty had to be tabled under section 231(2) of the Constitution.

34. For an international agreement falling into the first category of international agreements, approval of Parliament is not required and the tabling procedure under section 231(3) of the Constitution is for the purpose of notification[106] of Parliament of an international agreement entered into by the National Executive and which already binds the Republic of South Africa.[107]

34.1 The constitutional scheme is that those international agreements that

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106 This appears from the clear wording of section 231(3) of the Constitution, which does not cast tabling as a jurisdictional requirement for validity; it is also with respect trite law that the use of the word "*must*" does not necessarily carry with it a mandatory meaning but can also be used as a mere directive, especially where a strict enforcement thereof will result in serious inconvenience (Voet 1.3.16, mentioning as exceptions the case of permissive law and/or the useful interpretative guideline in terms of which the consequences of regarding something null and void are weighed up against the consequences - in this case the consequences for international relations and treaty obligations - if it is not so regarded; *Sutter v Scheepers* 1932 AD 165). See also by way of analogy Wiechers *Administratiefreg* (1984) 103:

> "*Die tertafellegging van administratiewe wetgewende handelinge is nie 'n voorwaarde vir die geldigheid van sulke handelinge nie; indien die wetgewende handeling om die een of ander rede gebrekkig is, kan die tertafellegging nie daardie gebrek herstel nie.*"

107 See Schneeberger "*A labyrinth of the tautology: The meaning of the term international agreement and its significance for South African law and treaty making practice*" 26 (2001) South African Yearbook of International Law 1-40 on p. 6: this is a notification rather than an approval process, and tabling does not affect the validity of the agreement which has already been concluded.

require the approval of Parliament in order to make it binding upon the Republic of South Africa, are tabled in Parliament under section 231(2) of the Constitution for Parliament to exercise its *ad hoc* power of considering and approving that international agreement so as to make it binding.

34.2 However, those international agreements that do not require the approval of Parliament in order to make them binding upon the Republic of South Africa, are tabled in Parliament under section 231(3) of the Constitution for Parliament to take note thereof:[108] its powers and remedies in this regard are in the political domain of oversight and accountability under section 55 and 92 of the Constitution.

35. The submission that the Russian Treaty was the "*type*" of an international agreement which required Parliamentary approval under section 231(2) of the Constitution) is with respect misconceived: none of the considerations relied upon by the Applicants are present - **(1)** in content and extent of the Russian Treaty is a framework agreement for cooperation; **(2)** no immediate financial commitments are made therein; **(3)** the Russian Treaty is not intended to take precedence over any subsequent agreement; **(4)** the Russian Treaty did not preempt the procurement process nor did it create any perception of favouritism;

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108 *Pacta sunt servanda* is the rock-bed or *Grundnorm* of international treaty law - see article 26 of the *Vienna Convention on the Law of Treaties (1969)*:

> "***Article 26: 'Pacta sunt servanda'***
> *Every treaty in force is binding upon the parties to it and must be performed by them in good faith.*"

(5) a tabling to allow for a debate in Parliament or an opportunity for public participation was not called for in respect of a first category international agreement by section 231(3) of the Constitution; **(6)** in any event the subjective test for classification (to be found in article 14 and 15 of the *Vienna Convention on the Law of Treaties (1969)* is not taken into account at all;[109] and **(7)** given the similarity between these international agreements, there is no reason why the one treaty should have been tabled in terms of section 231(2) of the Constitution whilst all the others were, without objection, tabled in terms of section 231(3) thereof.

36. The "*advice*" of the State Law Advisor on the tabling procedure for the Russian Treaty is simply that: advice which cannot change the objective facts.

37. In the result we submit that the true issue is whether objectively the correct tabling procedure has been followed, but in any event and even on a subjective level there was no flaw in the decision of the Minister.

38. In the result we respectfully submit that the relief pursued by the Applicants in respect of declaring the decision to table the Russian Treaty in terms of section 231(3) of the Constitution unconstitutional and unlawful, and having it reviewed

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[109] See Dugard *International Law: A South African Perspective* (2011) 54-55 (footnotes omitted):

> "*In practice, this may give rise to disputes about the precise meaning of the terms 'technical', 'administrative' or 'executive' in the context of treaty law. Ultimately, however, it is a question of intention. Where parties intend that an agreement is to come into force immediately, without ratification at the international level, it would be ridiculous for the South African Parliament to insist on parliamentary approval.*"

and set aside, is without any merit and should be dismissed with an appropriate order for costs.

TABLING OF AMERICAN TREATY AND SOUTH KOREAN TREATY

39. In the case of the American Treaty and the South Korean Treaty, albeit that they are similar in nature and content to the Russian Treaty, the complaint is not that they were tabled in terms of the wrong procedure but that they were tabled late.

40. Section 231(3) of the Constitution provides as follows (own underlining added):

> "*(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.*"

41. In the first place we respectfully submit that the Applicants also have no standing to claim this relief and we repeat what we have stated in **paragraph 30 above**.

41.1 We repeat that, in the context of section 231(3) of the Constitution, the purpose of tabling is to notify or inform Parliament of the existence of a treaty that binds the Republic of South Africa; once there was such a tabling, no court order can undo the fact of notification to Parliament or delete the knowledge thereof from the individual minds of Members of Parliament so that such a court order will not have any practical effect

and, also, the maxim applicable is *lex non cogit ad impossibilia.*

41.2 If there was an unreasonable or unconstitutional delay with, or any suspicion about the motives for, the tabling of the American Treaty or the South-Korean Treaty in Parliament, it is thus for Parliament to make that call and take it up with the Minister.

42. In the second place we respectfully submit in the alternative that the decision of the Minister to table these two treaties under section 231(3) of the Constitution is not justiciable in a domestic court and/or that a domestic court should exercise judicial restraint in this regard.[110]

43. In the third place we respectfully submit that, even if one was to assume an unreasonable delay in the tabling of these two treaties, it is only the delay itself that is unconstitutional[111] and such a delay does not affect the validity or effectiveness of the tabling itself nor does it make either of those two treaties invalid or without any binding or legal effect in the field of international law or international relationships.

43.1 Section 231(3) of the Constitution contemplates the tabling of an international agreement which is already unconditionally binding upon the Republic of South Africa (albeit not yet incorporated into the domestic or

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110 See paragraph 14-19 above.

111 See section 2 of the Constitution: the conduct inconsistent with it is invalid, which in this case is the delay itself and not the conclusion of a binding international agreement.

municipal law) and then imposes a separate obligation for the tabling thereof within a reasonable time: the clear meaning of this provision is that such tabling is not a requirement for validity and there is no provision for an automatic invalidity in the case of non-compliance.[112]

43.2 A contrary interpretation would create inconvenience and uncertainty in the international relations of the Republic of South Africa with other sovereign States: an international agreement binding one day, having been concluded in accordance with article 12 and article 13 of the *Vienna Convention on the Law of Treaties (1969)*, then at some uncertain date (namely from the moment where the delay in tabling becomes unreasonable) becomes invalid and the international rights and obligations in terms thereof unenforceable.

43.3 Such an interpretation would also allow the Republic of South Africa to escape from binding treaty obligations by what amounts to be its own unlawful conduct.

44. In the fourth place we respectfully submit that there was in any event no *unreasonable* delay.

44.1 Section 231(3) of the Constitution does not require immediate tabling but

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112 See *Metal and Allied Workers Union v State President of the Republic of South Africa* 1986 (4) SA 358 (D) 364B-E (per Didcott J, as he then was).

tabling within a reasonable time: what is reasonable in any particular instance must obviously depend on the facts and circumstances pertaining to each international agreement and it is not simply a question of how much time elapsed between the signature and the tabling thereof - the intricacies of international relations, the state of the national economy, the needs of the local industry, the prevailing circumstances and aspects of political expediency are some of the factors to also take into consideration.[113]

44.2 The argument for the Applicants focuses only on the lapse of time between concluding the treaty in question and the tabling thereof, but this one single consideration surely cannot be determinative and is not the only relevant consideration.

45. The explanation is:[114]

45.1 that there was no need to table these two treaties in Parliament during the past few years because the circumstances were such that, although cooperation between the State Parties as contemplated therein did become politically possible (with international doors having been opened at an expedient time as far as the peaceful use of nuclear energy was concerned and at a time when it was opportune to foster international

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113 See Record p. 805 (para 108.2 of the answering affidavit).

114 See Record p. 642-643 and 805-808 (para 13.3 and 108 of the answering affidavit).

relationships with these two State Parties in general), there was no practical or immediate need for such cooperation;

45.2 that only recently, when the policy-decision was taken that the Republic of South Africa should in general opt for the Pressurised Water Reactor technology as far as nuclear power plants are concerned, was an inventory or list of the countries made that are able to provide this technology;

45.3 that the United States of America and the Republic of Korea fall in that category, as do the French Republic, the Russian Federation, the People's Republic of China and the Kingdom of Japan (although the process of negotiating an international agreement with Japan is not yet complete);

45.4 that the tabling of the American Treaty and the South-Korean Treaty in Parliament (together with the treaties of other countries with Pressurised Water Reactor technology) was not mere window-dressing and the wild accusations by the Applicants in this regard are false; in fact, those unfounded allegations, amounting to bad faith on the part of the Republic of South Africa in its international relations with two other Sovereign States, are irresponsible and damaging to the international reputation and goodwill of this country; and

45.5 that under these circumstances, the decision to table these two treaties was valid and rational, and there was with respect no delay and in any event no unreasonable one nor was there any ulterior purpose therewith.

46. In the result we respectfully submit that the relief pursued by the Applicants in respect of declaring the decision to table the American Treaty and the South Korean Treaty in terms of section 231(3) of the Constitution unconstitutional and unlawful, and having it reviewed and set aside, is without any merit and should be dismissed with an appropriate order for costs.

INTERPRETATION OF SECTION 34 OF ELECTRICITY ACT

47. In a nutshell the case for the Applicants on the interpretation of section 34 of the ERA is premised on three propositions, namely:

47.1 that a ministerial determination in terms of section 34(1)(e)(i) of the ERA must specify the procurement system for the nuclear new generation capacity;

47.2 that the ministerial powers provided for in section 34(2) of the ERA can only be exercised and/or the procurement process (from the moment of bid specification onwards) can only commence after a determination of the extent and source of new generation capacity needed and a determination of the procurement system therefore; and

47.3 that a ministerial determination in terms of section 34(1)(a), (b) and (e) of the ERA must be made in consultation with NERSA and thus (when read with section 10(1)(d) of the National Energy Regulation Act 40 of 2004[115]) in accordance with a procedurally fair and public participation process.

48. The leading case on the interpretation of statutes is now *Natal Joint Municipal Pension Fund v Endumeni Municipality* (footnotes omitted):[116]

> "*[18] ... The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the*

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115 hereinafter referred to as the NERA.

116 2012 (4) SA 593 (SCA) par [18].

preparation and production of the document."

49. We respectfully submit that the argument for the Applicants is not premised upon this holistic approach but fixates on the strict literal meaning of the words used and is therefore fatally flawed.

50. The long title of the ERA summarises the purposes thereof,[117] which include the purpose:

50.1 to establish a national regulatory framework for the electricity supply industry; and

50.2 to make NERSA the custodian and enforcer of the national electricity regulatory framework.

51. There is no indication in this long title that the ERA has to do with authorising the procurement of electricity or nuclear energy by the State and that was not one of the mischiefs addressed at the time; in fact, the main purpose was to prepare a legislative regulatory framework for the privatisation of the electricity supply

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117 The long title of the ERA provides as follows:

"*To establish a national regulatory framework for the electricity supply industry; to make the National Energy Regulator of South Africa the custodian and enforcer of the national electricity regulatory framework; to provide for licences and registration as the manner in which generation, transmission, distribution, reticulation, trading and the import and export of electricity are regulated; to regulate the reticulation of electricity by municipalities; and to provide for matters connected therewith.*"

industry which, historically, was a State monopoly in the hands of Eskom.[118]

52. The ERA contains 37 sections divided into seven chapters: chapter 1 on interpretation, chapter 2 on oversight of the electricity industry, chapter 3 on electricity licences and registration, chapter 4 on reticulation, chapter 5 on the resolution of disputes and remedies against certain decisions, chapter 6 on investigations and chapter 7 on general provisions (of which section 34 is one).

53. The ERA was enacted at a time when two procurement systems, both complying with the requirements of section 217 of the Constitution, were already in place, namely

53.1 a centralised one under the State Tender Board Act 86 of 1968;[119] and

53.2 a decentralised one under the Public Finance Management Act 1 of 1999 read with the Treasury Regulations published under Government Notice R.225 of 15 March 2005 and with the Preferential Procurement Policy Framework Act 5 of 2000;

with both procurement systems already authorising the procurement of any "*goods and services*" by the State or an organ of state under the auspices of the

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118 See Record p. 666, 810-811 and 831-832 (para 26, 113 and 123.4.6 of the answering affidavit).

119 In terms of section 4(1) thereof but subject to the provisions of section (4)(1)(a) of the Armaments Act 87 of 1964, the State Tender Board has the power to procure supplies and services for the State.

State Tender Board or an accounting officer of the organ of state and already providing for the different procurement methods and procurement procedures that were available to the State or any organ of state.

54. Against this background and in this context section 34 of the ERA was enacted, with this section - a general provision in an over-arching national regulatory framework for the electricity supply industry of which NERSA was the custodian and enforcer - reading as follows (own underlining for the sake of emphasis):

> "***34. New generation capacity.***
> *(1) The Minister may, in consultation with the Regulator -*
> *(a) determine that new generation capacity is needed to ensure the continued uninterrupted supply of electricity;*
> *(b) determine the types of energy sources from which electricity must be generated, and the percentages of electricity that must be generated from such sources;*
> *(c) determine that electricity thus produced may only be sold to the persons or in the manner set out in such notice;*
> *(d) determine that electricity thus produced must be purchased by the persons set out in such notice;*
> *(e) require that new generation capacity must -*
> *(i) be established through a tendering procedure which is fair, equitable, transparent, competitive and cost-effective;*
> *(ii) provide for private sector participation.*
> *(2) The Minister has such powers as may be necessary or incidental to any purpose set out in subsection (1), including the power to -*
> *(a) undertake such management and development activities, including entering into contracts, as may be necessary to organise tenders and to facilitate the tendering process for the development, construction, commissioning and operation of such new electricity generation capacity;*
> *(b) purchase, hire or let anything or acquire or grant any right or incur obligations for or on behalf of the State or*

prospective tenderers for the purpose of transferring such thing or right to a successful tenderer;

(c) apply for and hold such permits, licences, consents, authorisations or exemptions required in terms of the Environmental Conservation Act, 1989 (Act No. 73 of 1989) or the National Environmental Management Act, 1998 (Act No. 107 of 1998), or as may be required by any other law, for or on behalf of the State or prospective tenderers for the purpose of transferring any such permit, licence, consent, authorisation or exemption to a successful tenderer;

(d) undertake such management activities and enter into such contracts as may be necessary or expedient for the effective establishment and operation of a public or privately owned electricity generation business;

(e) subject to the Public Finance Management Act, 1999 (Act No. 1 of 1999), issue any guarantee, indemnity or security or enter into any other transaction that binds the State to any future financial commitment that is necessary or expedient for the development, construction, commissioning or effective operation of a public or privately owned electricity generation business.

(3) The Regulator, in issuing a generation licence -

(a) is bound by any determination made by the Minister in terms of subsection (1);

(b) may facilitate the conclusion of an agreement to buy and sell power between a generator and a purchaser of that electricity.

(4) In exercising the powers under this section the Minister is not bound by the State Tender Board Act, 1968 (Act No. 86 of 1968)."

55. The first remarkable aspect of section 34(1) of the ERA is that the Minister is given a discretionary power: she "*may*" make a determination. If this was the only legal and prescribed route for procuring any new generation capacity in the electricity supply industry (including a nuclear capacity), one would have expected the legislator to say so expressly and to impose a duty on the Minister in this regard, especially in view of already existing procurement systems.

56. The second remarkable aspect of section 34(1) of the ERA is that the Minister need not make a determination in respect of all the subparagraphs thereof; after all, she has a discretion and there is no pressing need or reason why all of the aspects covered in section 34(1)(a)-(e) of the ERA need to be "*determined*" each and every time; private sector participation, for example, is not always a realistic and achievable objective.

57. A third remarkable aspect of section 34(1)(e) of the ERA is that it refers to a tender procedure (which is a specific method of procurement) and not to a procurement system - in context and **if** the Minister requires that a tender procedure has to be followed, the powers in section 34(2)(a)-(c) of the ERA assume such a required tender procedure and are available to the Minister.

58. The fourth remarkable aspect is that the powers in section 34(2)(d)-(e) of the ERA are not confined to an instance where a tender procedure was required but pertain to various activities in connection with the establishment or operation of a public or privately-owned electricity generation business.

59. The fifth remarkable aspect of section 34(3)(a) of the ERA is that NERSA (and only NERSA) is bound, in issuing a generation licence, by the ministerial determination.

Alleged duty to specify procurement system

60. In view of the foregoing we respectfully submit that the proposition, that a ministerial determination in terms of section 34(1)(e)(i) of the ERA must specify the procurement system for the nuclear new generation capacity, is nonsensical:

60.1 Dual systems of procurement are already available (albeit that the Minister is, in terms of section 34(4) of the ERA, not bound but in theory still free to follow the State Tender Board Act 86 of 1968) and there is no conceivable reason why the Minister must now be empowered to reinvent the wheel.[120]

60.2 The Minister is in any event expressly entrusted with a discretionary power in this regard, and there is no way in which this provision can now be read as containing a compulsory "*must*" when considering a determination or new generation capacity.

60.3 We respectfully submit that there is a reason why section 34(1)(e)(i) of the ERA does not refer to a procurement system but to a tendering procedure: in view and in the context of the overall purpose of the ERA to regulate the electricity supply industry, this is a regulatory power in terms of which the Minister can require that the tendering procedure, as

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120 See Klees *Electricity Law in South Africa* (2014) 241-240 and 248-260 (discussing the legal framework for public procurement of both capacity and electricity with reference to the existing procurement systems).

a specific form of procurement, has to be followed; section 34(1)(e)(i) of the ERA does not state that the Minister must "*determine*" a special procurement system but empowers the Minister to require that new generation capacity must be established in a particular manner - in other words, the focus of her power is on how that new generation capacity must be established and not on what the scope and details of the tendering procedure must be.

60.4 Section 34(1)(e)(ii) of the ERA provides that the Minister may, in consultation with the NERSA, require that new generation capacity must provide for private sector participation: this cannot mean that every determination must involve the private sector but must mean that the Minister may decide when it is opportune or technically feasible to open up the electricity supply sector and the national electricity grid, under the auspices and control of Eskom, to private entrepreneurs in a sector which historically has been dominated by the monopoly of one state-controlled public utility.

Alleged jurisdictional condition for commencing procurement

61. The proposition that the ministerial powers provided for in section 34(2) of the ERA can only be exercised and/or the procurement process (from the moment of bid specification onwards) can only commence after a determination of the extent and source of new generation capacity needed and a determination of the

procurement system therefore, is also with respect flawed.

61.1 In essence this proposition is to the effect that ministerial determinations are in law an absolute prerequisite or jurisdictional condition for the commencement of the nuclear procurement process by the State.

61.2 In the context of the ERA, as establishing a national regulatory framework for the electricity supply industry, these determinations are with respect regulatory instruments and their legal effect is spelt out expressly in section 34(3)(a) thereof: in issuing a generation licence, NERSA is bound by any relevant determination made by the Minister[121] (if one was indeed made - a prior determination is not required as a condition for the issuing of a generation licence and can be issued absent any determination[122]).

61.3 There is no other provision in the ERA or in any other legislation that spells out what the legal effect of such a determination is: in view thereof that this is expressly regulated, there is no room for any implied extension of the legal effects of such a determination so as to now become the means for authorising procurement in the context of a national regulatory framework for the privatized electricity supply industry.[123]

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121 See Klees *Electricity Law in South Africa* (2014) 106: this can be described as sector entry or access regulation which sets out the conditions that must be fulfilled to participate in the electricity supply industry and its different parts (in this case specifically in the generation of electricity).

122 See section 10-13 of the ERA.

123 The ordinary grammatical meaning of the word "*determination*" is that of a (1) firmness of purpose or (2) the process of establishing something exactly or an the act of coming

61.4 A discretionary determination is thus not an authorisation to commence procurement but a regulatory measure to constrain the unbridled over-investment or procurement by the private sector of new generation capacity that may be detrimental for the electricity supply industry, as and when circumstances require:[124] such a determination brings a regulatory measure into force but it does not involve the administration of any of the provisions of the ERA, which are the domain of NERSA as regulator, enforcer and custodian of the national regulatory framework for the electricity supply.[125]

61.5 From a historical perspective the need for such a regulatory measure can also be explained: historically the electrical supply industry was a State Monopoly subject to the dictates of the Government and it was free to implement all of its strategies and policies; now that the new ERA has dawned, the only way in which those policies of Government can still be lawfully pursued in a dispensation where NERSA as a separate juristic person is the appointed custodian and enforcer of the national electricity regulatory framework,[126] is by casting the relevant policies in the form of a determination which will then bind NERSA, with its consent, in the

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to a decision or of fixing or settling a purpose. It is derived from the Latin *determinatio* (fixing boundaries).

124 See section 34(3)(b) of the ERA.

125 See *Reflect-All 1025 v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2010 (1) BCLR 61 (CC) par[83] (89D).

126 established under section 3 of the NERA. See also section 9 thereof, which *inter alia* requires the members of NERSA to act independently of any undue influence or instruction; Klees *Electricity Law in South Africa* (2014) 113.

regulation of the electricity supply industry.[127]

61.6 The overall regulatory nature of determinations under section 34 of the ERA it is also supported by the regulation-making power of the Minister under section 35(4) thereof: the Minister is authorised to make regulations regarding *inter alia* new generation capacity; types of energy sources from which electricity must be generated; the percentages of electricity that must be generated from different energy sources; and the participation of the private sector in new generation activities - whereas such regulations will be in the nature of subordinate legislation creating rules of general application, a determination will in essence remain a policy which was made binding upon NERSA to deal with specific applications for a generation licence.

61.7 Lastly the powers in section 34(2) of the ERA are given not as necessary or incidental to any determination made under section 34(1) thereof, but the Minister is given "*such powers as may be necessary or incidental to any purpose set out*" therein.

Alleged requirement of public participation

62. The third proposition is that a ministerial determination in terms of section 34(1)

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127 The executive nature of such a determination explains why there is no provision for a delegation of this power in the ERA and why the Minister must exercise it personally.

of the ERA must be made in consultation with NERSA and thus (when read with section 10(1)(d) of the NERA) must be made in accordance with a procedurally fair and public participation process.

62.1 Section 10(1)(d) of the ERA provides as follows:

> "*(1) Every decision of the Energy Regulator must be in writing and be ...*
> *(d) taken within a procedurally fair process in which affected persons have the opportunity to submit their views and present relevant facts and evidence to the Energy Regulator; ...*"

62.2 This proposition relies on the supposition that the phrase "*every decision*" of NERSA (which is the Energy Regulator) literally means every decision and thus includes the decision under section 34(1) of the ERA to concur with the Minister in making a determination.

62.3 We respectfully submit that such an interpretation is incorrect.

62.4 In the first place the phrase "*every decision*" cannot simply be given a literal meaning but must be interpreted in context: so, for example, it is absurd to insist upon public participation for a decision of NERSA to adjourn its meeting or for a decision to request additional funding from Parliament through the Minister in terms of section 53 of the Public Finance Management Act 1 of 1999 or for a decision on the exercise of

the enforcement and investigate any powers of NERSA,[128] and thus the phrase "*every decision*" as used in this provision is any decision as contemplated in the context thereof but not literally "*every decision*" of NERSA.[129]

62.5 In the second place and in the context of section 10(1) of the NERA, the decision contemplated therein should at least be a decision which constitutes "*administrative action*" as defined in the Promotion of Administrative Justice Act 3 of 2000,[130] which the decision in terms of section 34(1) of the ERA, to concur with the policy-driven determination of the Minister, is not[131] and for which there is - other than NERSA - no affected persons.[132]

62.6 In the third place section 10(1) of the NERA is concerned with "*every decision*" of NERSA and not with joint decisions to be taken by the Minister in consultation with NERSA.

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128 See Klees *Electricity Law in South Africa* (2014) 121-127 and the statutory provisions referred to therein.

129 See Klees *Electricity Law in South Africa* (2014) 117-121, who refers in this regard to the "*regulatory decisions and actions*" or "*regulatory interventions*" by NERSA.

130 hereinafter referred to as "*the PAJA*".

131 The definition of "*administrative action*" in section 1 of the PAJA excludes the executive powers or functions of the National Executive, including the powers or functions referred to in section 85(2)(b) (developing and implementing national policy) and 85(2)(e) (performing any other executive function provided for in the Constitution or in national legislation). On this basis we submit that the power to make determinations in terms of section 34(1) of the ERA does not fall within the scope and ambit of this definition.

132 The definition of "*administrative action*" in section 1 of the PAJA requires a decision taken by an organ of state, when exercising a public power or performing a public function in terms of any legislation, which adversely affects the rights (or legitimate interests) of any person and which has a direct, external legal effect.

62.7 In the fourth place we draw attention to the following:

62.7.1 In terms of section 4(1)(c) of the NERA, one of the functions of NERSA is to undertake the functions set out in section 4 of the ERA.

62.7.2 Section 4 of the ERA enumerates the powers and duties of NERSA, but nowhere in that provision is its cooperation and/or concurrence in a ministerial determination under section 34(1) thereof contemplated.

62.7.3 The cooperation and/or concurrence in such a ministerial determination, as required by section 34(1) of the ERA, therefore falls outside the ordinary scope and ambit of the functions and/or powers and duties entrusted to NERSA in terms of these two provisions.

62.7.4 Section 10(1)(c) of the NERA requires that "*every decision*" of NERSA must be within the powers of NERSA as set out in the ERA, in other words as set out in section 4 thereof.

62.7.5 On this basis also the phrase "*every decision*" as used in section 10(1)(d) of the NERA should be restricted to decisions contemplated under section 4 of the ERA read

with section 4(1)(c) of the NERA.

62.8 In the fifth place there is also the argument that the express inclusion of the one implies the exclusion of the other:

62.8.1 Section 35(5) of the ERA expressly provides for a process of public participation for the making and promulgation of regulations (which includes regulations on virtually all aspects that may be determined in terms of section 34(1) thereof, such as new generation capacity and private sector participation).

62.8.2 Section 35(1) of the ERA goes even further and expressly instructs NERSA to consult with specific persons before making guidelines and publish codes of conduct and practice, or make rules by notice in the Government Gazette.

62.8.3 Where the ERA thus requires consultation and public participation, it says so expressly.

62.8.4 There is no such express requirement in the ERA for consultation and public participation in respect of the making of determinations under section 34(1) of the ERA.

62.8.5 Given the policy character as well as the only legal effect of a determination, to bind NERSA as far as the issuing of a generation licence is concerned, we also submit that a process of public participation serves no purpose and can make no contribution to the making of a determination, which explains why such a process is not expressly and clearly stipulated as a requirement by the legislator.

62.8.6 If the legislator required such a process for the making of a determination, it could easily have done so in as many words.

62.8.7 In addition a number of determinations have been made in the past under section 34(1) of the ERA, all of them with the concurrence of NERSA but none of them with a dedicated process of consultation and public participation - this conduct reveals how those officials, responsible for the implementation of this provision, understood its meaning.[133]

62.9 In the sixth place a ministerial determination under section 34(1) of the ERA is not "*administrative action*" as defined in the PAJA but in substance (and based on the approach as set out by the Constitutional

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133 See Steyn *Uitleg van Wette* (1981) 157-161 on the principle of *subsecuta observatio*.

Court in *Minister of Defence and Military Veterans v Motau*,[134] nothing more than executive policy made binding upon the custodian and enforcer of the national electricity regulatory framework to ensure that NERSA exercises its power to issue a generation licence in a manner consistent with government policy:[135] this is the very situation envisaged by section 85(2)(b) and (e) of the Constitution, and explains why such a ministerial determination can have no actual or potential adverse effect and/or "*direct and immediate consequences*"[136] for any other person but only impacts on NERSA, who must concur therewith, and explains why there is no provision for the delegation of this power which has to be exercised by the Minister personally - in principle it is difficult to see what purpose consultation and public participation will serve in this context.

Conclusion

63. In the result we submit that the interpretation of section 34(1) of the ERA as proposed by the Applicants, is incorrect and that the relief premised thereon

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134 2014 (8) BCLR 930 (CC) par [37]-[44]. The summary in par [44] reads as follows:
"*[44] In summary, the important question in this context is whether the power is more closely related to the formulation of policy, which would render it executive in nature, or the implementation of legislation, which would make it administrative. Underpinning this enquiry is the question whether it is appropriate to subject the power to the more rigorous, administrative-law review standard. The other pointers – the source of the power and the extent of the discretion afforded to the functionary – are ancillary in that they are often symptoms of these bigger questions.*"

135 See *Minister of Defence and Military Veterans v Motau* 2014 (8) BCLR 930 (CC) par [37]-[44].

136 See *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* (6) SA 313 (SCA) 324A-B, 325E and 325F-326D.

should be dismissed with an appropriate order for costs.

REVIEW OF 2013 DETERMINATION

64. The Applicants rely on the following grounds for the review of the 2013 determination, namely:[137]

64.1 firstly, that the 2013 determination was procedurally unfair;

64.2 secondly, that the failure to make the 2013 determination public and the delay in doing so was a violation of the requirements of just administrative action, the requirements of the NERA and the requirements of open and accountable government;

64.3 thirdly, that the 2013 determination did not comply with section 34(1)(e)(i) of the ERA read with section 217 of the Constitution, as it did not specify the procurement system to be used;

64.4 fourthly, that the decisions to make the 2013 determination were irrational and unreasonable, and took into account irrelevant considerations and/or failed to take account of relevant considerations.

65. These grounds of review are mainly premised on the assumption that making the

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137 See Record p. 405-506 (para 75 of the supplementary affidavit).

2013 determination under section 34(1)(e)(i) of the ERA was an "*administrative action*" as defined in the PAJA and therefore reviewable on the grounds set out in section 6 thereof: we respectfully submit that this assumption is false for the following reasons:

65.1 In the first place such a determination is in essence an executive action or at least adjunct to the policy formation responsibility of the National Executive: the formalisation of a policy for the electricity supply industry that would bind NERSA[138] with its consent[139] and as such it is excluded from the definition of "*administrative action*" by virtue of subparagraph (aa) of that definition - the executive powers or functions of the National Executive is excluded, and specifically also the powers or functions referred to in section 85(2)(b) (developing and implementing national policy) and section 85(2)(e) (performing any other executive function provided for in the Constitution or in national legislation).[140]

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138 See section 34(3)(a) of the ERA.

139 The determination is made in consultation with NERSA and thus with concurrence.

140 See *President of the Republic of South Africa v SARFU* 1999 (10) BCLR 1059 (CC), where a distinction was drawn between administrative action and executive action on the basis of the following test (footnotes omitted):

> "*[143] Determining whether an action should be characterised as the implementation of legislation or the formulation of policy may be difficult. It will, as we have said above, depend primarily upon the nature of the power. A series of considerations may be relevant to deciding on which side of the line a particular action falls. The source of the power, though not necessarily decisive, is a relevant factor. So too is the nature of the power, its subject matter, whether it involves the exercise of a public duty, and how closely it is related on the one hand to policy matters, which are not administrative, and on the other to the implementation of legislation, which is. While the subject matter of a power is not relevant to determine whether constitutional review is appropriate, it is relevant to determine whether the exercise of the power constitutes administrative action for the purposes of section 33. Difficult boundaries*

65.1.1 The source of this power is section 85(2)(b) and (e) of the Constitution read with section 34 of the ERA.

65.1.2 The nature of this power is not that of subordinate legislation but that of policy-making, given the force of a regulatory measure that binds the regulator of the electrical supply industry[141] - for the exercise thereof the Minister has to make a political judgment (on issues such as, for example, an appropriate energy mix, the degree and extent of private participation in the industry, and the degree and extent of intervening in the free market in so far as the purchase and sale of electricity is concerned[142]).

65.1.3 The subject matter of this power is the electrical supply industry and/or the national electricity regulatory framework and not the rights or interests of individuals.

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may have to be drawn in deciding what should and what should not be characterised as administrative action for the purposes of section 33. These will need to be drawn carefully in the light of the provisions of the Constitution and the overall constitutional purpose of an efficient, equitable and ethical public administration. This can best be done on a case by case basis."

141 Compare *Reflect-All 1025 v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2010 (1) BCLR 61 (CC) par [4] and par [83]-[84], where the acceptance and promulgation of the regulatory measures of "*route determinations*" and "*preliminary designs*" in terms of the Gauteng Transport Infrastructure Act 8 of 2001, imposed certain restrictions on the development of affected land on the implementation of legislation, were not administrative actions but was analogous to the power to determine the date on which legislation should come into force.

142 See section 34(1)(a)-(e) of the ERA.

65.1.4 This is a discretionary power not involving the exercise of a public duty and it is closely related, on the one hand, to policy matters, which are not administrative, whilst far removed from the implementation of the ERA, which is the responsibility of NERSA as custodian and enforcer of the national electricity regulatory framework.

65.1.5 The Constitution pursues an efficient, equitable and ethical public administration.

65.2 In the second place this policy-driven determination is not one which has or may have an adverse effect on the rights or interests of any affected person and/or "*direct and immediate consequences*"[143] for any other person (other than NERSA, which consents to be bound thereby):[144] this determination becomes part of the regulatory framework as a regulatory measure applicable only to future applications for generation licences under the ERA.[145]

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143 See *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* (6) SA 313 (SCA) 324A-B, 325E and 325F-326D.

144 We point out that the Constitutional Court held in *President of the Republic of South Africa v SARFU* 1999 (10) BCLR 1059 (CC) that one of the principal functions of section 33 of the Constitution - which is the foundation for the PAJA - is to ensure that, where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice.

145 The definition of "*administrative action*" in section 1 of the PAJA requires a decision taken by an organ of state, when exercising a public power or performing a public function in terms of any legislation, which adversely affects the rights (or legitimate interests) of any person and which has a direct, external legal effect.

66. That leaves only the doctrine of legality as the basis upon which to review the 2013 determination: we repeat that in this context the test for rationality requires that objectively a decision be rationally connected to the purpose for which it was taken: the exercise of such power objectively must be rationally related to the purpose for which the power was given and it is not a proportionality test nor is it a question of substantive reasonableness.[146]

Alleged procedural unfairness

67. With regard to alleged procedural fairness, we have already explained why public participation was not a requirement for the 2013 determination:

67.1 The making of a determination in terms of section 34(1) of the ERA does not constitute "*administrative action*" as defined in the PAJA.

67.2 The consultation between the Minister and NERSA as well as the joint decision between them, is not one of the decisions contemplated in section 10(1)(d) of the NERA.

67.3 The 2013 determination, which is a regulatory measure binding and constraining NERSA but not an actual procurement decision, did not materially and adversely affect any of the rights or interests of the

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146 See *Affordable Medicines Trust v Minister of Health of Republic of South Africa* 2006 (3) SA 247 (CC) para [49], [75] and [77]; *Masetlha v President of the Republic of South Africa* 2008 (1) BCLR 1 (CC) par [80].

Applicants nor of the public.

67.4 In the result public participation was not a requirement for the 2013 determination, also not under the doctrine of legality, and there is with respect no merit in this ground of review.

Alleged failure or delay to make public

68. With regard to the alleged failure to make the 2013 determination public and the delay in doing so, we draw attention to the following additional submissions:

68.1 In the first place and to the extent that publicity was required for the 2013 determination to have final legal effect, it was indeed made public within a month to those upon which it will have such a final legal effect: NERSA and the parties with an interest in a generation licence[147] - there was no need at the time to make the 2013 determination wider known.

68.2 In the second place the promulgation of such a determination in the Government Gazette is not required as a condition for validity or any kind of legal effect in any legislative provision (whether within a specific or a reasonable time or at all), although section 15 of the Interpretation Act 33 of 1957 permits or authorises the notification of such a determination to

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147 See Record p. 717-718, 765 and 825-826 (para 50.6-50.7, 69, 123.3.3-123.3.4 of the answering affidavit)

be by notice in the Government Gazette.[148]

68.3 In the third place there is with respect no legal requirement for the Minister to have consulted with and obtain the concurrence of NERSA for the further publication of the 2013 determination, nor was there any practical reason for doing so: the involvement of NERSA was completed and it was *functus officio* upon the expression and communication of concurrence in the 2013 determination, where after NERSA was bound to that determination in terms of section 34(3)(a) of the ERA as a matter of law and by virtue of its knowledge thereof, regardless of whether there was any kind of other publication thereof.

68.4 In the fourth place the publication of the 2013 determination was and is in law nothing more than a notification of an official act as contemplated in section 15 of the Interpretation Act 33 of 1957: it was not a decision to make a new or confirm an existing determination but a decision to publish an existing determination - consequently there was simply no room or scope for taking into consideration any so-called material changes in the energy sector and economy since 2013.

68.5 In the fifth place we respectfully submit that the 2013 determination does not violate the requirement of transparency for a procurement system

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148 In this regard it should be noted that a determination in terms of section 34(1) of the ERA is neither legislation nor even subordinate legislation: the rule at common law is that legislation must be promulgated in order to make it enforceable on citizens (Steyn *Uitleg van Wette* (1981) 179-182, section 13 of the Interpretation Act 33 of 1957).

under section 217 of the Constitution: that procurement system is already in place and compliant with all constitutional requirements, and the 2013 determination does not with respect designate the Department as a rogue procurement unit but allocates political responsibility for a nuclear programme to be discharged by necessary implication within the four corners of the law.[149]

68.6 In the sixth place we respectfully submit, being aware and appreciative of the importance of the constitutional values of an open, transparent and accountable government, that these constitutional values are not directly justiciable nor do they give rise to discrete and enforceable rights or a cause of action in themselves.[150]

68.7 In the result making the 2013 determination known to the public without delay was not legally or otherwise required, also not under the doctrine of legality, and there is with respect no merit in this ground of review

Alleged failure to specify procurement system

69. With regard to the alleged deficiency that the 2013 determination did not comply with section 34(1)(e)(i) of the ERA read with section 217 of the Constitution, as

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149 See Record p. 479-480 (annexure 'PL 42', especially item 5 and item 6 thereof).

150 See in respect of section 1 of the Constitution, *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO)* 2004 (5) BCLR 445 (CC) par [21].

it did not specify the procurement system to be used, we have already dealt with this ground of review and it has no merit: the ministerial power is to select in advance a specific procurement method and not to duplicate work already done.

Alleged irrationality of ministerial decision

70. With regard to the allegation that the ministerial decision to make the 2013 determination was irrational and unreasonable, and took into account irrelevant considerations and/or failed to take account of relevant considerations, we draw attention to the following:

70.1 At the outset we point out that the case for the Applicants on this ground of review is premised upon their interpretation and view of the role and function of section 34(1) of the ERA, which we have with respect already shown to be misconceived.

70.2 In the first place this misconception lies at the heart of the allegation that "*other relevant considerations*" (such as affordability of nuclear power, potential negative impact on electricity prices, potential socio-economic and environmental impacts, further studies or research on the full costs of certain technologies and the change in electricity demand forecast) were not taken into account:[151] these may be relevant considerations for

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[151] See Record p. 525-426 (para 122-124 of the supplementary affidavit); p. 834-840 (para 123.5 of the answering affidavit).

an actual procurement decision or a decision to grant either a generation licence or an environmental authorisation for a particular project but not for a determination in terms of section 34(1) of the ERA.

70.3 In the second place the Integrated Resource Plan (2010-2030) is not a mere policy document; once approved, it is recognised in terms of the ERA with a number of legal consequences flowing from that approval.

70.3.1 Accordingly a determination in terms of section 34 of the ERA cannot be repugnant thereto because then NERSA will have to give effect to two conflicting instruments under section 4(a)(iv),[152] section 10(2)(g)[153] and section 34(3)(a)[154] of the ERA.

70.3.2 An unapproved draft update of such a resource plan (as a work still in progress) would not be of any relevance: what the Minister did was to take steps that would allow for the implementation of the resource plan as was established at that point in time by Cabinet,[155] without thereby committing

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152 Section 4(a)(iv) of the ERA commands that NERSA must issue rules designed to implement the integrated resource plan.

153 Section 10(2)(g) of the ERA commands that a licence application must include evidence of compliance with any integrated resource plan applicable at that point in time or provide reasons for any deviation for the approval of the Minister.

154 Section 34(3) of the ERA provides that NERSA, in issuing a generation licence, is bound by any determination made by the Minister.

155 See section 1 of the ERA, defining an "*integrated resource plan*" to mean a resource plan established by the national sphere of government to give effect to national policy.

finally and irrevocably to a nuclear fleet of 9.6 GW but only creating a legal environment wherein that would become possible once NERSA is in the process of considering an application for a generation licence that would take up this capacity.[156]

70.3.3 The 2013 determination thus was not the exercise of a discretionary power to actually procure a nuclear fleet, as the Applicants seem to assume, nor was it a pre-emptive attempt to do so.

70.3.4 Furthermore, any future procurement decision concerning a massive infrastructure build (such as the construction of new nuclear generation capacity) will, of necessity, require an ongoing evaluation of changed circumstances with the benefit of new knowledge and, to the extent possible or necessary, consequent adaptation.[157]

70.3.5 Accordingly the taking into account of an approved integrated resource plan but leaving out of account the draft integrated resource plan is not an indication of irrationality.

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156 See Record p. 834-835 (para 123.5.2 of the answering affidavit).

157 See Record p. 834-835 (para 123.5.2 of the answering affidavit).

70.4 In the third place we have already made the point that no public participation process was required for the 2013 determination so that the argument, that the decision of the Minister was taken in bad faith and/or unreasonably and/or irrationally because of a lack of public participation, is without any foundation.

70.5 In the fourth place the 2013 determination was also not made in breach of the general environmental principle contained in section 2(4)(a)(vii) of the National Environmental Management Act 107 of 1998:[158]

70.5.1 Firstly, section 2(1) of the NEMA provides that the general environmental management principles set out in that section apply throughout the Republic of South Africa to the actions of all organs of state that may significantly affect the environment - a determination in terms of section 34(1) of the ERA itself does not have that potential and it is the further decisions that have to be taken for the actual procurement of or licensing or authorising nuclear plants that are to be informed by these principles.

70.5.2 Secondly, the principle relied upon by the Applicants (also

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158 hereinafter referred to as "*the NEMA*". Section 2(4)(a)(vii) thereof provides as follows:
"*Sustainable development requires the consideration of all relevant factors including the following: ... that a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions ...*".

called the precautionary principle) is in any event but one of a number of (not always compatible) factors required to be considered for sustainable development: section 2(3) of the NEMA states that development must be socially, environmentally and economically sustainable, and section 2(4)(a) thereof then continues to provide that the concept of "*sustainable development*" requires the consideration of all relevant factors including, amongst others, that pollution and degradation of the environment are avoided, or, where they cannot be altogether avoided, are minimised and remedied (for example, with the attempts at a reduction of greenhouse gasses), and that a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions - the primary point of departure is a right to development albeit qualified, and not a bar against or a hurdle for development.[159]

70.5.3 Thirdly, such a risk-averse and cautious approach is precisely what is followed in the nuclear programme and the phased approach for its potential implementation: a step-by-step approach is followed, allowing for study,

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159 See *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 (10) BCLR 1059 (CC) par [44], [50] and [51].

research and cooperation with other States with nuclear technology until a stage it is reached where the Republic of South Africa can go over to the actual procurement process - in the course of which the State is also free at any stage to decide not to proceed because of, for example, cost or financial implications.[160]

70.5.4 Fourthly, the precautionary principle does not require that the sovereign right of a State to pursue development can only be exercised under circumstances of absolute knowledge or scientific certainty about the potential impacts and consequences;[161] the injunction is in fact to proceed with caution.[162]

70.6 In the fifth place the Applicants unfortunately leave the primary

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160 See Record p. 838-840 (para 123.5.5 of the answering affidavit).

161 See Sands and others *Principles of International Environmental Law* (2012) 217-228; Birnie and others *International Law & the Environment* (2009) 152-164.

162 See in this regard principle 2 of the Rio Declaration (own underlining added):
"*States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.*"
See also in this regard principle 15 of the Rio Declaration (own underlining added):
"*In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.*"

environmental management principle, contained in section 2(2) of the NEMA, out of account: in terms thereof environmental management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural and social interests equitably:

70.6.1 The whole of the South African environmental has an anthropocentric basis.[163]

70.6.2 This anthropocentric basis forms the background against which the rationality of the 2013 determination becomes clear: it was informed by the need for a security of supply of electricity through a mix of available sources of energy supply, the need to reduce the CO_2 emissions from the coal-driven power plants and meet the target of the international obligations of the Republic of South Africa, and the desirability of stimulating a new nuclear industry so as to further industrialize the local economy and provide for growth in order to alleviate poverty.

70.7 In the result we submit that there is no merit in this ground of review.

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163 See Glazewski *Environmental Law in South Africa* (2005) 7. This is also in accordance with section 24 of the Constitution, recognising a fundamental right (a) to an environment that is not harmful to the health or well-being of anyone and (b) to have the environment protected, for the benefit of present and future generations in a way which secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

Alleged irrationality of concurrence

71. With regard to the allegation that the decision of NERSA to concur in the 2013 determination was irrational and unreasonable, and took into account irrelevant considerations and/or failed to take account of relevant considerations, we draw attention to the following:

71.1 In the first place section 10 of the NERA does not apply to the concurrence of NERSA in a ministerial determination under section 34 of the ERA but only to "*administrative action*" (as defined in the PAJA) that is taken by NERSA - this section is concerned with a unilateral decision of NERSA taken by it in the exercise of its powers and functions as contemplated in section 4 thereof (which by reference only incorporates section 4 of the ERA without any reference to section 34(1) thereof), and is not concerned with a consensual decision of the Minister and NERSA and thus the various arguments based on alleged infringements of the provisions of section 10 of the NERA are misplaced.

71.2 In the second place the manner in which NERSA dealt with the overstated forecasts for electricity demands in the Integrated Resource Plan (2010-2030) is not flawed but was prudent and objectively reasonable: on the one hand neither the 2013 determination nor the concurrence of NERSA therein was an immediate or actual procurement decision but only a regulatory measure to constrain future procurement;

on the other hand it is safer to plan and make policy on the basis of an over-estimation[164] and, when the time comes to take an actual procurement decision, the then current forecasts as well as the potential costs implications and the timing of procurement (including a possible deferment of the commissioning of new nuclear power plant) will be taken into account.

71.3 In the third place it is with respect inconceivable how it can be submitted that NERSA merely rubber-stamped the 2013 determination when the minutes of the meeting shows a serious engagement and debate, during which NERSA clearly applied its mind to the matter on the agenda.[165]

71.4 In the fourth place we have already explained the legal status of an approved integrated resource plan (with which the 2013 determination was consistent) and the irrelevance of a draft integrated resource plan.

71.5 In the fifth place we repeat that the 2013 determination was not an authorisation to proceed or comments with procurement: in fact, if there was no such determination of new generation capacity to be acquired from a nuclear source, a private company or an entity such as Eskom would be at liberty to embark upon a project for the construction of a nuclear power plant and to apply for a generation licence in terms of ERA,

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164 See Record p. 687, 826-827 and 841-842 (para 33.8, 123.3.7 and 123.6.3 of the answering affidavit).

165 See Record p. 555-559 (the minutes of the NERSA meeting on 26 November 2013).

which application will then be considered without any determination binding NERSA in this regard.[166]

71.6 In the sixth place the cost implications of nuclear power on electricity prices was taken into account by NERSA (as appears from the discussion as recorded in the minutes) but in any event the issue is not only a financial one of the potential impact on the price of electricity for the individual consumer[167] but is about the larger picture of the costs and benefits for the country as a whole of a full, comprehensive and globally-competitive nuclear industry for an industrialised South African economy with growth and development.

71.7 In the seventh place we repeat what we have already said in **paragraph 70.5 and 70.6 above** concerning the general environmental management principles of the NEMA.

71.8 In the result we submit that there is no merit in this ground of review.

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166 See section 10-13 of the ERA - a prior determination is not required for the lodging, processing or finalisation of an application for any of the licences required for activities under section 7 of the ERA.

167 In passing we refer in this regard to section 15(2) of the ERA:
"*(2) A licensee may not charge a customer any other tariff and make use of provisions in agreements other than that determined or approved by the Regulator as part of its licensing conditions.*"

Conclusion

72. In the result we submit that the 2013 determination was authorised and rational, and that there is no basis upon which it should be reviewed or set aside so that the relief pertaining thereto should be dismissed with an appropriate order for costs.

REVIEW OF REQUEST FOR PROPOSALS

73. The Applicants also seek an order setting aside any Request for Proposals yet to be issued by the Department pursuant to the 2013 determination, apparently on the basis that, if the 2013 determination falls, then it must follow that any Request for Proposals should also fall.

74. In the first place we respectfully submit that there is no ground or reason why the 2013 determination should be set aside.

75. In the second place we submit that this relief is completely premature in that to date no Request for Proposals has been issued.

76. In the third place a determination in terms of section 34(1) of the ERA is not a jurisdictional condition for issuing any Request for Proposals, which can be issued under any of the existing procurement systems already in place.

77. In the result we submit that the relief pertaining to the issuing of any Request for Proposals should be dismissed with an appropriate order for costs.

CONCLUDING REMARKS

78. In the result we respectfully submit that no case for any of the prayers has been made out on the papers before Court.

79. In the premise the President and the Minister will seek a postponement so that the necessary parties can be joined, alternatively a dismissal of this review application with costs, in both instances with an appropriate order for costs.

Signed and dated at Pretoria on this 2nd day of December 2016.

Adv MM Oosthuizen SC
Parc Nouveau Chambers
Pretoria

Adv K Warner
Hugenot Chambers
Cape Town

Adv RM Molea
Circle Chambers
Pretoria

LIST OF AUTHORITIES

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Interpretation Act 33 of 1957: section 13, 15
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National Environmental Management Act 107 of 1998: section 2
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Abrahamse v Cape Town City Council 1953 (3) SA 855 (C)
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