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

Case No: 19529/15

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

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SUPPLEMENTARY FOUNDING AFFIDAVIT

I, the undersigned,

PHILLIPINE LEKALAKALA

do hereby make oath and state that:

I. INTRODUCTION

1. I am employed as a Branch Coordinator by the first applicant.

2. I deposed to the founding affidavit in these proceedings, and I depose to this affidavit on the same basis.

3. The facts deposed to herein are within my personal knowledge, save where the context indicates otherwise, and are to the best of my knowledge and belief, true and correct. The submissions of law are made on the basis of legal advice received from the applicants' legal representatives.

4. I will continue to use the same abbreviations used in the founding affidavit.

II. SUMMARY

5. In the notice of motion, the Minister (the first respondent) and the President (the second respondent), where called upon, in accordance with Uniform Rule 53, to provide the records in relation to the decisions impugned in the notice of motion.

6. The Minister and the President have now furnished the applicants with documents that they say constitute the relevant records (and as will be discussed below,[1] so too has the third respondent ("**NERSA**")). In this affidavit, unless indicated otherwise by the context, I refer collectively to "**the record**" as a

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[1] See below heading III.C NERSA's record in relation to the 2013 s 34 Determination.

combined set of documents that relate to all the decisions, although each decision that is impugned would have its own record. I do this for ease of reference, and since the President and the Minister provided their documents collectively without any delineation between which documents served before which person, or in relation to which decisions.

7. The record was provided in two tranches and was not provided in accordance with the timeframe set out in the Uniform Rules. This necessitated the applicants' attorneys sending numerous letters to the Minister's and the President's attorneys and the delivering of a Rule 30A notice, in order to try and extract the record from the Minister and the President. Only upon threat of a compelling application was the record (such as it is) eventually produced.

8. So as to not distract from the substantive issues that arise from those documents that have been belatedly provided, at the conclusion of this affidavit I deal fully with the difficulties in obtaining the record, and I explain why the applicants are entitled to a punitive costs order on this basis alone on account of the respondents' conduct.[2]

9. The record revealed that in late 2013 the Minister, with the concurrence of NERSA, had made a determination in relation to the requirement for, and procurement of, nuclear power in terms of section 34 of the ERA. Strikingly, this determination was kept secret (notwithstanding specific requests made by

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[2] See section VIII: DIFFICULTY IN OBTAINING RULE 53 RECORD.

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the applicant as to whether any such determinations had been made), was only made public by promulgation in the Gazette in December 2015 ("**the 2013 s 34 Determination**"), and was only made public after the applicants had launched this application and sought the record of the decisions impugned in this application. I highlight later that such opacity is entirely consistent with an ulterior purpose and failure of transparency that has beset the government's nuclear procurement processes and decision-making.

10. In light of the documentation eventually provided as part of the record, the purpose of this supplementary founding affidavit is to:

10.1 indicate how the record supports and provides a basis to supplement the grounds upon which the impugned decisions are challenged;

10.2 set out basis for challenging the 2013 s 34 Determination; and

10.3 indicate the relief now sought and the necessary amendments that are required to be made to the notice of motion.

11. In the remainder of this affidavit I will deal with the following issues:

11.1 The documents provided as part of the record;

11.2 The supplementation and confirmation of the grounds of review;

11.3 The challenge to the 2013 s 34 Determination;

11.4 The importance of the constitutional principle of openness, accountability and transparency and its relevance in this matter;

11.5 The relief sought in terms of the amended notice of motion;

11.6 The difficulties in obtaining the record;

11.7 The conclusion.

III. THE RECORD

A. The incomplete 'record' initially furnished

12. After a significant delay, various correspondence, and the filing of a Rule 30A Notice (all discussed below),[3] on or about 23 December 2015 the Minister and the President delivered the 'record' of their decisions as contemplated by Rule 53(1)(b).

13. I annex a copy of the index to the record, as furnished by the Minister and the President, marked "**PL41**".

14. The record consists of:

14.1 A copy of a determination under section 34(1) of the Electricity Regulation Act, 2006 (**ERA**), signed on 11 November 2013 by the then

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[3] See section VIII: DIFFICULTY IN OBTAINING RULE 53 RECORD.

Minister of Energy Dikobe Ben Martins (referred to as "**the Minister**", save as is necessary to distinguish the past and current holders of the office), and on 17 December 2013 by the then Chairperson: NERSA (Cecilia Khuzwayo) in relation to the requirement for and procurement of 9600 MW of electricity from nuclear energy ("**2013 s 34 Determination**"). I annex a copy of the 2013 s 34 Determination marked "**PL42**";

14.2 The 11 June 2015 letter from the Minister to the Parliamentary Clerk of Papers giving the Parliamentary Liaison Officer permission to submit international governmental agreements (**IGAs**) signed with South Korea, United States of America, Russia, France and China for tabling in Parliament in accordance with section 231(3) of the Constitution of the Republic of South Africa, 1996 (**the Constitution**). A copy of this letter was already annexed to the founding affidavit (**PL24**).

14.3 IGAs signed with South Korea, the United States of America, Russia, France and China. Copies of these IGAs were already annexed to my founding affidavit (**PL24.1** to **PL24.5**).

B. The 'supplementary record'

15. After further delays and various correspondence (discussed below),[4] on 16 February 2016, the applicants' attorneys of record (Adrian Pole Attorneys –

[4] See section VIII: DIFFICULTY IN OBTAINING RULE 53 RECORD.

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hereinafter referred to as "**Pole**") belatedly received by email a bundle of documents that the State Attorney indicated would be filed as a supplementary record to the Rule 53(1)(b) record already filed by the Minister and the President.

16. An indexed and paginated hard copy of the supplementary record was filed by the State Attorney on 19 February 2016.

17. I annex a copy of the index to the record, as furnished by the Minister and the President, marked "**PL43**".

18. The supplementary record consists of the following documents (annexed marked "**PL43.1**" to "**PL43.14**"):

18.1 Department of Energy (**DOE**) Route Form for DG and/ Ministerial submissions and accompanying Ministerial submission (an internal DOE memorandum to the Minister) in relation to the determination in respect of the nuclear programme, which was approved by the Minister's on 7 November 2011 and by the Director-General: Energy and the Deputy Director-General: Policy and Planning on 8 November 2013 (**PL43.1**) – which sought:

18.1.1 the approval of the 2013 s 34 Determination (annexed to the submission) for promulgation in the Gazette; and

18.1.2 the signing of a letter seeking NERSA's concurrence;

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18.2 A letter from the Minister to NERSA seeking NERSA's concurrence in the 2013 s 34 Determination dated 11 November 2013 (**PL43.2**);

18.3 NERSA's letter dated 20 December 2013 to the Minister indicating that NERSA had resolved to concur in the 2013 s 34 Determination (**PL43.3**), attached to which was:

18.3.1 a certified copy of the extract of the Minutes of the Energy Regulator Meeting No. 96 of 26 November 2013 in relation to the aforesaid concurrence, which were attached to NERSA's letter of 20 December 2013, and

18.3.2 the 2013 nuclear s 34 Determination as signed by the Minister and the Chairperson of NERSA (which the index suggests forms part of NERSA's letter, although the letter makes no reference to this);

18.4 The Minister's letter to ESKOM advising it of the 2013 s 34 Determination, dated 23 January 2014 (**PL43.4**);

18.5 The Minister's letter to the Minister of Public Enterprises (**MPE**), advising the MPE of the 2013 s 34 Determination, dated 23 January 2014 (**PL43.5**);

18.6 Presidential Act No. 373 approving the US IGA, dated 23 August 1995 (**PL43.6**);

18.7 President's Minute No. 289 approving the Russian IGA, dated 20 September 2014 (**PL43.7**);

18.8 President's Minute No. 363 approving the South Korea IGA, dated 5 October 2010 (**PL43.8**);

18.9 President's Minute No. 360 approving the China IGA, dated 5 November 2014 (**PL43.9**);

18.10 A letter from the Minister to the President dated 19 September 2014, in relation to delays in signing the Russian IGA (**PL43.10**);

18.11 Explanatory Memorandum and accompanying draft Russian IGA, signed by the state law advisor (international law) on 24 November 2013 (**PL43.11**);

18.12 Department of Energy (**DOE**) Route Form for DG and/or Ministerial submissions and the accompanying Ministerial submission in relation to the Determination under section 34(1) of the ERA– Nuclear procurement programme, dated 1 December 2015 (**PL43.12**), in which the following recommendations were approved (inter alia by the Minister on 8 December 2015):

18.12.1 Publication of the 2013 s 34 Determination in the *Gazette*;

18.12.2 Letters to the MPE and Chairperson of Eskom advising them

of this development;

18.12.3 The inclusion of the 2013 s 34 Determination in the record.

18.13 Minister's letter to ESKOM dated 08 December 2015, in relation to the 2013 s 34 Determination (**PL43.13**);

18.14 Minister's letter to the MPE dated 08 December 2015, in relation to the 2013 s 34 Determination (**PL43.14**);

C. NERSA's record in relation to the 2013 s 34 Determination

19. On 16 March 2016, NERSA provided its record in relation to the 2013 s 34 Determination, in response to letters from Pole, which I now turn to discuss. As will be clear from what I say below, the glacial pace at which NERSA has provided the record of its decision, together with the fact that it has had to be extracted from NERSA rather than voluntarily disclosed by NERSA in compliance with its duty to act transparently and accountably, does NERSA no honour. Accordingly, a punitive costs order will also be sought against NERSA in respect of the provision of the record.

20. On 15 January 2016, Pole sent NERSA a letter in relation to the 2013 s 34 Determination. I attach a copy marked "**PL44**". It is unnecessary to repeat the full contents thereof, which are to be considered and incorporated herein as if specifically traversed. In summary:

20.1 Pole advised NERSA that the applicants intended amending their notice of motion and supplementing their affidavit to challenge the 2013 s 34 Determination, which had been withheld from the public (notwithstanding specific questions directed to NERSA, prior to the launching of this application, by the applicants as to whether any section 34 determinations in relation to nuclear capacity had been made).

20.2 Pole's letter requested NERSA to provide the relevant record relating to its concurrence in the s 2013 34 Determination and the decision to withhold it from the public, by 1 February 2016.

21. A month of silence from NERSA went by. On 1 March 2016, Pole again wrote to NERSA, given that no response had been received from NERSA, and that the Minister and the President had provided (on 16 February 2016) the supplementary record, which included documents in relation to NERSA's concurrence in the s 34 Determination. I attach a copy marked "**PL45**". It is unnecessary to repeat the full contents thereof, which are to be considered and incorporated herein as if specifically traversed. In summary:

21.1 Pole advised NERSA that the Minister and the President had provided a record that related to the 2013 s 34 Determination which included documents relating to NERSA concurrence, which indicated that NERSA clearly had documents in its possession.

21.2 Pole indicated certain documents which evidently would be in NERSA's possession that would form part of its record.

21.3 Pole noted that NERSA's ongoing failure to provide the record was a violation of the Constitution and relevant sections of the National Energy Regulator Act.

21.4 Pole called upon NERSA to provide the record of NERSA's concurrence in the 2013 s 34 Determination and any consultation with the Minister in relation to the Minister's decision to publish the Determination in the *Gazette* in December 2015, by 7 March 2016.

22. On 7 March 2016, NERSA – apparently reckoning that it could no longer avoid providing the documents, given that even the Minister and President had referenced them on 16 February 2016 – emailed Pole advising that it was attending to the applicants' request, and that NERSA should be able to revert to Pole by 9 March 2016 (I attach a copy marked "**PL46**").

23. Nothing was received until 16 March 2016, when NERSA sent Pole a letter by email (dated 7 March 2016, but sent only on 16 March 2016), wherein it provided the documents constituting its record. I attach a copy of that letter marked ("**PL47**").

24. From that letter (read with the documents furnished therewith) the following is made clear:

24.1 That a copy of NERSA's concurrence in the 2013 s 34 Determination had already been provided by the Minister and the President (a reference to annexure "**PL43.3**");

24.2 That the extracts of minutes of NERSA's meeting held on 26 November 2013 (which was attached to the concurrence letter already provided by the Minister and the President (**PL43.3**)) constituted the official record of the proceedings.

24.3 NERSA provided a report in relation to the Minister's 2013 s 34 Determination tabled at the meeting of 26 November 2013 where the decision to concur was taken (I attach a copy marked "**PL48**").

24.4 NERSA indicated that a letter dated 22 November 2013 from the Minister to NERSA (which was referred to in the minutes of the 26 November 2013 meeting) and which Pole had called for could not be found (I note that this letter had also been sought from the Minister, by way of a letter sent on 1 March 2016 to the State Attorney, but as discussed below, no response was received).[5]

24.5 NERSA could not find any records of any consultation with the Minister in relation to her decision to publish the 2013 s 34 Determination. I note in this regard that NERSA's letter includes an

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[5] See, below, para 185.

obvious inadvertent typographical error, which would have altered the meaning (the word "not" was clearly missing).

24.6 NERSA also attached a copy of its letter to the Minister wherein it confirmed its concurrence in the 2013 s 34 Determination, which letter attached a signed copy of the s 34 Determination and the extracts of the minutes. I attach a copy marked "**PL49**". I draw attention to the following:

24.6.1 Unlike the version of this letter provided by the Minister and the President (PL43.3) the letter was not signed and dated by the Chairperson of NERSA (the letter is otherwise identical).

24.6.2 The attached s 34 Determination only bears NERSA's signature whereas, in the version purportedly attached to the same (albeit signed) letter in the Minister's and President's record, the attachment included the signature of the Minister too (although, the Minister's counter signature was dated a month earlier than NERSA's signature, despite it clearly being added thereafter (or superimposed from a separate document) (particularly since, as will be discussed below, NERSA made a very minor change to the wording of the s 34 Determination – which was retained by the Minister when publishing the Determination)).

24.6.3 It may be that nothing turns on these anomalies, but I draw the Court's attention thereto for the sake of completeness – and the respondents are invited to explain the anomalies in their answering papers in the interests of complete transparency.

24.7 NERSA did not suggest that there were any further documents in its possession that would form part of the record for the 2013 s 34 Determination.

25. In the circumstances, the applicants have prepared this affidavit on the acceptance that the documents provided by NERSA constitute its complete record in relation to the 2013 s 34 Determination.

IV. SUPPLEMENTATION AND CONFIRMATION OF THE GROUNDS OF CHALLENGE AND RELIEF SOUGHT

26. The record provides further support for the applicants' challenges, and a basis to supplement the challenges to the signature and tabling of the Russian IGA (prayer 1), the tabling of the US and South Korean IGAs (prayer 2), and the declaration sought in relation to when nuclear procurement may commence (prayer 3).

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A. The decisions to sign the Russia IGA are unlawful and unconstitutional

27. In paragraphs 160 to 160.6.4 of the applicants' founding affidavit, I set out the reasons why the applicants contend that the Minister's signature of the Russian IGA, and the President's authorisation of this signature, were unlawful and unconstitutional.

28. The record filed by the Minister and the President reinforces the grounds upon which these decisions are challenged.

29. On 19 September 2014, the Minister wrote an Explanatory Note (**PL43.10**) to the President explaining the delays in signing the Russian IGA. This Explanatory Note states that the Russian IGA "*was ready for signature in November 2013 during the time of my predecessor. However, prior to signature of the Framework Agreement, several technical issues were identified. It was then decided to postpone the signing of the Framework Agreement until such time when these technical challenges would be solved*". It is stated further in the Explanatory Note that "*these technical issues have now been resolved... [a]ll preparations between the two countries have been completed for signing and finalization of the road map...*".

30. No other indication appears in the papers as to what these "technical issues" were. But the fact that signature of the IGA was delayed by a year to deal with these issues, when understood in the broader context (and the other documents discussed below), reinforces the applicants' contention that the Russian IGA was

intended to and did include binding agreements in relation to nuclear procurement as already agreed between South Africa and Russia.

31. An Explanatory Memorandum **(PL43.11)** also forming part of the supplementary record indicates that it was "*intended that the Agreement will be signed by the Parties on 25 November 2013.*" A copy of the Russian IGA accompanying this Explanatory Memorandum was signed by the State Law Advisor (International Law) and dated 24 November 2013 **(PL43.11)**, and is substantially identical to the Russian IGA subsequently signed on 24 September 2014. The index provided by the State Attorney indicates that the draft Russian IGA and the Explanatory Memorandum formed part of one document.[6] This makes clear that:

31.1 The Explanatory Memorandum was prepared by the State Law Advisor;

31.2 The Explanatory Memorandum was prepared prior to 25 November 2013, in anticipation of the signing of the Russian IGA; and

31.3 The Explanatory Memorandum served before the Minister and the President (given that it formed part of their joint record, one must assume that both had regard to this draft memorandum prior to agreeing to the signature of the Russian IGA).

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[6] Both documents form part of item 18 in the indexed record, collectively described as "Agreement between the Government of the Republic of South Africa and the Government of the Russian Federation on Strategic Partnership and Cooperation in the Fields of Nuclear Power and Industry with **explanatory memorandum.**"

32. As I have set out in the applicants' founding affidavit (paragraph 152), the Russian IGA creates a strategic partnership between the parties in relation to the procurement of nuclear power plants, including by, inter alia, agreeing:

32.1 to implement priority joint projects of construction of (initially) two nuclear power plants with Russian VVER reactors (at specified sites) and subsequently other nuclear power plants (at sites to be identified) with a total installed capacity of 9600MW (matching the 9600MW in the 2013 nuclear s 34 Determination);

32.2 an indemnification to Russia from liability for damages in the event of a nuclear accident inside or outside the Republic of South Africa, and giving a veto to Russia regarding the use of other suppliers; and

32.3 a commitment to give the Russians a "special favourable" tax regime;

32.4 that the IGA would take precedence of any other agreements and was intended to be in force for 20 years.

All of this was in striking contradistinction to the other IGAs (both the US and South Korean IGAs signed years before, and the Chinese and French IGAs signed soon after the public was advised that the Russian IGA had been entered and following the concerns raised by various parties that the Russian IGA appeared to reflect a *fait accompli*) that the Minister chose to table before Parliament in June 2015, which included none of these commitments.

33. The State Law Advisor's Explanatory Memorandum makes clear that the IGA was indeed intended, and understood, as creating a firm commitment that Russia would construct the required nuclear power plants in South Africa. This is evident from the following explanation of the agreement now revealed by the record:

> "The Parties collaborate in areas as outlined in Article 3 of this Agreement **which are needed for the implementation of priority joint projects of construction of two new NPP units with VVER reactors [only manufactured by Russia] with the total capacity of up to 2,4 GW at the site selected by the South African Party** (either Koeberg NPP, Thyspunt or Bantamsklip) in the Republic of South Africa **and other NPP units of total capacity up to 7,2GW at other identified sites in the Republic of South Africa** and construction of a multi-purpose research reactor at the research center located at Pelindaba, Republic of South Africa. **The mechanism of implementation of these priority projects** will be governed by separate intergovernmental agreements, in which the Parties shall agree on the sites, parameters and installed capacity of NPP units planned to be constructed, in the Republic of South Africa. Cooperation in areas as outlined in Article 3 of this Agreement, will be governed by separate agreements between the Parties, the Competent Authorities, as well, as by agreements (contracts) between Russian and (or) South African authorized organizations, which are involved by the Competent Authorities of the Parties for the implementation of cooperation in the framework of this Agreement. **The Competent Authorities of the Parties can, by mutual consent, involve third countries' organizations for the implementation of particular cooperation areas in the framework of this Agreement.** The sources and format of financing of the activities outlined in Article 3 of this Agreement will be agreed on and fixed by separate agreements between the Parties."

34. As noted in the founding affidavit, while this IGA and this explanation indicated that there would need to be further agreements entered into, it is evident that those agreements would merely deal with some of the finer details of the broad agreement already reached (including for instance financing for the

implementation of the Russian IGA, which already included an agreement to use Russia to construct the nuclear power plants).

35. The Explanatory Memorandum emphasised (as also made plain by the wording of the IGA, see the founding affidavit para 152.7) that other countries could only be involved in implementation of any of the areas of cooperation (which includes the construction of the nuclear power plants) by mutual agreement between South Africa and Russia. In other words, by signing the Russia IGA, South Africa has agreed that Russia could veto the involvement of any other country in the construction of proposed nuclear power plants to provide the 9600 MW of electricity determined to be required in the 2013 s 34 Determination.

36. The Explanatory Memorandum confirms the plain meaning of the obligations created by the Russian IGA, as set out in the founding affidavit in paragraph 152, and the binding nature and specificity of the agreement reached.

37. This provides further confirmation that properly interpreted, as made clear in the founding affidavit, the Russian IGA was not some idle step in launching a procurement process for 9600MW of nuclear power. The Russian IGA reflects a commitment by South Africa not only to fetter the future discretion of various organs of state in the exercising of their statutory powers in relation to the procurement of nuclear power, it also records pre-emptive binding commitments in relation to a number of issues (including tax and liability) that were unconstitutionally made absent and prior to any constitutionally compliant tender process (as required by section 217 of the Constitution).

38. As will be discussed in more detail in the next section in relation to the tabling of the IGA, the State Law Advisor states in the Memorandum that the Russian IGA "*falls within the scope of section 231(2) of the Constitution and Parliamentary Approval is required.*" This is not only a legal assessment, but also a substantive assessment. It means that the State Law Advisor has determined that the agreement is not merely an agreement of a technical or administrative nature, which may bypass parliamentary approval (in terms of section 231(3), read with section 231(2)), but rather is the type of substantive international agreement which requires parliamentary approval in terms of section 231(3), since for instance it may have budgetary consequences (as indicated in the founding affidavit paragraph 163).

39. It is precisely for this reason that the DOE and Rosatom went public on the day that the Russian IGA was signed claiming truthfully that they had signed a deal for the construction of nuclear power plants in South Africa. Their efforts to backtrack thereafter – after an immediate outcry about these developments and as it apparently dawned on them that they had effectively advertised that the South African government had acted in violation of the Constitution and the law in relation to procuring of nuclear new generation capacity (see paragraph 154 of my founding affidavit) – simply confirms the obvious.

40. In this light, the subsequent IGAs entered into with China and France (and the tabling of the decade old US IGA and half-decade old South Korean IGA) were mere window dressing to legitimize an unlawfully-commenced nuclear

procurement process. Russia was clearly given a head start over other prospective bidders (its IGA included far more detailed commitments, including commitments in relation to liability, favourable tax, and the right to veto third party countries involved, that none of the other IGAs contained). Indeed, the Russian IGA constitutes an internationally binding commitment, which is currently in place, for the procurement of a fleet of VVER nuclear reactors from Russia.

41. I make the above points in supplementing the applicants' factual basis for reviewing the Minister's signature of the Russian IGA, and the second respondent's authorisation of this signature, on the grounds that these decisions were unlawful and unconstitutional and in violation of the principle of legality (as more fully set out in paragraph 160 of the founding affidavit). In summary this is so for these reasons:

41.1 The Russian IGA violated section 217 of the Constitution (paras 160.1 - .4), it was therefore unconstitutional and unlawful for the Minister and President to decide to agree to this IGA.

41.2 Even if the Russian IGA is interpreted as not falling within the remit of section 217, and in any event, the Minister's decision to sign and the President's decision to authorise the signature of the agreement are nevertheless irrational and in violation of the principle of legality (para 160.6): particularly given that the Russian IGA pre-empts any nuclear procurement process and that entering into a more comprehensive

agreement with one potential bidder was irrational, reflected a future fettering of discretion in favour of Russia, and created a perception of bias.

41.3 Although, at the time the Russian IGA was signed in 2014, the 2013 s 34 Determination had already been signed by the Minister and NERSA, as dealt with below,[7] this determination was unlawful, and moreover was only promulgated in the *Gazette* in December 2015. Therefore, the s 34 Determination could not provide a lawful basis to commence with any procurement of 9600 MW of nuclear power, which was evidently the purpose of the Russian IGA.

B. The decision to table the Russian IGA is unlawful and unconstitutional

42. In paragraphs 161 to 178 of the applicants' founding affidavit, I set out the reasons why the applicants contend that the Minister's decision on or about 10 June 2015 to table the Russian IGA before Parliament in terms of section 231(3) of the Constitution was unconstitutional and unlawful, and falls to be reviewed and set aside.

43. The Explanatory Memorandum prepared by the State Law Advisor (**PL43.11**), and which served before the Minister and the President, in discussing the nature of the Russian IGA, includes the following:

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[7] See section V: THE 2013 S 34 DETERMINATION WAS UNLAWFUL AND UNCONSTITUTIONAL

"The Agreement falls within the scope of section 231(2) of the Constitution and Parliamentary Approval is required".[8]

44. It was clearly and correctly recognised by the State Law Advisor that the Russian IGA falls within the scope of section 231(2) of the Constitution and that parliamentary approval was required.

45. Therefore, the memorandum that was before the Minister prepared by the State Law Advisor, supports the applicants' contention that the Russian IGA, given its content and extent (see paragraphs 162 to 166 of my founding affidavit), was clearly the type of agreement which required approval by Parliament in terms of section 231(2) of the Constitution.

46. As I point out in paragraph 167 of my founding affidavit, it was necessary to table the Russian IGA under section 231(2) of the Constitution in order to ensure that a number of important constitutional requirements were met and objectives achieved. It would firstly have allowed both houses of parliament (the NA and the NCOP) – the legislative branch of government – to consider whether to approve the agreement. Given the contents, they may well have refused such approval (as envisaged in the Explanatory Memorandum). It is precisely for this reason that the Constitution creates a check and balance on executive power in relation to the entering into of international agreements – while they may be negotiated and signed by the executive, they must then be approved by

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[8] Emphasis added.

Parliament to become binding. In fact, the process is analogous to the constitutional checks and balances in the passing of domestic legislation, which may be introduced as a Bill by the executive, but must be approved by Parliament to become law.

47. The parliamentary approval process required by section 231(2) also serves another vital democratic end. It allows for a public participation process as required by section 59 of the Constitution, which would have afforded the applicants (and other members of the public) an opportunity to make important representations regarding the content of the Russian IGA, and regarding other important related issues (including *inter alia* environmental issues, socio-economic issues, and in relation to constitutionally and statutorily compliant procurement).

48. All of this was rendered nugatory by the failure to table the Russian IGA under section 231(2). Thus the Minister's unlawful tabling of the Russian IGA under section 231(3) undermined two fundamental principles of the Constitution: the separation of powers (between the executive and the legislature, by circumventing Parliament's power to approve such international agreements) and the principle of participatory democracy.

49. In light of these constitutional prescripts, and the State Law Advisor's own advice in this regard, it is remarkable that the Minister would have chosen to bypass section 231(2) of the Constitution. Certainly such a bypassing would have had to be explained. Yet, the Minister's decision to act contrary to the

view expressed by the State Law Advisor in the Explanatory Memorandum by tabling the Russian IGA under section 231(3) of the Constitution, rather than section 231(2), is not explained in any documents that form part of the record (there is no evidence that she sought or received any alternative legal opinion on the issue). The Minister appears at best to have failed to apply her mind to the requirements of section 231(2), and at worst to have deliberately bypassed its provisions for an ulterior purpose. Accordingly, the Minister's decision was also irrational, she failed to have regard to relevant considerations, and the fact that the State Law Advisor's assessment was ignored and that Parliament was bypassed (and participatory democracy frustrated) indicates that the decisions were taken for an ulterior purpose.

50. In the premises, the tabling of the Russian IGA under section 231(3) was unlawful and unconstitutional as set out in my founding affidavit, and the Court must declare this decision unconstitutional and set it aside. Furthermore, the fact that the Minister was directly advised to table the agreement under section 231(2) but without any reason disclosed in the record ignored this legal advice from the State Law Advisor, or overlooked it, means that the decision violated the principle of legality, since the Minister's decision:

50.1 was substantively irrational, in that the Minister either intentionally or inadvertently ignored the advice of the State Law Advisor, particularly since there is no evidence in the record that any alternative legal advice was sought or received prior to the Minister's decision to table the IGA;

50.2 was procedurally irrational in that the Minister failed to have regard to relevant considerations (the State Law Advisor's considered view), or took irrelevant considerations into account (whatever other non-legal views the Minister may have had regard to);

50.3 given the absence of any factual or legal basis to ignore the advice given by the State Law Advisor, a reasonable inference is raised that the Minister's decision was based on an ulterior purpose (to have the IGA made binding on an expedited basis without the need for parliamentary approval or public participation) and therefore the decision was not rationally connected with the purpose for which the power was conferred.

C. The unlawful tabling of the South Korean and US IGAs

51. In paragraphs 169 to 178 of the applicants' founding affidavit, the applicants aver that the tabling of the US IGA twenty years after it was entered into, and the South Korean IGA five years after it was entered into, constituted unreasonable delays in the tabling of the IGAs before parliament. The applicants thus contend that the decision to table them was in violation of section 231(3) of the Constitution, and accordingly unconstitutional and unlawful.

52. There is no documentation in the record which provides any factual basis for the unreasonable delay in gazetting of the US and South Korean IGAs many years

after they were signed.

53. There is no indication that the Minister sought any advice prior to gazetting these agreements notwithstanding so significant a delay – and despite the fact that the State Law Advisor had otherwise been involved in providing advice (albeit ignored) regarding the tabling of the Russian IGA.

54. There is thus nothing in the record to gainsay the applicants' contention that these agreements (one being two decades old, the other half a decade old) were belatedly gazetted as mere window-dressing for purposes of retrospectively attempting to undo the damage caused by the revelations regarding the Russian IGA. Accordingly, the only reasonable inference is that the IGAs were tabled under section 231(3) for an ulterior purpose (the decision is not rationally connected to the purpose for which the power was conferred, but for an ulterior purpose) and is therefore in breach of the principle of legality.

D. The need to take the ERA nuclear requirement decision and nuclear procurement system decision prior to the commencement of nuclear procurement and the requirements in taking those decisions

55. In paragraphs 179 to 193 of the applicants' founding affidavit, I set out the grounds for seeking a general declaratory order that, prior to the commencement of any procurement process for nuclear new generation capacity (being at the very least prior to the appointment of a bid specification committee or persons tasked with drawing up the invitation to bid (a request for proposals (**RFP**)), and/or the exercise of any powers under section 34(2) of the ERA in relation to

the procurement of nuclear energy, the Minister and NERSA were required, after first conducting a procedurally fair public participation process, to make a determination that:

55.1 new generation capacity is required and that the electricity must be generated from nuclear power and the percentage thereof, in terms of sections 34(1)(a) and (b) of the ERA – **"the ERA nuclear requirement decision"**; and

55.2 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, in terms of section 34(1)(e) of ERA, read with section 217 of the Constitution – **"the ERA nuclear procurement system decision"**.

56. As I have indicated above, the record filed by the Minister and the President includes the 2013 s 34 Determination signed by the Minister and NERSA, which determination was kept secret for two years and was only disclosed to the applicants and the public by inclusion in the record, and published in the *Gazette,* in December 2015.

57. The record demonstrates that, even though the Minister and NERSA hid the 2013 s 34 Determination from the public and did not gazette it, the Minister and her department accepted that the relevant section 34 determinations were, as submitted by the applicants, legal perquisites for the procurement of new nuclear

capacity and commencement of the nuclear procurement process. This is made clear from the following:

57.1 The internal DOE Ministerial memorandum (or submission) from November 2013 in relation to the taking of the s 34 Determination (**PL43.1**),[9] which indicated that:

57.1.1 "The Integrated Resource Plan contemplates the introduction of approximately 9600MW of nuclear energy by 2030. **The process can only continue once the Minister of Energy has made a determination under section 34 of the Electricity Regulation Act , in consultation with Nersa.**"[10]

57.1.2 The recommendation to the Minister was in the following terms:

"It is recommended that the Minister:

1.1 **approves the s34 determination in Annexure A for promulgation in the government gazette, so that the Nuclear Procurement process can be launched**; and

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[9] This document is described in the index as "*Route Form for DG and all Ministerial submissions: Section 34 determination*".

[10] Para 1, emphasis added.

1.2 signs the attached letter to Nersa seeking their concurrence."[11]

57.1.3 "The procurement process will be launched once the Minister has made a determination in terms of s34 of the Electricity Regulation Act."[12]

57.2 On 23 January 2014, both the Chairperson of Eskom and the MPE were advised by the Minister of the 2013 s 34 Determination, in identical letters (**PL43.4** and **PL43.5**). In those letters, the following is noted:

"In order to proceed with the procurement, the Electricity Regulation Act, No.4 of 2006 requires that new generation capacity requirements be determined in consultation with the National Energy Regulator of South Africa (NERSA).
Please find enclosed the Section 34 Determination on the Nuclear Procurement Programme as concurred to by NERSA."

57.3 On 8 December 2015, and prior to gazetting of the 2013 s 34 Determination on 21 December 2015, the Minister sent identical letters (**PL43.13** and **PL43.14**) to the current MPE and the Chairperson of Eskom, which were in the exact same terms at the letters sent in January 2014, advising of the 2013 s 34 Determination and pointing out that a necessary determination in terms of section 34 was required in order to proceed with procurement.

58. On 26 December 2015, a few days after the 2013 s 34 Determination was

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[11] See para 1 and repeated in para 7.
[12] Para 3.4.

gazetted, the DOE issued a media statement titled *'Progress with the Nuclear New Build Programme'* (annexed hereto as "**PL50**"). It also underlines that the DOE accepts that the ERA nuclear requirement determinations and procurement system determinations are necessary prerequisites for a nuclear procurement process. In particular, the DOE noted that:

> "In order to proceed with the Request for Proposals as agreed by Cabinet on 9 December 2015 it was necessary to ensure that the National Electricity Regulator of South Africa (NERSA) has been consulted on the appropriate energy mix and particularly the intention to procure additional nuclear capacity. This was done in 2013 and agreed by NERSA and the Minister at the time, Minister Ben Martins, MP, and a determination to this effect in terms of the Electricity Regulation Act of 2006 was signed. However, the actual gazetting of this determination was withheld until such stage that government had agreed to proceed with the Request for Proposals. Once this agreement was reached, on 9 December 2015, the present Minister of Energy, Ms Tina Joemat-Pettersson, consented that the determination signed in 2013 could be released, particularly as nothing had changed in the Integrated Resource Plan for Energy in the intervening period."[13]

59. As will be dealt with in the section on relief,[14] notwithstanding the fact that the s 34 Determination has now been gazetted, the declaration in relation to what the ERA requires prior to the procurement of nuclear power is still necessary to clarify the legal obligation upon the government in a number of respects. That is palpably clear given that the approach taken by the Minister and NERSA in relation to the 2013 s 34 Determination demonstrates significant and fatal legal deficiencies, which are highlighted in the next section.

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[13] Emphasis added.

[14] See section VII: RELIEF SOUGHT.

V. THE 2013 S 34 DETERMINATION WAS UNLAWFUL AND UNCONSTITUTIONAL

60. Given the facts revealed in the record, the applicants supplement the founding papers to challenge the 2013 s 34 Determination, which was gazetted by the Minister on 21 December 2015.

61. The 2013 s 34 Determination was a multi-stage decision-making process, including the decision made by the Minister to make the determination, the decision by NERSA to concur in the determination, and the decision by the Minister to publish the 2013 s 34 Determination by notice in the *Gazette* on 21 December 2015.

62. Each of the decisions made in that process was unlawful and unconstitutional, and therefore, this Court must review and set aside the 2013 s 34 Determination, as sought in the amended notice of motion filed together with this affidavit.[15]

A. The facts

63. The record reveals the following key facts:

63.1 On 11 November 2013, the Minister signed the 2013 s 34 Determination.

63.2 On 17 December 2013, the Chairperson of NERSA signed the 2013 s

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[15] See further section VII: RELIEF SOUGHT.

34 Determination in concurrence. The decision to concur was made at a meeting of members of NERSA held on 26 November 2013.

63.3 On 21 December 2015, some two years later, the 2013 s 34 Determination was published by notice in the *Gazette* (GN1268, *GG39541* of 21 December 2015).

64. On its face the 2013 s 34 Determination purports to be:

64.1 First, a determination in terms of section 34(1)(a) and (b) of the ERA that new generation capacity is required and that accordingly 9600 megawatts (**MW**) must be generated from nuclear energy (paragraph 1) – what the applicants refer to as the "ERA nuclear requirement decision";

64.2 Second, a determination in terms of section 34(1)(e) that the required nuclear new generation capacity, "shall be procured through tendering procedures which are fair, equitable, transparent, competitive and cost-effective" (paragraph 2) - what the applicants refer to as the "ERA nuclear procurement system decision" (albeit, as discussed below and in the founding affidavit, such a decision is required to include the setting out of the procurement process or system to be followed, and the s 34 Determination did not include this).

65. Neither NERSA nor the Minister sought to consult with, or otherwise invite comment from, any interested and effected parties, nor the public, prior to

signing the s 34 Determination in 2013 – the s 34 Determination was made in secret without any public participation, and then kept secret for a further two years.

66. The record provided by the Minister and the President included a memorandum (referred to as a ministerial submission) dated 01 December 2015 from the DOE Director-General to the Minister providing background to the publication of the 2013 s 34 Determination by notice in the *Gazette* (**PL43.12**). The relevant provisions of this memorandum are as follows:

66.1 The purpose of the memorandum was to request the Minister to approve the publication of the 2013 s 34 Determination in the *Gazette* (paragraph 1.1 of the letter);

66.2 The purpose of the letter was further to *"request the Minister to approves (sic) that the section 34(1) Determination be made part of the court record in order to show that the applicant (sic) case was based on false assumptions"* (paragraph 1.3 of the letter).

66.3 It is pointed out in paragraph 3.4 of the memorandum that

> "[a]lthough the determination process was completed in 2014 [this should have read 2013] with NERSA and signed by the previous Minister of Energy, Minister Ben Martins, the determination was not gazetted due to change (sic) in the leadership in the Ministry and to further conduct some work prior to gazetting. As a consequence, there has been progress on the nuclear build work done by the Department and relevant stakeholders, it is therefore deemed appropriate to publish it. The determination needs to be gazetted (**Annexure 4**)".

66.4 Annexure 4 to the memorandum (referred to in the last line of paragraph 3.4 of the memorandum) was inexplicably not provided to the applicants. But, I assume that it is either the s 34 Determination itself, or some advice indicating the need for the determination to be gazetted. Pole has written to the State Attorney seeking a copy of the annexure, as will be discussed below.[16]

66.5 It is stated further in paragraph 3.5 of the memorandum that:

> "The publishing of the determination has become urgent as the Department is facing litigation by Earthlife Africa Johannesburg and the Southern African Faith Communities Environment Institute. In the Notice of Motion... the applicants claim that the Minister has not published a Section 34 determination nor conducted a public participation process and therefore any decisions to facilitate, organize, commence or proceed with the procurement of nuclear new generation capacity is unlawful.
>
> During the meeting of 27 November 2015 to brief the legal counsel defending the Department... [t]he legal counsel requested to include the determination when filing the record for the court papers. The legal councel (sic) advised that the inclusion of the determination in the answering affidavit will weaken the case for the applicant as it will show that their application is based on false assumption (sic)."

66.6 It is recommended in paragraph 6.1 of the letter that, among other things, the Minister approves the publication of the 2013 nuclear s34 determination in the *Gazette*.

66.7 There was no suggestion that NERSA's concurrence would be sought, or that it would be consulted, in relation to the decision to gazette the

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[16] See section VIII: DIFFICULTY IN OBTAINING RULE 53 RECORD.

2013 s 34 Determination.

67. The DOE's media statement of 26 December 2013 (**PL50**), as discussed in more detail above, also makes clear that:

67.1 the Minister accepted that the 2013 s 34 Determination with the concurrence of NERSA was a necessary prerequisite in order to proceed with procurement;

67.2 while the 2013 s 34 Determination was signed in 2013, "*the actual gazetting of this determination was withheld until such stage that government had agreed to proceed with the Request for Proposals*";

67.3 it was only once government had agreed to proceed with the Request for Proposals (**RFP**) that "*the present Minister of Energy, Ms Tina Joemat-Pettersson, consented that the determination signed in 2013 could be released, particularly as nothing had changed in the Integrated Resource Plan for Energy in the intervening period.*"

68. The DOE's media statement is a misleading. The record confirms that the reason the 2013 s 34 Determination was released was **not** primarily because the government had "agreed to proceed with the Request for Proposals", but because "[t]he legal councel (sic) advised that the inclusion of the determination in the answering affidavit will weaken the case for the applicant as it will show that their application is based on false assumption (sic)".

69. Indeed, in light of the repeated requests prior to that by the applicants – all ignored – for the proof of such determination, it is clear that the Minister never had any intention of disclosing the 2013 s 34 Determination. Such disclosure only occurred on the advice of her lawyers, as revealed by the record, and only once those lawyers had been forced to give that advice upon consideration of the applicants' founding papers.

70. That the Minister (and NERSA) had settled on a path of deliberately "withholding" the signed 2013 s 34 Determination from the public for two years, is clear from their persistent efforts to keep the Determination secret in the teeth of direct requests and threats of litigation from the applicants:

70.1 As I set out in paragraph 199 to 120 of my founding affidavit, on 26 July 2015, Pole wrote to the Minister on behalf of the applicants requesting, among other things, that the Minister advise whether any nuclear s 34 determinations had been made (see specifically paragraph 120.4.6 of my founding affidavit). No response was ever received from the Minister.

70.2 Similarly, NERSA, despite concurring in the decision and despite enquiries from the applicants, also deliberately failed to advise the public that a section 34 decision was taken (see paragraphs 130 to 136 of the founding affidavit).

70.3 At the time when the applicants launched this application, the 2013 s 34

Determination had not been communicated to the public at all (by way of notice in the *Gazette* or through some other means of communication). Indeed, despite multiple public statements and press releases in relation to the procurement, as chronicled in the founding affidavit, no mention was made of the 2013 s 34 determination. More telling, there was clearly an intention to keep the determination secret (as the DOE states in December 2015, it was "*withheld*"). For instance, in the DOE *Media Statement: Nuclear Procurement Process Update* dated 14 July 2015 (**PL27**) it was indicated that the DOE had been designated as the "Procuring Agency";[17] yet no indication was given that this designation had in fact occurred in the 2013 s 34 Determination (see para 5), which had not yet been made public.

70.4 Notwithstanding that the Minister had approved the nuclear s 34 Determination for promulgation in the *Gazette* in 2013 (see recommendation 7.1 contained in the Director-General: Energy's 8 November 2013 request for the Minister to approve the nuclear s34 determination (**PL43.1**), which recommendation was signed and approved by the Minister on 11 November 2013), at the time the applicants launched these proceedings the 2013 nuclear s34 Determination had not been published or communicated to the public.

71. Accordingly, the Minister (by which the applicants refer to the office, which has

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[17] See the founding affidavit para 101.6.

had two occupants during the relevant time), the DOE, and NERSA, unconstitutionally kept the exercise of public power secret, in direct violation of the fundamental constitutional principle of open, transparent and accountable government.[18] A variety of review grounds arise in this regard, which I shall deal with later.

72. In any event, and as will also be dealt with below, the delay in gazetting was unreasonable, and the Minister unlawfully chose to gazette the determination after two years without consulting NERSA.

73. Furthermore, if the Minister believed that the determination was not legally effective until made public by being gazetted, as would appear clear from her belated decision to gazette the determination, and the Minister had not determined yet to give legal effect thereto prior to 2015 so that unspecified further work could be conducted, then there is no explanation as to why the Minister nevertheless proceeded with the procurement process prior to the gazetting of the s 34 Determination. In this regard it will be recalled that prior to December 2015 the government had already signed the IGAs which the Minister claimed were necessary for procurement, and had authorised the DOE to act as the procuring agency, and had the RFP prepared.

74. The only plausible explanation for the Minister's conduct is that she has attempted to 'cure' this obvious and fatal procedural and substantive flaw in the

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[18] See section VI: ACCOUNTABILITY, OPENNESS, TRANSPARENCY.

nuclear tender process by publishing the 2013 s 34 Determination some two years after it was signed. Her efforts to do so are unbecoming of themselves (as I shall detail further below). But in any event those belated efforts by her cannot change the fact that when the tender process began, no public (and thus final) s 34 Determination was in place.

75. As will be discussed in the next section, in any event the belated gazetting of the s 34 Determination does not in fact render the current procurement process lawful. On the contrary, the Minister's efforts at retrofitting the process confirm a variety of other irregularities, since:

75.1 First, the 2013 s 34 Determination was procedurally unfair;

75.2 Second, the failure to make the decision public and the delay in doing so was a violation of the requirements of just administrative action, the requirements of NERA, and the requirements of open and accountable government;

75.3 Third, the 2013 s 34 Determination did not comply with section 34(1)(e)(i) of the ERA read with section 217 of the Constitution, as it did not include any decision in relation to the procurement system to be used; and

75.4 Fourth, the Minister's and NERSA's decisions to make the s 34 Determination were irrational and unreasonable and took into account

irrelevant considerations, and failed to take account of relevant considerations.

B. Grounds of challenge to the 2013 s 34 Determination and its 2015 publication in the *Gazette*

76. The applicants aver that the Minister's and NERSA's 2013 s 34 Determination decisions, including the Minister's decision to publish the s 34 determination in the *Gazette* only in 2015, violated the requirements for administrative action to be lawful, reasonable and procedurally fair, and (to the extent, that a court were to find that any of these decisions did not constitute administrative action, which is denied) in any event, violated the principle of legality.

1. Procedural unfairness – No public participation

77. In paragraph 143 of the applicants' founding affidavit, I pointed out that in terms of the Promotion of Administrative Justice Act 2000 (PAJA), which gives effect to section 33 of the Constitution, administrative action must be lawful, reasonable and procedurally fair, and that these obligations are further delineated in section 6 of PAJA. Section 6(2)(c) of PAJA provides that a court has the power to judicially review administrative action if the action was procedurally unfair.

78. Section 3 of PAJA provides that administrative action which materially and adversely affects the rights or legitimate expectation of any person must be perceived to be fair. Section 4 of PAJA provides more particularly that in cases where administrative action materially and adversely affects the rights of the

public, an administrator, in order to give effect to the right to procedurally fair administrative action, must decide whether:

(a) to hold a public enquiry in terms of subsection (2);

(b) to follow a notice and comment procedure in terms of subsection (3);

(c) to follow the procedures in both subsections (2) and (3);

(d) where the administrator is empowered by any empowering provision to follow a procedure which is fair but different, to follow that procedure; or

(e) to follow another appropriate procedure which gives effect to section 3.

79. Moreover, NERSA and its decisions (including the decision to concur in any section 34 determinations) is created and governed by the National Energy Regulator Act 40 of 2004 (**NERA**).[19] Section 10 of NERA provides, in relevant part, that:

"Every decision of [NERSA] must be in writing and be-
(a) consistent with the Constitution and all applicable laws;
(b) in the public interest;
.....
(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 [NERSA]"**

80. Therefore, as I pointed out in paragraph 182.3 of my founding affidavit the decision by NERSA must, in addition to the obligation under sections 3 and 4 of PAJA, in terms of section 10(1)(d) of the National Energy Regulator Act, *"be taken with a procedurally fair process in which affected persons have the*

[19] See founding affidavit para 29-34.

opportunity to submit their views and present relevant facts and evidence to [NERSA]".

81. A determination that South Africa requires significant new nuclear energy generation and to procure that capacity, is a decision which materially and adversely affects the rights of the public. As noted in the founding affidavit the decision to procure a certain amount of nuclear new generation capacity has profound consequences for the South African public. It raises issues not only in relation to costs (the burden of paying for a procurement that could cost approximately R1 trillion will fall to the public, through taxes, increased electric charges, and/or through the reduction of other social goods (education, social assistance, health services, and housing) that will necessarily be crowded out if government is forced to use the National Revenue Fund to pay for nuclear power), but also significant substantive issues in relation to the environment, and directly implicates inter alia section 24 of the Constitution (the right to a healthy environment). These are issues that the applicants, together with others, would have been well placed to address, and had a right to give their input on.

82. It is clear from the record and supplementary record that neither the Minister or NERSA complied with the requirements of sections 3 and 4 of PAJA or section 10(1)(d)[20] of NERA before making the the 2013 s 34 Determination decision

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[20] Section 10(1)(d) of NERA provides that "*Every decision of [NERSA] must be in writing and be...taken within a procedurally fair process in which affected persons have the opportunity to submit their views and present relevant facts and evidence to [NERSA]".*

and concurring therewith respectively (or before the s 34 Determination was gazetted). The relevant facts upon which the applicants base this submission are as follows:

82.1 The internal DOE Ministerial memorandum (or submission) from November 2013 in relation to the 2013 s 34 Determination decision made by the Minister includes a recommendation made by the Director-General: Energy to the Minister (signed on 8 November 2013) (**PL43.1**). This document makes no reference to any public participation process as contemplated in section 4 of PAJA.

82.2 Under the heading *'Communication with other Departments/Organisations'*, reference is made to only the National Nuclear Energy Executive Subcommittee (a Cabinet committee) including National Treasury, Department of Public Enterprises and NERSA (it is in any event, unclear what the nature of these communications were, or whether they involved any provision for input to be received).

82.3 On 11 November 2013, only three days after the recommendation was signed by the Director-General: Energy and without any public participation process having been conducted, the Minister signed the s 34 Determination (**PL42**);

82.4 On 20 December 2013, NERSA wrote to the Minister advising that, at a

meeting held on 26 November 2013, NERSA resolved to concur with the Minister (**PL43.3**) (according to a stamp the letter was only received by the DOE on 6 January 2014). The letter indicates that a certified copy of NERSA's decision was attached in Appendix A. Appendix A comprises of an '*Extract of the Minutes of the Energy Regulator Meeting No. 96 of 26 November 2013*'. Under the heading *'Members of the public'*, state owned entity Eskom's Mr V Gibbs is indicated as being present. Clearly no members of the public, interested and affected parties, non-governmental organisations or community-based organisations were privy to or participated in this meeting (nor, were they given reasonable notice of the intention to take the decision, and any opportunity to make representations).

82.5 On 21 December 2015, the 2013 nuclear s 34 determination was published by notice in the *Gazette*, two years after the 2013 decision was taken by the Minister with the concurrence of NERSA. The nuclear s 34 determination was never published by notice in the *Gazette* in draft form inviting comment from the public, nor was any other type of public participation process followed (this is made clear by the absence of any reference to such a procedure in the DG's memorandum to the Minister in relation to gazetting (**PL43.12**) and the DOE's December 2015 press statement (**PL50**)).

83. Therefore the record underlines the applicants' own experience (and that of the

public more generally), that notwithstanding that a determination under section 34 of the ERA that 9600MW of nuclear new generation capacity is needed and should be procured clearly has the potential to materially and adversely affects the rights of the public (as set out in paragraphs 18 and 182.4 of my founding affidavit), members of the public were not afforded any opportunity to comment on or make representations to the Minister and NERSA before the 2013 s 34 Determination decisions were made.

84. To compound this procedural unfairness, the nuclear s 34 determination decision was not communicated to the public for a period of two years – and may never have been so communicated had the applicants' case not been launched and the record not been extracted from the government, as it had to be in this case.

85. As I describe in paragraphs 119 to 129 of my founding affidavit, Pole wrote to the Minister before this litigation commenced querying the existence of any nuclear section 34 determination. The Minister did not respond, and the applicants (and the public) were kept in the dark until the Minister was compelled to do so in the face of this litigation.

86. As set out more fully in paragraphs 130 to 135 of the applicants' founding affidavit, Pole wrote to NERSA on 26 July 2015 asking whether NERSA had been consulted and had given its concurrence in respect of any nuclear section 34 determination, and requested evidence of any such concurrence or consultation. NERSA failed to disclose that it had made a decision concurring in the 2013 nuclear s 34 determination. It is submitted that this was in clear

violation of section 10(2) of NERA, which stipulates that any decision of NERSA and the reasons therefor must be available to the public. NERSA's conduct was in any event clearly in violation of the constitutional principle of accountability, responsiveness and openness. As discussed above, only on 16 March 2016 did NERSA belatedly provide its record in relation to the 2013 s 34 Determination – without apology or explanation for the delay.

87. It is submitted that, in addition to denying the applicants (and other members of the public) an opportunity to make representations to the Minister and NERSA before their respective decisions were made, the procedural unfairness was compounded by the Minister's and NERSA's failure to communicate the decision to the public for a period of two years, and by their failure to respond to Pole's queries regarding the existence of any such determination. By doing so, the Minister and NERSA effectively shielded the nuclear s 34 determination decisions from public scrutiny, and prevented the applicants (and any other members of the public who had an interest) from exercising their constitutional right to challenge these irregular and procedurally unfair decisions on review. That shielding took place with a clear ulterior purpose: to proceed apace with steps to effect procurement, including the signing the Russian IGA and commencing the drafting of the RFP, as discussed in the founding affidavit – and to do so without affording the public an opportunity to comment properly by bypassing the requirements of public participation and openness, all the while through hiding the fact of the decision from the public's gaze.

88. In this regard the Minister thus deliberately kept the applicants and the public in the dark about her intention (only revealed two years after the fact in the teeth of this litigation) to publish the 2013 s 34 Determination by notice in the *Gazette*. As a consequence, the applicant and members of the public were again denied the opportunity to make representations to her regarding this decision. As a result, the Minister's decision to gazette the s 34 Determination was also procedurally unfair.

89. In light of the above, it is submitted that:

89.1 the Minister's and NERSA's s 34 Determination decisions, and the Minister's subsequent decision to keep the Determination private and then only make it public by promulgation in the *Gazette*, were unconstitutional because they were procedurally unfair (and are therefore reviewable in terms of section 6(2)(c) of PAJA);

89.2 NERSA's decision to concur failed to comply with a mandatory and material procedure or condition of an empowering provision (namely section 10(1)(d) of NERA) (and is therefore reviewable in terms of section 6(2)(b) of PAJA).

2. The unlawful delay in gazetting the 2013 s 34 Determination decision

90. The applicants aver that the publication of the 2013 s 34 Determination two years after it was made constitutes an unreasonable delay in the decision-making process, and was in violation of the applicants' rights to just administrative

action and violates the principles of open and accountable government.

91. I am advised that as a matter of law, while the ERA does not expressly require that section 34 determinations be gazetted, it is clear that such decisions must be made public in order for them to have final legal effect (for instance, so as to provide a basis for nuclear procurement). This is consistent with the fact, as discussed above, that the Minister took the view that the 2013 s 34 Determination, which had not been made public, should be gazetted prior to the RFP being released; and that in 2013 the then Minister specifically approved not only the signing of the s 34 Determination, but its gazetting.

92. I point out that the recommendation made by the Director-General: Energy to the Minister (**PL43.1**) (signed on 8 November 2013) was that the Minister:

"7.1 approves the s34 determination in **Annexure A** for promulgation in the government gazette, ***so that*** the Nuclear Procurement process can be launched."

93. Recommendation 7.1 forms part of recommendation 7. On 11 November 2013 the Minister signed off below this recommendation, indicating:

"Recommendation 7: Approved"

Annexure A to the recommendation is the nuclear s 34 determination substantially in the format belatedly published by notice in the *Gazette* by the Minister in December 2015 (save for one small qualification at the end of paragraph 1 of the determination, which I discuss in paragraph 136 below).

94. The recommendation as approved by the then Minister clearly and explicitly required that the nuclear s 34 determination be published in the *Gazette* and the purpose was so that the nuclear procurement process could commence. It follows that for this administrative action to be reasonable, rational and lawful, the 2013 s 34 Determination should have been published in the *Gazette* within a reasonable period of time, after NERSA had given its concurrence, and, given the legal purpose for the s 34 Determination, prior to the commencement of any procurement process.

95. I also point out that the Director-General's letter to the Minister dated 01 December 2015 **(PL43.12)** also acknowledges that the nuclear s 34 determination needed to be published in the *Gazette:*

> Although the determination process was completed in 2014 [*this date may be a reference to the fact that NERSA's letter to the Minister confirming its December 2013 concurrence was only received on 6 January 2014*] with NERSA and signed by the previous Minister of Energy, Ben Martins, the determination was not gazetted due to change (sic) in the leadership in the Ministry and to further conduct some work prior to gazetting. As a result, there has been progress in the nuclear build work done by the Department and relevant stakeholders, it is therefore deemed appropriate to publish it. The determination needs to be gazetted...".

96. There is no indication what this work to be conducted prior to gazetting was – and no evidence thereof in the record. However, this at least indicates that the Minister took the view that the s 34 Determination would not have legal effect (and thus provide the basis for the nuclear procurement), until promulgated in the gazette (otherwise, it would make no sense to suggest that gazetting was intentionally delayed so further work could be undertaken).

97. Nevertheless, even if the Minister intended to delay gazetting for this purpose (to allow further work to be done), there is no explanation as to why the fact that the Minister and NERSA had concurred in a decision was not made public – at least since ESKOM and the MPE were immediately advised of the fact (as indicated earlier, see **PL43.4** and **PL43.5**).

98. The Minister approved the Director-General's recommendation to gazette the 2013 s 34 Determination on 8 December 2015, and the s 34 Determination was gazetted on 21 December 2015, some two years after the determination was made. As indicated above, this was the first time that the 2013 s34 Determination was made public.

99. This internal memorandum, makes clear that the Minister and the DOE (her department) accepted that for the s 34 Determination to be given legal effect to, and so that it could be relied upon, it needed to be gazetted. This is also made clear from the 26 December 2015 Media Statement, discussed above.

100. Yet, despite a significant delay, between when NERSA concurred in the 2013 s 34 Determination, and gazetting, NERSA was not consulted, nor did they concur in the decision belatedly to gazette the s 34 Determination (this is made clear by the record, including the fact that NERSA in their letter of 16 March 2016 (**PL47**), confirms that there was no record of any consultation by the Minister of NERSA in relation to the decision to gazette the Determination). This is particularly relevant, given that, the approach taken by the Minister appears to make clear that the 2013 s34 determination could only be relied upon once

gazetted. However, although NERSA had been willing to concur in the decision two years earlier, the Minister could hardly take for granted after so significant a delay, that it would have necessarily concurred in the s 34 Determination in its unaltered form in 2015. In those two years, there may well have been material reasons for NERSA to question the amount of nuclear new generation capacity required (indeed, even in 2013, it had substantial concerns in this regard, as discussed below).

101. This is significant, since its 26 December 2015 media statement titled *'Progress with the Nuclear New Build Programme'* (**PL50**), the DOE provided the following explanation for the belated publishing of the 2013 nuclear s34 determination:

> "It should be noted further that the current process is guided by the Integrated Resource Plan for Electricity 2010-2030 which was first gazetted in May 2011... on 9 December 2015, the present Minister of Energy, Ms Tina Joemat-Pettersson, consented that the determination signed in 2013 could be released, particularly as nothing had changed in the Integrated Resource Plan for Energy in the intervening period."

102. While it is correct that the IRP2010 had not changed, at the time when the Minister made her decision to publish the s 34 Determination the IRP2010 relied upon was already over four years old.

103. It is evident that NERSA was not provided an opportunity to consider this issue (an opportunity which apparently the Minister afforded unlawfully only to herself).

104. Of course, NERSA may well have taken a different view, had its concurrence been sought (as was lawfully required), since even when it gave its concurrence in 2013 to the s 34 Determination, it had already raised concerns in relation to the forecasts contained in the IRP (which it viewed even in 2013 as including overstated electricity forecasts) – as discussed below.

105. Even though the Minister, purported to consider the issue of whether to gazette the 2013 s 34 Determination she failed to take into account that relevant and material changes had taken place in the energy sector and economy during the intervening period. That such changes had occurred was recognised by the DOE in its draft IRP2010 update document published on its website on 21 November 2013, ten days after the then Minister had signed the nuclear s 34 Determination, and inviting public comment by 7 February 2014 (these uncertainties are briefly described in paragraphs 45 to 47 of my founding affidavit). These changed circumstances and uncertainties were relevant considerations that should have served as clear warning bells to the Minister, and she should have applied her mind to these changed circumstances before putting the 2013 s 34 Determination into effect by publishing it in the *Gazette.*

106. It is submitted that the Minister failed to take into consideration relevant and material changes in the energy sector and economy since the nuclear s34 determination was signed in 2013.

107. In those circumstances, the failure to gazette (or otherwise make public) the s34 Determination for two years, and the manner in which it was finally gazetted is

unreasonable, irrational and unlawful for the following reasons:

107.1 The failure to make the determination public by publication in the *Gazette* for two years was in violation of the requirements of open, transparent and accountable government (in terms of section 1 of the Constitution), and the need for a transparent procurement system (as required by section 217 of the Constitution), and the requirement in section 10(2) of NERA that all decisions of NERSA (which would include its concurrence) be made available to the public; and/or

107.2 NERSA did not concur (nor was their concurrence sought) in the decision to gazette the 2013 s 34 Determination in an unaltered form, some two years after the determination were first made. This constituted a violation of the requirement to comply with a mandatory empowering provision (section 34 of the ERA), as required by the principle of legality and section 6(2)(b) of PAJA.

107.3 The Minister failed to properly apply her mind to the question of whether the 2013 s 34 Determination (in particular in relation to the requirement for 9.6GHW of nuclear energy) was still appropriate in December 2015 – a violation of the requirements of reasonableness, rationality, and the requirement to have regard to relevant considerations (as required by section 6 of PAJA and/or the principle of legality).

3. No specific system for the procurement of nuclear new build capacity in violation

of s 34 of the ERA, read with s 217 of the Constitution

108. In paragraphs 194 to 206 of the applicants' founding affidavit, I set out the reasons why the applicants contend that the Minister's and/or the government's decision and/or actions in commencing and proceeding with the procurement of nuclear energy without there first having been an ERA nuclear procurement decision, is unlawful and unconstitutional.

109. While at the time of deposing to the applicants' founding affidavit the 2013 s 34 Determination had not been made public, I made the point in my founding affidavit that, even assuming that a proper ERA nuclear requirement determination had been made, having regard to the fundamental importance to the country of the procurement of nuclear energy, and on a proper construction of section 34(1)(e), there would need to be in place a specific system for the procurement of nuclear new generation capacity, and that no generic procurement system would meet the requirements of section 217 of the Constitution (see specifically paragraphs 194 and 195, as well as paragraphs 196 to 206 of my founding affidavit).

110. Thus, as made clear in the relief sought in prayers 3 and 4 of the original notice of motion, a lawful ERA nuclear procurement system decision would require that the procurement system to be used be specified in advance of the procurement itself.

111. With regard to a system of procurement for nuclear energy the 2013 s 34

Determination (**PL42**) provides only as follows:

> 2. electricity produced from the new generation capacity ("the electricity"), shall be procured through tendering procedures which are fair, equitable, transparent, competitive and cost effective.

112. This wording is tautological – it simply repeats the wording used in section 34(1)(e)(i) of the ERA, namely that the Minister may, in consultation with NERSA, require that new generation capacity must be established through a tendering procedure which is fair, equitable, transparent, competitive and cost-effective. In so doing the 2013 nuclear s 34 determination wording is identical to the wording used in section 217 of the Constitution (save that the word section 217 refers to a "system" rather than a "procedure").

113. By simply reiterating the wording used in the empowering statutory provision, the 2013 s 34 Determination was incomplete and defective. It is submitted that the legislature could not have intended by including section 34(1)(e)(i) in the ERA that the Minister and NERSA would have a discretion regarding whether or not to comply with section 217 of the Constitution – such an interpretation would lead to absurdity. Rather what must have been the purpose of the section was that the Minister and NERSA were empowered and enjoined to prescribe the procurement process or system to be followed (which would need to be fair, equitable, transparent, competitive and cost-effective).

114. Therefore, as was submitted in the applicants' founding affidavit (see paragraphs 197 to 201), on a proper interpretation of this section, once a determination was

made that new generation capacity deriving from nuclear energy was required, the Minister, with the concurrence of NERSA, was required to specify a system for the procurement of nuclear power to meet the requirements of section 34(1)(e) of the ERA (read with section 217 of the Constitution).

115. Furthermore, the 2013 s 34 Determination clearly recognised that the DOE would be given a free hand to conduct procurement on an ad hoc basis in any manner that the DOE saw fit. This is so since the Determination provided that:

> "5. the procurement agency in respect of the nuclear programme will be the Department of Energy;
> 6. the role of the procurement agency will be to conduct the procurement process, including preparing any requests for qualification, requests for proposals and/or all related and associated documentation, negotiating the power purchase agreements, facilitating the conclusion of the other project agreements, and facilitating the satisfaction of any conditions precedent to financial close which are within its control;"

116. Therefore, it is clear from the 2013 s 34 Determination that the Minister (with NERSA's concurrence) failed to specify a system for the procurement of new electricity generation capacity derived from nuclear energy. This constituted a violation of section 34(1)(e). It is submitted that inter alia, a lawful section 34(1)(e) decision is required to specified the procurement process or system to be followed. For instance this would include specifying certain issues: for instance, the nature of the tendering process, whether a Request For Qualifications (RFQ) would be required (which would request an expression of interest on the part of potential contractors), and when and by whom it would be developed and published, when and by whom the Requests for Proposals (RFP)

would be developed and published (including the specification of criteria that would be applied), and the process of adjudication (including who the adjudicators would be and how they would be selected).

117. By failing to specify a system for the procurement of new electricity generation capacity derived from nuclear energy, the Minister and NERSA have violated section 34(1)(e)(i), and the requirements of section 217, including that procurement must occur in terms of a transparent system.

118. It is also relevant to emphasise again, that no opportunity for public comment (or other form of public participation) on the Minister's decision in terms of section 34(1)(e) was afforded by the Minister or NERSA to the applicants (or any other members of the public). As set out above, this constituted a violation of the requirements of procedural fairness, as set out in section 4 of PAJA, and it violated the requirements of the NERSA Act, and therefore is reviewable in terms of section 6(2)(c) of PAJA.

119. The Minister's failure to specify a procurement system for new electricity generation capacity derived from nuclear energy is compounded by the fact that, while the Minister promulgated *Electricity Regulations on New Generation Capacity* that apply to the procurement of electricity new generation capacity by organs of state, the regulations expressly exclude new generation capacity derived from nuclear power technology (regulation 2(1) of GNR399 of 4 May 2011)) – this exclusion was specifically noted in NERSA's Report on the Minister's Nuclear Determination (**PL48** – "the NERSA Report"), which served

before NERSA when it took the decision to concur in the s 34 Determination. I note, for instance, that these regulations make provision in regulation 5 for feasibility studies to be undertaken and then set out mandatory considerations and outcomes for such studies, in section 5(2), if such studies are undertaken. This adds an additional layer of governance and oversight specifically tailored to energy procurement. The outcomes include 2(c) "the demonstration of the anticipated value for money to be achieved through the new generation project." Within the regulatory void that existed in relation to nuclear procurement, it was even more pressing that a lawful, reasonable, and rational decision in terms of section 34(1)(e)(i) required a detailed procurement system to be specified.

120. In conclusion, for the reasons set out above, the failure to specify the procurement system or process to be used rendered the 2013 s 34 Determination reviewable on one, more or all of the following grounds:

120.1 There was non compliance with a mandatory and material condition prescribed by an empowering provision (section 34(1)(e)(i) of the ERA) – in terms of section 6(2)(b) of PAJA and/or the principle of legality;

120.2 The decision was materially influenced by an error of law (to the extent the Minister and NERSA failed to appreciate that a system had to be specified) – in terms of section 6(2)(d) of PAJA and/or the principle of legality;

120.3 The decision was irrational – in term of s 6(2)(f)(ii) of PAJA and/or the principle of legality;

120.4 The decision was unreasonable – in terms of section 6(2(h) of PAJA.

4. *The ERA nuclear requirement decision contained in the 2013 s 34 Determination was irrational, unreasonable, and taken without regard to relevant considerations, or with regard to irrelevant considerations*

121. The applicants aver that the ERA nuclear requirement decision (that 9600 MW of electricity was required from nuclear power) by the Minister and NERSA, contained in the 2013 s 34 Determination, was irrational and unreasonable, and failed to take relevant considerations into account, and took irrelevant considerations into account.

a) The ERA nuclear requirement decision by the Minister

122. In the memorandum from the Director-General to the Minister dated 8 November 2013 in relation to the taking of the 2013 s 34 Determination (**PL43.1**), the '*Background and Motivation*' section states that:

> "The Department of Energy ("DoE") intends to prepare documentation for the procurement of approximately 9600MW of power from nuclear energy, which is in accordance with the capacity allocated under the Integrated Resource Plan for Electricity 2010-2030 (published as GN 400 of 06 May 2011 in Government Gazette no 34263) ("IRP 2010-2030")."

123. The document does not set out any other relevant considerations relating to the procurement of nuclear energy, including (but not limited to) issues such as affordability of nuclear power, potential negative impacts on electricity prices and potential socio-economic and environmental impacts. The document, and the Minister's subsequent decision to sign the nuclear s 34 determination three

days later, shows that there was a failure to appreciate that a policy-adjusted choice was made in the IRP2010 to commit to a nuclear fleet of 9600MW. The IRP2010 is a policy document that is not legislation and which cannot bind the discretionary power vested in the Minister by statute and the Constitution (see paragraphs 54 to 57 of my founding affidavit).

124. In addition, the Minister failed to take into account that while the IRP2010 was adopted as policy, it is acknowledged in the IRP2010 itself that it was a serious error not to conclude or release a socio-economic impact study, that further research was required on the full costs relating to specific technologies (including nuclear) around the costs of decommissioning and managing spent nuclear fuel, and that if the costs of the nuclear build turn out to be higher than assumed, this could increase the expected price of electricity (see paragraphs 43 and 44 of my founding affidavit).

125. It is also relevant to note that when the Minister signed off on the s 34 Determination in November 2013, the Minister's own department had already embarked on a process to update the IRP2010, with a IRP2010 update document published on the DOE's website on 21 November 2013, ten days after the Minister had signed the nuclear s 34 Determination (inviting public comment by 7 February 2014, an invitation that turns out to have been cynical in the extreme in light of the Minister's secret determination ten days earlier).

126. The draft IRP2010 update is a comprehensive technical document based on extensive and detailed research: the report itself consists of 114 pages of

information and recommendations together with Electric Power Research Institute (EPRI) research running into 276 pages. It contains wide ranging draft recommendations by the DOE, including with regard to possible future nuclear procurement, and signalled a material departure from the IRP2010 in regard to the procurement of a nuclear fleet. The draft IRP2010 update document also records that there had been a number of developments in the energy sector in South and Southern Africa since the IRP2010 was promulgated, that the electricity demand outlook has changed markedly from that expected in 2010, and that *'all these uncertainties suggest that an alternative to a fixed capacity plan as espoused in the IRP 2010 is a more flexible approach taking into account the different outcomes based on changing assumptions and scenarios and looking at the determinants required in making key investment decisions.*" These issues are described in more detail in paragraphs 45 to 47 of my founding affidavit.

127. Furthermore, despite the requirement set out in the IRP2010 that further research as to the full cost of nuclear was required, the IRP2010 update records that this has been difficult to achieve, and yet this costing was highly relevant, since if the nuclear capital costs were to be over a certain level this would militate in favour of the adoption of an alternative energy generation source. In particular the report records that "*[a] persistent and unresolved uncertainty surrounds nuclear capital costs*"[21] and goes on to state that "*[i]f it is clear that there is no*

[21] IRP2010 update report para 3.3.

commitment to nuclear capital cost below $6500/KW then procurement should be abandoned as the additional cost would suggest an alternative technology instead."[22]

128. What is immediately obvious is that none of these material changes and considerations, so clearly reflected in the draft IRP2010 update document, were of any moment to the Minister. The Minister blithely ignored them.

129. That is not to say that the Minister was not aware of them. At the time of signing the 2013 s 34 Determination, the Minister of course knew of the draft IRP2010 update. A certified copy of NERSA's *'Extract of the Minutes of the Energy Regulator Meeting No. 96 of 26 November 2013'* (**PL43.3**) filed as part of the supplementary record indicates at paragraph 5.2(b) that *'[t]he Minister has however since informed NERSA in a letter dated 22 November 2013 that an updated IRP has been published on the Department of Energy's website for comment'*. The letter referred to was, curiously, not included in the supplementary record filed by the Minister and the President. Pole has written to the State Attorney requesting a copy, but no response was received.[23]

130. It is clear, with respect, that the Minister unreasonably and irrationally placed unqualified reliance on the IRP2010 (a policy document), and to make matters worse the Minister did so when the Minister knew that the IRP2010 update

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[22] Ibid para 12.5.2 (emphasis added).
[23] See section VIII: DIFFICULTY IN OBTAINING RULE 53 RECORD.

process was underway (with public comment still awaited on the draft prepared by the DOE), which already indicated that different conclusions had been reach in the subsequent two years (since IRP2010 was finalised) and which had indicated a change in approach to nuclear procurement. As a result, the Minister failed to take relevant considerations recorded in the draft IRP2010 update into account, and his decision was unreasonable and irrational.

131. Having regard to the uncertainties relating to the need for a fleet of nuclear power stations revealed in the draft IRP 2010 update, and with the 2013 s 34 Determination already pre-emptively signed by the Minister and NERSA by the time the public comment period closed on 7 February 2014, it is unsurprising that the IRP 2010 update never saw the light of day (see paragraph 49 of my founding affidavit).

132. In paragraph 147 of my founding affidavit, it was highlighted that section 2 of the National Environmental Management Act, 1998 (NEMA) sets out a list of principles that apply throughout South Africa to the actions of all organs of state that may significantly affect the environment and which apply alongside all other appropriate and relevant considerations, including that a risk averse and cautious approach is applied which takes into account the limits of current knowledge about the consequences of decisions (see section 2(4)(a)(vii)). It is submitted that the Minister failed to apply a risk averse and cautious approach notwithstanding incomplete information provided and/or relied upon in the IRP2010 regarding socio-economic impacts of the nuclear fleet build

programme, as well as uncertainty regarding the full costs of decommissioning of a fleet of nuclear reactors and managing spent fuel. To this day, NERSA confirms that it has never done such a costing. On 9 March 2016, in the Business Day, it was reported that NERSA's Mr Thembani Bukula told Parliament that "...Nersa had not undertaken any modelling of what a nuclear build programme would do to the cost structure of electricity". A copy of the media report is attached marked '**PL51**'.

133. In conclusion, the Minister's ERA nuclear requirement decision in the 2013 s 34 Determination violated the requirements of PAJA and the principle of legality (which requires decisions to be substantively and procedurally rational and taken in good faith) in one, more, or all of the following grounds:

133.1 The Minister's decision was taken because irrelevant considerations were taken into account or relevant considerations were not considered – in having unconsidered reliance on the IRP2010, and having no regard to the draft 2010 Update and the process that was still to be concluded – it is therefore reviewable in terms of section 6(2)(e)(iii) of PAJA and/or the principle of legality.

133.2 The Minister's decision was taken in bad faith and/or unreasonably and/or irrationally, given that the decision was taken secretly without any public participation process, when the Minister's department had called for comments on the IRP2010 Update, which was relevant to the nuclear power required, and which comments were rendered

meaningless inasmuch as they were required to be submitted only after the Minister had taken the impugned decision – it is therefore reviewable on the basis that the decision was unreasonable and irrational (in terms of sections 6(2)(f)(ii) and (h) of PAJA) and/or taken in bad faith (in terms of section 6(2)(e)(v) of PAJA), and in violation of the principle of legality on the basis that the decision was irrational and/or vitiated by bad faith.

133.3 The Minister's decision was furthermore unlawful because it failed to comply with a mandatory requirement of law and/or was motivated by a material error of law inasmuch as the Minister failed to give proper effect, or any effect at all, to the obligatory requirements in NEMA to ensure that a risk averse and cautious approach was applied which takes into account the limits of current knowledge about the consequences of decisions (see section 2(4)(a)(vii)) of NEMA).

b) ERA nuclear requirement decision by NERSA

134. Section 10(1)(e) and (f) of NERA provide together that every decision of the Energy Regulator must be in writing and must be based on reasons, facts and evidence that must be recorded, and explained clearly as to its factual and legal basis and the reasons therefor.

135. The record provided by the Minister and the President includes a letter dated 11 November 2013 from the Minister to the Chairperson of NERSA (**PL43.2**). The stated purpose of this letter is to *'request confirmation of Nersa's concurrence in*

the proposed determination'. It attaches a copy of the 2013 s 34 Determination, and contains a request that the Chairperson *'confirm NERSA's concurrence with the terms of the Determination by responding to this letter and attaching a certified copy of the applicable NERSA decision'*. NERSA is invited to contact the DOE's Deputy Director-General: Policy and Planning with any queries or concerns.

136. In the letter dated 20 December 2013 from NERSA to the Minister in reply **(PL43.3)**, it advised that *'[t]he Energy Regulator, at its meeting on 26 November 2013, resolved to concur with the Minister of Energy..."*. This letter reiterates the wording of the draft determination provided by the Minister, save for the addition of the words ***'or as updated) [our insertion]'*** after the words *'IRP2010-2030'* at the end of paragraph 1. Nothing seems to turn on these words that were added, which clearly did not change the determination that 9600 MW of nuclear new generation capacity was required, and which appear to merely repeat what was always stated in paragraph 3.[24] This is the same wording used in the jointly signed 2013 s 34 Determination filed as part of the record in these proceedings (and as published in the *Gazette*), which appears to indicate that the Minister accepted this addition as merely an editorial addition, which was retained in the final determination. As I explain elsewhere in this supplementary affidavit and below, the draft IRP2010 update published on the DOE website on

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[24] Paragraph 3 provided that "*the nuclear programme shall target connection to the Grid as outlined in the IRP2010-2030* ***(or as updated)***".

21 November 2013 inviting public comment by 7 February 2014 was never updated.

137. Attached to NERSA's letter as Appendix A is a *'certified copy of the NERSA decision on the Nuclear Procurement Programme'* ("the NERSA decision"). The NERSA decision comprises of NERSA's *'Extract of the Minutes of the Energy Regulator Meeting No. 96 of 26 November 2013'*. The following is noted from these Minutes:

137.1 The meeting was attended physically by three members, with two members attending by way of 'Teleconference' (paragraph 1.1.1).

137.2 The Chairperson of NERSA was absent from the meeting, being on *'Private business'*.

137.3 A report on the concurrence with the Minister of Energy on the new generation capacity determination is referred to (paragraph 5.2), but was not included in the supplementary record of the Minister and the President (since it apparently was not sent to the Minister). However, as indicated above, a copy of this report, the NERSA Report (PL48), formed part of NERSA's record belatedly provided on 16 March 2016.

137.4 The NERSA decision fails to record the facts and evidence contained in this report on concurrence, but indicates that *'in considering the report*

various queries were raised by Members to which Mr Bukula responded as follows'. These queries were as follows:

137.4.1 **First**, in relation to the issue of overstated forecasts, the Minutes indicate the following:

> "a. Overstated forecasts
> In October 2012, the Energy Regulator approved a determination from the Minister for renewable energy. Stated in the document was the fact that all the forecasts were overstated. The Energy Regulator approved despite having noted this because the relevant section requiring concurrence is section 34 which has specific regard to such matters as the new generation capacity, who the suppliers will be and the types of energy sources etc."

137.4.2 The NERSA Report elaborates on the overstated forecasts, indicating that:

> "(c) However, the forecasts of the IRP 2010 – 2030 appear to be overstated when compared with peak demand. For example, the peak demand in 2013 is about 36 000 MW as opposed to the peak demand of IRP2010 of 42 416 MW in 2013, which is more than 6000 MW below the IRP2010 forecast. Currently the IRP2010 is being revised with the main focus being the reduction of demand forecast
>
> (d) the significant reduction in the revised demand forecast of the CSIR will require the deferment of the commissioning dates of the New build options of the IRP2010 by about at least 5 years given the coal and renewable energy programs currently under construction".

137.4.3 It is clear from the above that NERSA's Report on concurrence in relation to the 2013 s 34 Determination raised the problem of overstated electricity demand forecasts in the IRP2010, and underscores that there was no pressing

need for NERSA to make a decision on concurrence on the 2013 s 34 Determination at the time (the NERSA Report indicates that the commissioning dates of new build options could be deferred by at least five years). It is not clear why the prior approval in October 2012 in relation to renewable energy is referred to in the NERSA decision (other than that it appears that the issue of overstated forecasts was an ongoing concern that NERSA had previously raised in relation to the section 34 determination for renewable energy).

137.4.4 NERSA gave its approval despite having noted that the electricity demand forecasts in the IRP2010 were overstated by as much as 6000 MW in 2013.

137.4.5 In seeking to justify this gross irregularity (ignoring its statutory role, and merely rubber stamping the determination, that it knew to be based on inaccurate information), NERSA states that it gave its approval despite the overstated electricity demand forecasts because *'the relevant section requiring concurrence is section 34 which has specific regard to such matters as the new generation capacity, who the suppliers will be and the types of energy sources etc.'*

M.J.

137.4.6 The reason offered is difficult to comprehend and is an exercise in obfuscation, whereas concurrence in such a critical context required nothing less than clarity of reasoning. What is clear is that overstated electricity demand forecasts are clearly a critical consideration when deciding whether or not to concur with a s 34 Determination for 9600MW of new electricity generation capacity deriving from nuclear energy, and simply making reference to the empowering statutory provisions demonstrates that NERSA failed to apply its mind properly to this highly relevant consideration, or worse simply viewed its concurrence as a statutorily-required rubber stamp (i.e. that it was required to approve the Minister's determination, regardless of its concerns).

137.4.7 Second, the record of NERSA's decision on concurrence, being the certified Extract of the Minutes, fails to record the reasons, facts and evidence upon which this aspect of the decision is based, and fails to explain clearly the factual and legal basis, and the reasons for, this aspect of the decision (a mandatory requirement of section 10(1)(e) and (f) of NERA).

M.J

137.4.8 Third, in relation to the issue of an outdated IRP, the Minutes indicate the following:

> "b. Outdated Integrated resource plan (IRP)
> The matter of the IRP being outdated stood true when the previous decision was taken (27 September 2012). NERSA amongst other things needs to be consistent as the Regulator.
> The Minister has however since informed NERSA in a letter dated 22 November 2013 that an updated IRP has been published on the Department of Energy's website for comment. NERSA will be commenting on the updated IRP."

137.4.9 This paragraph shows that NERSA was aware that the IRP2010 was out of date at the time when it made its decision on concurrence. However, NERSA side-stepped this highly relevant consideration by stating that this "*stood true*" when NERSA took its 27 September 2012 decision (it is assumed that this decision was its concurrence on the renewable energy determination), and that it needed to be 'consistent'. But then, incredibly, it chose deliberately to act inconsistently. It did so by fettering its own discretion regarding the 2013 s 34 Determination concurrence. If in 2012 NERSA was of the view (correctly) that the IRP2010 was outdated, it would of course have been even more outdated a year later in 2013, which would only have heightened the irregularity in failing to take this into account.

137.4.10 NERSA also apparently seeks to justify its decision by referring to the IRP update process that the Minister had informed it about, and states that it would comment on the updated IRP. This attempted rationalisation of the decision is itself irrational and unreasonable, since any concerns NERSA may have expressed in the IRP update process, would be legally irrelevant, at least in relation to nuclear procurement. That is because its concurrence would effectively give the necessary consent for the statutory s 34 Determination (which, as indeed occurred, would be used by the Minister to commence procurement of the 9600 MW of nuclear new generation capacity). NERSA provided its consent prematurely, and it knew it was doing so. As has been demonstrated earlier in this supplementary affidavit, the draft IRP2010 update was open for public comment until 7 February 2014, but this update process failed to see the light of day and the IRP2010 was never updated. Whatever comments NERSA may have made on the draft IRP update, they were rendered meaningless not only by the DOE's failure to finalise the IRP2010 update process, but by concurring in the making of the s 34 Determination (which had legal effect, allowing for procurement to proceed, unlike an IRP document).

M. B.

137.4.11 By pre-empting the draft update process notwithstanding its acknowledgment that the IRP2010 was out of date, NERSA took irrelevant considerations into account (the outdated IRP2010) and failed to take highly relevant considerations into account (as documented in the draft IRP2010 update). NERSA's decision was also unreasonable and irrational in the circumstances.

137.4.12 Fourth, in relation to the issue of levelised costs of electricity, the Minutes indicate the following:

"d. Levelised costs of electricity

With regard to the costs on the nuclear programme being double, the Energy Regulator noted the same issue in the previous determination on renewable energy. However, it should be noted that these issues have been raised with the Minister.

137.4.13 The NERSA Report elaborates on the implications of nuclear power on electricity prices, indicating that:

"(e) The overnight capital cost for the nuclear power plant are estimated at R26575 in the IRP 2010 – 2030. The current estimates of overnight capital costs based on the Areva/Mitsubishi nuclear plant construction in Turkey are about $4600/kW (R45 830/kW).

(f) The Levelised Cost of Electricity (LCOE) projected from overnight costs of R45 830/kW is R0.95/KWh (in 2013 ZAR).

M.J.

(g) The procurement programme for nuclear energy may have no impact on MYPD3[25] but will affect the MYPD4.

137.4.14 The above information read together shows that NERSA had information before it indicating that the overnight capital costs of a nuclear power plant[26] were already almost 'double' the overnight capital costs as estimated in the original IRP2010, and that this would have a knock-on effect on the levelised cost of electricity[27] and, inevitably, on the price of electricity as determined by NERSA.

137.4.15 NERSA seeks to justify its decision by again referring to a prior determination it made relating to renewable energy, while also rationalizing the decision by stating that "these issues have been raised with the Minister". NERSA never explains (and there is nothing in the record in this regard) that the Minister gave any explanation, or if such explanation was given, how it was regarded as acceptable by NERSA. The inference that NERSA acted supinely by abdicating its responsibility to the Minister is overwhelming. It is submitted

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[25] The acronym 'MYPD' refers to Multi Year [electricity] Price Determinations, made by NERSA on application by Eskom. MYPD3 refers to Eskom's third Multi Year Price Determination, which runs for five years and is scheduled to continue until 31 March 2018.

[26] The overnight capital costs of a nuclear power plant are the costs of construction as if the plant was built 'overnight' but typically excludes the cost of finance.

[27] The IRP2010 states that the 'levelised cost of energy' refers to 'the discounted total cost of a technology option or project over its economic life, divided by the total discounted output from the technology or project over the same period, i.e. the levelised cost of energy provides an indication of the discounted average cost relating to a technology option or project'.

that NERSA again not only fettered its own discretion, but failed to apply its mind properly and independently to this highly relevant consideration.

137.4.16 In so doing NERSA took irrelevant considerations into account (the prior renewable determination and its raising of the cost issue with the Minister) and failed to take highly relevant considerations into account (as documented in the draft IRP2010 update).

137.4.17 NERSA's decision was irrational and unreasonable in the circumstances. Despite the various and serious concerns reflected in the Minutes, it failed properly and independently to exercise its power of concurrence, thus rendering itself a mere pawn of the Minister.

138. It is further submitted that NERSA also failed to apply a risk averse and cautious approach (as required by section 2(4)(a)(vii) of NEMA) when making its decision in concurrence on the 2013 s 34 Determination notwithstanding the information that served before it indicating the forecasts were overstated, the IRP2010 outdated, and that the overnight capital cost of a nuclear power plant was almost double that estimated in the IRP2010.

139. In conclusion, for the reasons set out above, NERSA's decision to concur in the ERA nuclear requirement decision in the 2013 s 34 Determination violated the

requirements of PAJA and the principle of legality (which requires decisions to be substantively and procedurally rational and taken in good faith), on one, more or all grounds:

139.1 NERSA's decision was taken because irrelevant considerations were taken into account or relevant considerations were not considered – it is therefore reviewable in terms of section 6(2)(e)(iii) of PAJA and/or the principle of legality.

139.2 NERSA's decision was also taken because of the unauthorised or unwarranted dictates of another person or body – it is therefore reviewable in terms of section 6(2)(e)(iv) of PAJA and/or the principle of legality.

139.3 NERSA's decision was unreasonable (and therefore reviewable in terms of section 6(2)(f)(h) of PAJA) and irrational, and therefore reviewable in terms of section 6(2)(f)(ii) of PAJA and the principle of legality on the basis of irrationality and/or that the decision was vitiated by bad faith.

VI. ACCOUNTABILITY, OPENNESS, TRANSPARENCY

140. Prior to considering the remedy that this Court should grant, given the basis of what has been set out in the founding affidavit as supplemented by this affidavit, I emphasise that it is important for this Court to approach this matter within the

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proper constitutional framework.

141. The President, the Minister and NERSA are organs of state, and their actions effectively provide the framework in which South Africa will be committed to spend approximately R1 trillion (R1000 Billion) in the procurement of eight nuclear power plants – this has significant financial, social and environmental implications for the country and its people. The Minister's and NERSA's actions are pre-eminently public matters, pursuant to the exercise of significant public powers, and are subject to the fundamental constitutional principles of openness, transparency and accountability.

142. The Constitutional Court has succinctly summarised the position[28] thus "*[t]he founding values of our Constitution include a democratic government based on the principles of accountability, responsiveness and openness.*[29] *The public administration, which includes organs of state,*[30] *'must be accountable',*[31] *and '[t]ransparency must be fostered by providing the public with timely, accessible and accurate information.'* "[32]

143. As organs of state, the President, the Minister and NERSA also have duties to "*assist and protect the courts to ensure the independence, impartiality, dignity,*

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[28] AllPay II para 50 (footnotes retained from the original).

[29] Section 1(d).

[30] Section 195(2)(b).

[31] Section 195(1)(f).

[32] Section 195(1)(g).

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accessibility and effectiveness of the courts" in terms section 165(4) of the Constitution. Courts can only function effectively if they are in possession of all material evidence. Section 165(4) of the Constitution imposes a duty on the respondents to assist the courts to ensure, *inter alia*, their effectiveness. This involves a positive obligation to place relevant and material evidence before a court of law.

144. Furthermore, the requirement for transparency is made more pressing when the issues relate to procurement, as in the current matter, since section 217 makes clear that procurement must comply with a system that is transparent. I am advised that the Supreme Court of Appeal has held that:

> When the Constitution, in section 217, requires that the procurement of goods and services by organs of State shall be transparent, its purpose is to ensure that the tender process is not abused to favour those who have influence within the institutions of the State or those whose interests the relevant officials and office bearers in organs of State wish to advance. It requires that public procurement take place in public view and not by way of back door deals, the peddling of influence or other forms of corruption.[33]

145. Notwithstanding, these constitutional requirements, and the important ends they serve (inter alia to protect against corruption), the entire nuclear procurement process has remained shrouded in secrecy. This has created serious concerns. For instance, the Minister's failure to specify a procurement system for nuclear energy raises the risk – and the public perception of the risk – that tender specifications (or criteria) could be slanted to favour a specific bidder, and that a

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[33] *South African National Roads Agency Limited v Toll Collect Consortium and another* [2013] 4 All SA 393 (SCA), at paragraph 18.

decision on procurement will be pushed through regardless of affordability and socio-economic impacts. Having regard to the anticipated costs of the nuclear fleet procurement programme, this could be economically and socially catastrophic.

146. The President, the Minister and NERSA have signally failed to fulfil their constitutional obligations of accountability and transparency in relation to the nuclear procurement at issue in this matter, including their duties to this Court, for the following reasons:

146.1 The Minister and NERSA failed to advise the public or the applicants, despite direct and pertinent requests for information, that the s 34 Determination had been taken.

146.2 The Minister then only gazetted the s34 Determination and made it public, on the advice of the Minister's counsel to try to gain an advantage in this litigation. In other words, it was in response to this litigation that the Minister was moved to a modicum of openness.

146.3 The President and Minister delayed in providing a complete record and the record provided appears to have been deliberately filleted (as discussed in detail below).

146.4 The facts now reveal that while the Minister was seeking public input on the 2010 IRP update, the Minister was nevertheless secretly making a s

34 Determination without awaiting any input from the public.

146.5 NERSA only belatedly – and when it could no longer be avoided – provided information on its concurrence on the 2013 s 34 Determination concurrence by email on 16 March 2016 – the details of which I have already provided earlier.

146.6 The public input process has been rendered a sham and/or deliberately undermined.

146.7 The Minister and NERSA made the s 34 Determination without any public involvement – no public participation process was used.

146.8 The s 34 Determination did not set out and specify the procurement process or system to be used, but rather it gave the DOE a free hand to determine how to procure the nuclear power and to do so by way of an ad hoc procedure not open to public scrutiny.

146.9 As discussed below, despite the need to obtain a copy of the RFP (which apparently has been released), so that the time-frame for procurement and its nature may be understood, the Minister and the President simply ignored the applicants' request.

146.10 The failure of openness and proper public participation is not only the case in relation to the s 34 Determination. Indeed, the government has deliberately bypassed the legislature and undermined any public

participation by failing – despite the advice of the State Law Advisor – to table the Russian IGA under section 231(3) of the Constitution rather than section 231(2). That, on the back of a behind-the-scenes agreement being concluded between the Minister and Rosatom for the construction of nuclear power plants in South Africa, and which confirms (despite the best efforts by the government to backtrack after the revealing joint media conference by the Minister and Rosatom) that the government in advance has effectively fettered its discretion in favour of Russia.

VII. RELIEF SOUGHT

147. As indicated above, a consideration of the record has necessitated certain amendments being made to the notice of motion. An amended notice of motion is accordingly filed together with this affidavit. The main change is that prayer 4 has been amended, to rather seek to review and set aside the 2013 s 34 Determination that has now been gazetted.

148. As they were rightly obliged to do in the interests of open an accountable government and the need to expeditiously deal with the lawfulness of the important decisions under review, the Minister and NERSA have already provided the relevant record in relation to the 2013 s 34 Determination:

148.1 The correspondence makes clear that the Minister has already provided the record in relation to the s 34 Determination (including the decision

to belatedly gazette the s 34 Determination) in response to the initial notice of motion and the correspondence (as discussed below);[34]

148.2 Moreover, NERSA has also now provided its record in relation to the 2013 s 34 Determination.[35]

148.3 Given that NERSA was given ample time to provide the record (indeed from the time Pole first wrote to NERSA until NERSA belatedly provided its record, was a period of two months). Their letter makes plain that the documents they have provided are the only documents forming part of NERSA's record in relation to the 2013 s 34 Determination. NERSA also makes plain that there are no documents relating to any attempt to consult with them prior to the decision to gazette the 2013 s 34 Determination (this is not surprising, since the record provided by the Minister does not suggest that any concurrence was sought from NERSA in relation to the decision to gazette).

149. Therefore, since the Minister, the President and NERSA do not suggest that there are any further documents that form part of the records of the decisions under review in terms of the amended Notice of Motion, their election in this regard means that there are no further records by the President, the Minister or NERSA.

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[34] See below heading VIII DIFFICULTY IN OBTAINING RULE 53 RECORD.
[35] See above heading III.C NERSA's record in relation to the 2013 s 34 Determination.

150. In the circumstances, the amended notice of motion calls upon the President and the Minister to file their answering affidavits (since they have already delivered their notice of intention to oppose), and calls upon NERSA (and any other Respondents) if they wish to oppose the relief sought, to deliver their notices of intention to oppose, and thereafter to deliver their answering affidavits.

A. Prayer 1 - Relief in relation to the Russia IGA

151. The legal basis for the relief sought in relation to the Russian IGA, which has not been amended, has been set out in the founding affidavit (as summarised in paragraphs 212 to 215).

152. As discussed above,[36] this has been amplified by the documents in the record, and the further grounds of challenge arising from this documentation.

153. Therefore, in terms of section 172 of the Constitution this Court is required to declare the signature of the Minister, the authorisation of the President, and the tabling by the Minister, unconstitutional and it is appropriate and just and equitable to set aside those decisions.

B. Prayer 2 – Relief in relation to the tabling of the US and South Korean IGAs

154. The legal basis for the relief sought in relation to the US and South Korean IGAs, which has not been amended, has been set out in the founding affidavit (as

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[36] See sections IV.A and IV.B.

summarised in paragraphs 216 to 217).

155. The grounds of challenge have been amplified by the fact that no documentation in the record indicates that there was any factual basis for, or consideration of, the unreasonable delay in tabling these IGAs before Parliament.

156. Therefore, in terms of section 172 of the Constitution it is required for this Court to declare the Minister's decisions to table these IGAs unconstitutional and it is appropriate and just and equitable to set aside those decisions.

C. Prayer 3 – declaration relief in relation to section 34 of the ERA

157. In prayer 3, which has not been amended, the applicants have sought a declaratory order which confirms the necessary decisions which must be made under section 34, their content, and the manner in which they must be made, prior to the commencement of procurement nuclear new generation capacity. The basis for this relief is summarised in the founding affidavit in paragraphs 219 to 223.

158. It is submitted that while the record now reveals for the first time that a section 34 determination has been made and that the Minister appears to accept that it was a prerequisite to have taken the ERA nuclear requirement and nuclear procurement system decisions prior to commencement of the procurement of nuclear power plants, it is still necessary for this declaration to be made. This is so for the following reasons:

158.1 First, in order to confirm the requirement that a lawful ERA nuclear requirement decision and the ERA nuclear procurement system decisions are both required prior to the procurement process commencing. This is particularly so, since the 2013 s 34 Determination was only gazetted after the procurement process had begun (for instance the 26 December 2015 press statement makes clear that the RFP had already been drawn up prior to the gazetting).

158.2 Second, since the 2013 s 34 Determination was taken without any form of public participation (by which is meant compliance with the requirements of procedural fairness in section 4 of PAJA), it is thus necessary to clarify that such public participation is a requirement.

158.3 Third, to make clear that there needs to be a procurement system specified in the s 34 Determination, not merely a repetition of the words of section 34(1)(e)(i), and that without this, any *ad hoc* procurement process followed will be unlawful.

D. Prayer 4 – the unlawful 2013 s 34 Determination

159. Prayer 4 was previously predicated on the fact that no section 34 determinations had been made. Prayer 4 has now been amended to take account of the fact that the record now reveals that the 2013 s 34 Determination was taken in 2013 and gazetted in 2015.

160. Therefore, the following relief is now sought:

160.1 Declaring that the determination under section 34(1) of the ERA gazetted on 21 December 2015 (GN 1268, GG 39541) in relation to the requirement and procurement of nuclear new generation capacity, signed by the Minister on 17 December 2013, with the signed concurrence by NERSA on 11 November 2013 ("the section 34 Determination"), is unlawful and unconstitutional, and is reviewed and set aside.

160.2 Setting aside the Request for Proposals issued by the DOE pursuant to the section 34 Determination.

161. The unlawfulness and unconstitutionality of the 2013 s 34 Determination and its subsequent gazetting are dealt with above. It is clear that the decisions by the Minister and NERSA were in violation of PAJA, the requirements of legality, section 34 of the ERA and section 10 of NERA.

162. It is submitted that it is therefore just and equitable to declare unconstitutional and set aside the s 34 Determination as gazetted. There is no proper basis to suspend the setting aside. The procurement of nuclear power, which is significant at a financial, socio-economic, and environmental level, and will have implications for South Africa for decades, cannot be allowed to be based on an unlawful and unconstitutional determination. There is therefore no justification to suspend the effect of the unconstitutionality.

163. Given the declaration sought in prayer 3 coupled with the order sought in prayer 4, this would mean that any steps in the procurement process would also be unlawful and invalid, since they would be based on an unlawful section 34 Determination, which is a legal prerequisite for nuclear procurement.

164. Therefore, for the avoidance of doubt as to the legal consequences flowing from prayer 4, read with prayer 3, a specific order is sought setting aside the RFP prepared by the DOE. The RFP would appear to have been finalised, or imminently to be finalised, and apparently has been, or will shortly, be issued to relevant prospective bidders (although not made public). This appears from:

164.1 the DOE 26 December 2015 Media Statement, which provides the background to the decision to gazette the s 34 Determination, and wherein it is noted that on 9 December 2015, "*Cabinet approved that ...the Department of Energy should issue the Request for Proposal (RFP) for the Nuclear New Build Programme of 9600MW of nuclear power.*" It was further noted that "*[i]n order to proceed with the Request for Proposals as agreed by Cabinet on 9 December 2015 it was necessary to ensure that the National Electricity Regulator of South Africa (NERSA) has been consulted on the appropriate energy mix and particularly the intention to procure additional nuclear capacity. This was done in 2013 and agreed by NERSA and the Minister at the time, Minister Ben Martins, MP, and a determination to this effect in terms of the Electricity Regulation Act of 2006 was signed. However the actual*

gazetting of this determination was withheld until such stage that government had agreed to proceed with the Request for Proposals."

164.2 However, on 10 March 2016, a Business Day news report quoted the DOE DG (Mr Thabane Zulu) as having advised Parliament that the Minister "*had instructed officials to finalise and issue a request for proposals for the government's 9,600MW nuclear build programme by the end of the month [i.e. end of March 2016]*", and that the DOE has "*concluded negotiations with the Treasury on key aspects of the nuclear procurement strategy*", that "*publication of the request for proposals would take place once discussions on this strategy between the department, the Treasury and the office of the independent power producers were finalised*", and that the DOE had "*put together a tight technical team to prepare the request for proposal*". I attach a copy of the Business Day news report marked "**PL52**".

165. The Minister and the President have, despite request,[37] failed to provide a copy of the RFP nor have they denied that it was finalised and/or had been issued (thus the applicants are unable to determine precisely if and when the RFP was issued, and what timetable the DOE has set for the procurement process). They will be required in answer to play open cards with the Court by providing those details.

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[37] See below paragraph 181.19.12.

166. To the extent that this Court accepts, as clearly the Minister believes to be the case, and as the applicants aver to be the position, that the s 34 Determination needed to be made public (either by publication in the Gazette or otherwise) before it could be relied upon, then any steps to begin nuclear procurement, which would include the drawing up of an RFP, would evidently have been unlawful prior to the s 34 Determination being gazetted on 21 December 2015.

167. Moreover, the DOE's own press statements in July 2015 appear to indicate that the RFP[38] was already being drawn up months prior to the gazetting of the s 34 Determination.

168. Even if the s 34 Determination could be relied upon prior to it being gazetted, since the 2013 s 34 Determination as gazetted was unlawful and should be set aside (as prayed for in prayer 4), it is clear that the RFP which issued pursuant to this should be set aside.

E. Costs

169. Part of the litigation commenced by the applicants seeking a declaratory order (prayer 4) on the predicate of there being no relevant s 34 determination in place. The Minister has now revealed that such a determination was in place, and that

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[38] See the founding affidavit paragraph 101.5. The press statement refers to the Bid Invitation Specifications and related evaluation criteria being finalized by the end of July 2016. This appears to be a clear reference to what might be referred to more properly as an RFP.

she has belatedly decided to gazette the s 34 Determination in part to gain an advantage in this litigation.

170. The fact that both the Minister and NERSA, despite being asked about the existence of any section 34 determination, prior to the commencement of litigation, did not disclose the fact of a section 34 determination having been made, means that they are responsible for the wasted costs associated with the applicant having to amend its relief, and delays created by having to supplement its challenge (and now call formally for a record in relation to the s 34 Determination).

171. In the circumstances, and given the sufficient delays and difficulties in obtaining the record from the Minister, the President and NERSA (as discussed below),[39] as a mark of this Court's displeasure at their unlawful and unconstitutional conduct it should order the Minister, the President and NERSA to pay the costs of this application, or at least such costs as related to the requirement to amend the relief sought and to procure the records from the Minister, the President and NERSA, on an appropriate punitive scale.

F. Timetable and the need for expedition

172. In the founding affidavit, the applicants set out why the application should be heard on a semi-urgent basis and with slightly truncated time-frames for the filing of the record and further affidavits (see paragraphs 228 to 235).

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[39] See below heading VIII DIFFICULTY IN OBTAINING RULE 53 RECORD.

173. The portions of the 26 December 2015 Media Statement (**PL50**) quoted above appear to indicate that the RFP was to be issued forthwith (and more recent news reports indicate that at least by the end of March 2016 it would be issued).

174. On 15 January 2016, the applicants sought a copy of the RFP from the State Attorney so that the time-frame for the procurement process could be understood, and sought an undertaking that no further steps would be taken to continue with the process of procuring 9600 MW of nuclear power until this application had been determined.[40]

175. Despite the importance of this issue, no response was received to this request (whether to refuse to provide a copy and the grounds for such refusal, or if it had not been finalised and issued despite the Media Statement of 26 December 2015, to confirm that to be the case and to indicate when this might occur). This is yet the latest instance of the Minister and the President seeking to intentionally and unconstitutionally hide the procurement process from public scrutiny, even in the teeth of this application.

176. It is therefore evidently still essential that the matter be dealt with on an expedited basis, as set out in the founding affidavit.

177. Thus, the amended notice of motion provides for slightly truncated times for the filing of any notice of intention to oppose from NERSA (the President and

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[40] See below paragraphs 181.19, 181.19.12, and 181.19.13.

Minister having already filed a notice of intention to oppose) and the filing of answering affidavits.

178. As stated in the founding affidavit, the applicants believe that it is appropriate for the parties to approach the Judge President and to reach an agreement to provide for the expedited determination of this matter. It is clearly in the interests of justice, for the application to be heard on an expedited basis, and in line with expedited times for filing further papers and heads of argument.

VIII. DIFFICULTY IN OBTAINING RULE 53 RECORD

179. The applicants experienced exceptional difficulty in obtaining a full and proper record from the Minister and the President and NERSA. Now finally a record and a supplementary record have been filed, which the Minister's and the President's legal representatives claim to be the entire record. NERSA too has filed its record – on 16 March 2016. Given the elections by the respondents to provide the documents that they claim served before them at the time of the decisions impugned in this application, together with the need for finality and expedition (and subject to requests for certain documents referenced by the Minister but not attached), the applicants now approach this litigation on the basis of those elections – namely, that the Minister, the President and NERSA have to date provided the documents that constitute the entire record before them in relation to the relevant decisions.

180. That being said, the Minister's, the President's and NERSA's failure to

timeously provide a full and complete record in relation to the decisions being challenged in this litigation is consistent with the opaque, uncooperative and obstructive manner in which the Minister and the President have conducted themselves in relation to the nuclear programme and nuclear procurement process as a whole (including forcing the applicants to file a notice in terms of Rule 30A – annexed marked "**PL53**", and the letters written by Pole to NERSA and referenced earlier). This is in violation of the Minister's and the President's obligations as organs of state to assist the court by placing all relevant material before the court (section 165(4) of the Constitution), as discussed above. NERSA is similarly implicated in the failure of transparency, and there also in violation of the directed duties it bears under NERA.

181. I have already described above the efforts to obtain any transparency and documents from NERSA. I now describe below the efforts made by Pole to obtain a full and proper record of the decisions by the Minister and the President, and to do so as expeditiously as possible, and, in particular, I give detail of how the secret 2013 s34 decision was first revealed to have been taken, when it was included in the scant documents provided in the initial record. These efforts are more fully described in a letter emailed by Pole to the Minister's and President's attorneys on or about 5 February 2016 (a copy of which I annex marked "**PL54**", together with all the relevant correspondence referred to therein in chronological order as "**PL54.1**" to "**PL54.16**").

181.1 In the applicants' notice of motion (served on the Minister and the

President on 12 October 2015), the applicants gave notice of our intention to request a preferent date from the Judge President for the hearing of this matter, and called upon the Minister and the President, within 10 days of receipt of the notice of Motion, to dispatch to the Registrar the records of their respective decisions that were sought to be reviewed (including all correspondence (including e-mails), reports, memoranda, documents, evidence, transcripts of recorded proceedings, and other information serving before them), together with such reasons as the Minister and the President are by law required or may desire to give or make, and to notify Pole that it had done so.

181.2 On 29 October 2015, Pole received a letter from the State Attorney, Cape Town requesting on behalf of the President a four-week extension in which to file the record.

181.3 On 30 October 2015, Pole wrote by email to the State Attorney, Cape Town noting that the abovementioned letter was written on behalf of the President, and that only a notice to oppose on behalf of the Minister was served on the applicants' Cape Town corresponding attorneys on 28 October 2015. Pole requested clarification on whether a notice to oppose would also be served in respect of the President, and whether the extension request was intended for the President only.

181.4 The State Attorney, Cape Town replied on the same date advising that the extension request was intended for both the Minister and the

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President, and that the State Attorney, Cape Town was also instructed by the President.

181.5 On 4 November 2015, Pole wrote by email to the State Attorney, Cape Town attaching a letter dated 3 November 2015. It was pointed out in the letter that, as was evident from the applicants' notice of motion and founding affidavit, the applicants were seeking to have the matter heard on a semi-urgent basis. Pole explained that the applicants were open to discussing the request for an extension of time for the filing of the record of proceedings, and it was proposed that this be done by reaching agreement on truncated time-frames for the filing of the record and subsequent papers, as well as in respect of the matter being heard on a preferent date to be allocated by the Judge President. Time-frames for the filing of the record and subsequent papers were proposed. With regard to the record, it was proposed that the Minister and the President provide their record(s) of decision on or before 20 November 2015 (being more than five weeks from the date when the application was served on the Minister and the President). The State Attorney, Cape Town was requested to revert by close of business on 6 November 2015, with the intention being that any such agreement would be made an order of court at a meeting to be arranged with the Judge President.

181.6 On 5 November 2015, the Minister's Notice to Oppose was served on the applicants' correspondent attorneys.

181.7 On 6 November 2015, the State Attorney, Cape Town wrote to Pole by email acknowledging receipt of the 3 November 2015 letter, and advising that the Senior State Attorney, Pretoria (hereinafter referred to as the "**State Attorney**") would now be acting as instructing attorney and the State Attorney, Cape Town as the correspondent. Pole was requested to direct all correspondence to the State Attorney.

181.8 On 6 November 2015, following a telephonic discussion with the State Attorney, Pole forwarded by email a copy of the 3 November 2015 letter previously emailed to the State Attorney, Cape Town.

181.9 On 13 November 2015, Pole wrote to the State Attorney by email referring to the proposed time frames (including in respect of the filing of the record), and requested an urgent response.

181.10 On 19 November 2015, Pole wrote to the State Attorney attaching a letter of the same date. This letter referred to the previous correspondence, advised that no response had been received to the proposed time-frames for the filing of the record and subsequent papers, and that the time-frame proposed for the filing of the record expired the following day (20 November 2015). It was highlighted that the fifteen-day time period contained in Rule 53(1)(a) had expired on 2 November 2015. Pole requested that the State Attorney reply urgently to the proposed time-frames, and requested further that, if they were not yet in a position to file the record (or to respond to the proposal), they advise

Pole of the reasons and indicate when they would be in a position to do so.

181.11 On 25 November 2015, Pole wrote to the State Attorney attaching a letter of the same date. This letter also referred to previous correspondence, advised that no response had been received to the proposed time-frames for the filing of the record and subsequent papers, and that the time-frame proposed by our clients for the filing of the record had expired on 20 November 2015. Pole advised the State Attorney that the applicants would have no choice but to instruct him to bring the necessary application to compel production of the record should the record not be filed by 27 November 2015, alternatively should an agreement in relation to an acceptable time-table for the filing of the record and subsequent papers not be reached by the same date.

181.12 On 11 December 2015 at 11h30, the applicants' Cape Town correspondent attorneys (the Legal Resources Centre) delivered a notice in terms of Uniform Rule 30A (**PL53**), notifying the Minister and the President that the applicants intended, after the lapse of 10 days, to apply for an order that the Minister and the President comply with Rule 53(1)(b).

181.13 Also on 11 December 2015 and at 13h47, Pole received an email from the State Attorney with an attached letter dated 10 December 2015. The State Attorney apologised for only reverting at that stage to the

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applicants' previous correspondence, and advised that he had been unable to do so at an earlier stage. The State Attorney advised further that:

181.13.1 the State Attorney was in the process of compiling a record of the decisions to be reviewed;

181.13.2 this process was taking longer than initially envisaged;

181.13.3 the documentation required to be included in the record needed to be obtained from various Government Departments;

181.13.4 the records were of a 'fairly sensitive nature';

181.13.5 some difficulty had been experienced in obtaining the correct documentation to include in the record; and

181.13.6 some progress had been made.

181.14 The State Attorney requested an indulgence to file a record on or before 29 January 2016

181.15 On 15 December 2015, Pole received an email from the State Attorney with a letter attached of the same date, requesting an agreement to the late filing of the record on or before 15 January 2016.

181.16 On 17 December 2015, Pole wrote to the State Attorney advising that the applicants were prepared to agree to the late filing of the record on or before 15 January 2016, failing which the application to compel would be launched without further notice.

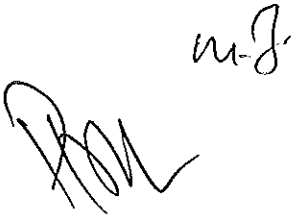
181.17 On 23 December 2015, the Minister's and the President's correspondent attorneys belatedly served a notice on the applicants' Cape Town correspondent attorneys filing a 'record'.

181.18 On 13 January 2016, Pole received an email from the State Attorney with a letter attached dated 12 January 2016. The State Attorney advised that Pole's letter dated 17 December 2015 had only come to his attention on 11 January 2016, but that the Minister's and the President' correspondent attorneys had served a record on the applicants' Cape Town correspondent attorneys.

181.19 On 15 January 2016, and with no further records having been received, Pole wrote to the State Attorney (in summary):

181.19.1 Noting that the record belatedly filed consisted of the nuclear s34 determination and the s231(3) IGA documents;

181.19.2 Recording that this record was incomplete, and that the Minister and the President had failed to comply with the applicants' Rule 30A(1) notice;



181.19.3 Recording that the applicants were aggrieved that the 2013 nuclear s34 determination was deliberately withheld from the public (as stated in the DOE's media statement titled '*Progress with the Nuclear New Build Programme*' dated 26 December 2015) until published by notice in the Gazette on 21 December 2015 and served on the applicants as part of the Rule 53 Record on 23 December 2015;

181.19.4 Recording that the applicants were also aggrieved that the Minister had failed to respond to Pole's letters sent prior to commencing this litigation querying the existence of any nuclear s34 Determination, stating that this was further evidence of the gross lack of transparency that has characterised the Minister and the government's conduct relating to the procurement of new nuclear capacity, and that the applicants fully intended seeking a punitive costs order against the Minister (whose conduct directly resulted in wasted effort and unnecessary litigation in relation to those portions of the relief and founding affidavit which were predicated on the understanding that no nuclear section 34(1) determinations had been made);

181.19.5 Pointing out that, in the applicants' view, the making of the nuclear s34 determination in secret and without public

participation, as well as the deliberate withholding of this determination from the public for a period of two years, was unlawful and unconstitutional (violating inter alia the requirements of open, accountable and transparent government and reasonable, lawful, and procedurally fair administrative action);

181.19.6 Notifying the State Attorney that the applicants intended exercising their rights in terms of Rule 53(4) to amend, add to and vary their Notice of Motion and to supplement their supporting affidavit in order to review the nuclear s34 determination;

181.19.7 Advising the State Attorney that in advance of the applicants doing so, the applicants required the Minister to provide the relevant record relating to the s 34 Determination, and the decision to withhold it from the public and to only gazette it on 21 December 2015. This included relevant portions of the record relating to decisions made at Cabinet Meetings held in June 2015 (at which the decision was made to proceed with developing the nuclear build programme) and 9 December 2015 (at which the decision was made to proceed with the RFP and publish the s 34 Determination, and at which the Energy Security Sub-Committee provided a

report-back on work done by the DOE and National Treasury in respect of funding and financing the nuclear programme);

181.19.8 Calling upon the Minister and the President (having regard to the urgency of this matter as set out in previous correspondence, as compounded by the Department of Energy's 26 December 2015 Media Statement indicating that a Cabinet Decision had been made on 9 December 2015 that the DOE should issue a RFP for the nuclear build programme of 9600MW of nuclear power) to dispatch all of the relevant record(s) to the Registrar (that is, the records as more fully described in the applicants' Rule 30A(1) notice, and the full s 34 Determination record), together with the reasons for these decisions, and to notify the applicants that they had done so, by no later than **1 February 2016**;

181.19.9 Recording that unless and until any further part of the record(s) was provided, the applicants must assume that the Minister and the President were refusing to act transparently in providing the Court, the applicants, and the public, access thereto;

181.19.10 Pole stated that it seems impossible to imagine that such material and potentially adverse decisions could have been

taken without further documents forming part of the decision-making;

181.19.11 Aside from reserving the applicants' rights to seek to compel the production of documents withheld, Pole also placed on record the obvious: that should the Minister and the President fail to provide any documents that do form part of the record(s), they would not be entitled belatedly to produce and rely on such documents in any answering affidavit which they may file in due course;

181.19.12 Requesting a copy of the RFP so that the applicants could consider the proposed procedural timeframe and steps going forward; and

181.19.13 Requesting an undertaking from the State Attorney that no further steps would be taken to continue with the process of procurement of 9,600MW of nuclear power until this litigation had been adjudicated upon.

181.20 On 21 January 2016, Pole telephoned the State Attorney querying whether the applicants could expect to receive a further record from the Minister and the President. The State Attorney indicated that he was meeting with his team of counsel and client representatives the following week, and would come back to Pole by the end of that

following week.

181.21 Having received no further correspondence from the State Attorney and no 'further record' from the Minister and the President, on 4 February 2016 Pole again telephoned the State Attorney querying whether the Minister and the President intended filing a further record, and if so by when. The State Attorney confirmed that he had met with his team of counsel, and that he would send Pole a letter that he had dictated (following perusal by his team of counsel) indicating what further records the Minister and the President would be providing, and by when. This telephone conversation was confirmed by Pole's email to the State Attorney of the same date.

181.22 On 5 February 2016, Pole wrote to the State Attorney reiterating that in a case of this importance and urgency, where the Minister's and the President's conduct has been criticised publicly and in the applicants' papers as failing the standards of transparency, and where the public has been told that the Minister and the President and the government is proceeding apace with the nuclear procurement, this lackadaisical foot-dragging by the State was not only inconsistent with its duties under the Constitution, but was also reflective of the opacity that has characterised the nuclear procurement process thus far. Pole also stated that it violated the applicants' rights to supplement their papers (or compel production of outstanding documents).

181.23 Pole stated that if the 'further record' was not received by 9h00 on 8 February 2016 at the latest, together with a full and proper accounting of why any other records are being excluded or withheld, the applicants would:

181.23.1 Proceed on the basis that there were no further documents on which the Minister and the President are able to justify the impugned decisions;

181.23.2 Begin preparing the applicants' supplementary founding affidavit; and

181.23.3 Seek to resist any attempt by the Minister and the President to belatedly thereafter attempt to rely on any documents that have not already been disclosed as part of the rule 53 record.

182. On 5 February 2016, Pole received an email from the State Attorney with a letter attached of the same date advising that he was unfortunately still not in a position to finalise the supplementary record. The State Attorney advised further that the matter had again been discussed with his client, who had indicated that they would do their best endeavours to furnish him with the outstanding documentation by Monday, 8 February 2016. The State Attorney indicated that he trusted that he would be in a position to furnish Pole with the documents that were, according to the Minister and the President, outstanding. The State Attorney stated further that, as regards paragraph 23 of Pole's letter dated 5

February, the Minister and the President did not concede that the proposed procedure was the correct one under the circumstances and reserved their right to supplement the record as indicated. I annex a copy of the letter (marked "**PL55**").

183. On 16 February 2016, Pole received an email from the State Attorney with a letter attached of the same date, and the supplementary record referred to above.[41] I annex a copy of the letter (marked "**PL56**").

184. Even on its own terms the supplementary record was incomplete since documents in the record referred to other documentation that had not been provided.

185. On 1 March 2016, Pole accordingly urgently wrote to the State Attorney seeking this further documentation, by no later than 7 March 2016. I attach a copy of that letter marked "**PL57**", and ask that its contents, which speak for themselves, should be included in this affidavit as if specifically traversed herein. No response was received to Pole's letter.

186. It is unfortunate that I have had to detail these attempts to obtain the full record.[42] However, I am advised that in a case of this importance and given the lack of transparency attendant to the nuclear procurement process, it has been necessary to do so. The above demonstrates that:

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[41] See section III.B: The 'supplementary record'.

[42]

186.1 The Minister, the President and NERSA – no doubt with the benefit of legal representation throughout – have elected eventually (after being afforded ample opportunity to provide a complete record) to provide the record of their decision-making. They have chosen to produce the documents that I have attached as constituting the record of their decision-making. This supplementary founding affidavit has been prepared by the applicants on the basis that what has been provided to date is the complete record of the decisions impugned in this application.

186.2 The manner in which the Minister, the President and NERSA have provided the record constitutes an affront to this Court in violation of their obligations in terms of section 165(4) of the Constitution, and the requirements for open, accountable and transparent government in terms of section 1, section 195 and section 217 of the Constitution. In NERSA's case, it also constitutes a violation of their obligations under NERA.

186.3 These violations should be deterred. And the unnecessary efforts that the applicants were put to in extracting the record from the respondents should be compensated. Accordingly, it would be just and equitable for a punitive costs order to issue against the Minister, the President and NERSA – and further argument will be directed in this regard at the hearing of the matter.

IX. CONCLUSION

187. The applicants accordingly pray for the relief sought in the amended notice of motion filed together with this affidavit.

PHILLIPINE LEKALAKALA

The terms of Regulation R. 1258 published in Government Gazette No. 3619 of 21 July, 1972 (as amended) having been complied with, I hereby certify that the deponent has acknowledged that he/she knows and understands the contents of this affidavit which was signed and sworn to before me at Johannesburg on this 23rd day of MARCH 2016.

COMMISSIONER OF OATHS

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