Original.

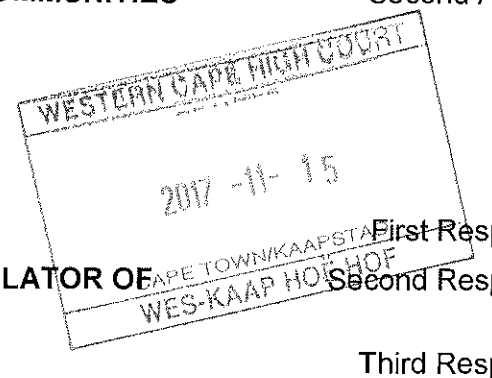
IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Case No: 19529/15

In re:

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

And



THE MINISTER OF ENERGY	First Respondent
THE NATIONAL ENERGY REGULATOR OF SOUTH AFRICA	Second Respondent
ESKOM HOLDINGS (SOC) LTD	Third Respondent
DEMOCRATIC ALLIANCE	Fourth Respondent

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
ESKOM HOLDINGS (SOC) LTD	Sixth Respondent

NOTICE OF MOTION
In the urgent application seeking declaratory and auxiliary relief pursuant to judgment granted in the main application

TAKE NOTICE THAT the Applicants will apply on **WEDNESDAY 29 NOVEMBER 2017** at 10h00 or as soon thereafter as counsel may be heard for an order in the following terms:

1. That the non-compliance by the Applicants with the Uniform Rules relating to form and service be condoned and this application be heard as one of urgency in accordance with Uniform Rule 6(12);

2. It is declared that no steps, including the issuing of a Request for Proposals or a Request for Information, may be taken by the Minister (the first respondent) and/or Eskom (the third respondent) for the procurement of new electricity generation capacity derived from nuclear power in the absence of a lawful determination in terms of section 34 of the Electricity Regulation Act 4 of 2006 (**ERA**) that such new electricity generation capacity derived from nuclear power is required, which determination must

   2.1 be with the concurrence of NERSA (the second respondent) in terms of section 34(1) of the ERA, and

2.2 NERSA may only concur after following a procedurally fair public participation process in relation to the said determination.

3. The Minister and/or Eskom are directed to deliver a report(s) to this Court within 10 (ten) days of the date of this order, confirmed on affidavit, detailing any steps that they have taken after this Court's judgment of 26 April 2017 (under the same case number, "**the Judgment**"), and the future steps they intend taking, in relation to the procurement of new electricity generation capacity derived from nuclear power, including but not limited to: any steps in relation to section 34 of the ERA; the relevant procurement process to be followed; and any steps in relation to any negotiating, renegotiating and/or tabling before Parliament under section 231 of the Constitution of any intergovernmental agreements in relation to nuclear cooperation or procurement.

4. The Applicants may within 10 (ten) days of the filing of the report(s) provided for in prayer 3, deliver any affidavits dealing with the contents of the report(s);

5. Declaring, that if the evidence before the Court on affidavit (or by way of the report(s) provided for in prayer 3) confirms that the Minister and/or Eskom have taken any steps that are in contempt of the Judgment then, on suitably supplemented papers, the Applicants are granted leave to approach this Court on an urgent basis for an order of contempt of court against the

Minister and/or Eskom.

7. The Minister and any respondent opposing this application are directed to pay the Applicants' costs.

8. Further and/or alternative relief that is just and equitable.

TAKE NOTICE THAT if any of the Respondents intends opposing this application, it is required to file its notice of opposition by Friday, 17 November 2017 and its answering affidavit by 17h00 on Wednesday, 22 November 2017 and to notify the applicants' attorney that it has done so.

TAKE NOTICE FURTHER that the accompanying founding affidavit of **ELILZABETH JANE MCDAID** and the annexures thereto will be used in support of this application.

TAKE NOTICE FURTHER that the Applicants have appointed the address of their Attorneys as set out below, at which they will accept notice and service of all process in these proceedings.

DATED AT CAPE TOWN ON THIS 15 Novembe **DAY OF 2017**

pp

ADRIAN POLE ATTORNEY

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C/O LEGAL RESOURCES CENTRE

Per: ANGELA ANDREWS

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Ref: Ms Angela Andrews

TO: **THE REGISTRAR OF THE ABOVE HONOURABLE COURT**

KEEROM STREET
CAPE TOWN

AND TO: **THE STATE ATTORNEY PRETORIA**
First Respondent's attorneys
SALU Building
316 Thabo Sehume Street
Pretoria
Private Bag x 91, Pretoria, 0001
Tel: 012 309 16 28
Per: Mr Eben Snyman
Ref: 8028/2015/Z46

c/o THE STATE ATTORNEY, CAPE TOWN

4th Floor
Liberty Life Building
22 Long Street
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Tel: 021 441 9200
Per: A Marsh-Scott
Ref: 3081/15/P19

AND TO: **THE NATIONAL ENERGY REGULATOR OF SOUTH AFRICA**

Second Respondent
Kulawula House
526 Madiba Street
Arcadia
PRETORIA

AND TO: **CLIFFE DEKKER HOFMEYER**

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15/11/17
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Cape Town, 8001.

AND TO: **MINDE SCHAPIRO & SMITH ATTORNEYS**

Fourth Respondent's Attorneys
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Tel: 021 918 9000
Email: elzanne@mindes.co.za
Ref: Elzanne Jonker

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MINDE, SCHAPIRO & SMITH

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In re:

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SPEAKER OF THE NATIONAL ASSEMBLY	Fourth Respondent
CHAIRPERSON OF THE NATIONAL COUNCIL OF	Fifth Respondent

PROVINCES

ESKOM HOLDINGS (SOC) LTD Sixth Respondent

FOUNDING AFFIDAVIT
In the urgent application seeking declaratory and auxiliary relief pursuant to judgment granted in the main application

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I, the undersigned,

ELILZABETH JANE McDAID

do hereby make oath and state that:

I. INTRODUCTION

1. I am an adult employed as a Coordinator: Energy and Climate Change Programme by the second applicant, the Southern African Faith Communities' Environment Institute (**SAFCEI**).

2. I depose to this affidavit on behalf of the Applicants.

3. The facts contained in this affidavit are unless the contrary appears from the context, within my personal knowledge, and are to the best of my knowledge and belief both true and correct.

4. Where I make submissions of law, I do so on the advice of the Applicants' legal representatives.

5. In the affidavit, for ease of reference, I will refer to the first to third respondents collectively as "**Government**", save as is necessary to distinguish between them.

II. THE NATURE OF THIS APPLICATION

6. On 26 April 2017, this Court per Bozalek and Baartman JJ delivered judgment in the main application under the same case number (**the Judgment**). A copy of the Judgment is attached marked "**EJM1**".

7. The judgment declared a series of steps taken by the Government between 2013 and 2016 in furtherance of its nuclear power procurement programme to be unlawful, unconstitutional and invalid. The reasons provided in the Judgment confirm categorically that compliance with the constitutional principles of the rule of law and openness, transparency and accountability are central features of the regulatory scheme for the procurement of new electricity generation capacity from nuclear power.

8. Subsequent to the Judgment being handed down, the Minister of Energy (the first respondent, "**the Minister**") issued a media release stating unequivocally that she would not be appealing the judgment.

9. The Government, having elected not to appeal the Judgment, is bound by the terms of the judgment.

10. Clearly, this means that the Government is not entitled to engage in a stratagem or course of action, which by deliberate design or otherwise circumvents the findings of the Judgment and undermines its efficacy and import. Indeed, all organs of state are under a constitutional duty to assist and protect the courts to ensure their independence and the effectiveness of the courts (section 165(4) of the Constitution). This includes an obligation to make serious good faith endeavours to comply with court orders.

11. Yet, for the reasons set out in more detail in this affidavit, the Applicants have a reasonable apprehension that the Government has indeed embarked, or imminently intends embarking, on a course of action to procure nuclear new power plants directly in conflict with this Court's Judgment. Despite, being called upon to give undertakings to confirm that this is not the case, none of the Government respondents has given any assurances that they will not embark on such a course of action. On the contrary, their public pronouncements – never disavowed, despite being given a reasonable opportunity to do so – are to the effect that they are urgently readying themselves to take immediate steps to call for tenders for the procurement of nuclear energy. Aside from it being unlawful and unconstitutional to move with such opacity and urgency to bypass the strictures of the law and openness and transparency, there is neither need

for nor capacity to commit to the procurement of nuclear energy at this time. That much has been made clear by the Minister of Finance just last month, who stressed at the time of his medium-term budget speech that South Africa will not have the money for a major nuclear programme for at least the next five years, that the "*economy can't afford the nuclear at the present moment*", that South Africa has "*access to electricity*" and that "*there are no intensive users that are taking up the generation capacity that we have*".

12. Therefore, the Applicants have been forced to once again approach this Court, and to do so urgently, to ensure the rule of law is protected, this Court's judgment is respected, and the requirements of open and accountable government are safeguarded.

13. The Applicants accordingly seek declaratory relief and ancillary orders in consequence of the Judgment. The relief is necessary and required by the rule of law (section 1(c) of the Constitution), open, transparent and accountable government (section 41(1) of the Constitution, read with section 1(d) and section 195), and the duty to assist and protect the courts and to ensure their independence and effectiveness (section 165(4) of the Constitution), and, also, section 237, the requirement to fulfil all constitutional obligations without delay.

14. The substantive orders sought by the Applicants are, in summary, the following:

14.1 A declaration that no steps, including the issuing of a Request for Proposal or a Request for Information, may be taken by the Minister and/or Eskom for the procurement of new electricity generation capacity derived from nuclear power in the absence of a lawful determination in terms of section 34 of the Electricity Regulation Act 4 of 2006 (**ERA**) that such nuclear power is required, which determination must

14.1.1 be with the concurrence of NERSA in terms of section 34(1) of the ERA, and

14.1.2 NERSA may only concur after following a public participation process in relation to the said determination.

14.2 An order directing the Minister and/or Eskom to deliver a report(s) to this Court within 10 (ten) days of the date of this order, confirmed on affidavit, detailing any steps that they have taken after the Judgment and the steps they intend taking in relation to the procurement of nuclear power, including but not limited to: the process to be followed pursuant to section 34; the relevant procurement process to be followed; and any steps in relation to any negotiating, renegotiating and/or tabling before Parliament under section 231 of any intergovernmental agreements in relation to nuclear cooperation or procurement.

14.3 The Applicants may within 10 days of the filing of the report(s), deliver any affidavits dealing with the contents of the report(s);

14.4 A declaration that if the evidence before the Court on affidavit (or by way of the report(s)) confirms the Minister and/or Eskom have taken any steps that are in contempt of the Judgment then, on suitably supplemented papers, the Applicants are granted leave to approach this Court on an urgent basis for an order of contempt of court against the Minister and/or Eskom.

15. This relief is sought pursuant to the powers of this Court under sections 172 and 173 of the Constitution to declare conduct unconstitutional, to grant just and equitable relief in constitutional matters and to protect and regulate its own process.

16. The Applicants have brought this urgent application under the same case number as the main matter, for ease of reference and given that this application involves a failure to comply with the Judgment in the main matter, and therefore certain of the papers previously filed in this matter may be of relevance. However, in this urgent application only three of the original Government respondents have been cited. The reason for this is that it is only the Minister and Eskom whose actions appear to indicate that they intend to violate the Judgment, and NERSA is required to take certain actions in compliance with the Judgment.

17. The remainder of this affidavit is structured as follows:

17.1 Part III sets out the details of the parties;

17.2 Part IV sets out the key findings of the Judgment which are relevant to the relief sought in this application;

17.3 Part V sets out the conduct of the Government subsequent to the Judgement which has given rise to this application;

17.4 Part VI deals with the relief sought by the Applicants to deal with the Government's conduct and the basis for that relief; and

17.5 Part VII addresses the issue of urgency.

III PARTIES IN THIS APPLICATION

18. The first applicant is Earthlife Africa–Johannesburg (**Earthlife**) a non-governmental non-profit voluntary association, which has the power to sue and be sued in its own name, and which has its offices at 5th Floor, 87 De Korte Street, Braamfontein 2107, Johannesburg, South Africa.

19. Earthlife was established by environmental- and social-justice advocates to mobilise civil society around environmental issues in relation to people, and

includes a Sustainable Energy and Climate Change Project that works to promote local and global environmental and social justice on sustainable energy and climate change issues. Earthlife is an autonomous branch of Earthlife Africa.

20. The second applicant is the Southern African Faith Communities' Environment Institute (**SAFCEI**), a registered Public Benefit and Non-Profit Organisation, which has its offices at The Green Building, Bell Crescent, Westlake Business Park, Cape Town.

21. SAFCEI was established by multi-faith environmental- and social-justice advocates to, among other things, confront environmental and socio-economic injustices, and to support and encourage faith leaders and their communities in Southern Africa to take action on eco-justice, sustainable living and climate change issues. SAFCEI includes an Energy and Climate Change Programme that focuses on climate change and energy.

22. Earthlife and SAFCEI (**the Applicants**) bring this application in:

22.1 their own interests, as contemplated in section 38(b) of the Constitution; and

22.2 in the public interest, as contemplated in section 38(d) of the Constitution.

23. The first respondent is the MINISTER OF ENERGY (**the Minister**). The Minister's office is located at Parliament Building, 7th Floor, 120 Plein Street, Cape Town. The Minister is served care of the State Attorney, 4th Floor, Liberty Life Building, 22 Long Street, Cape Town. In terms of section 34 of the ERA the Minister is required to take decisions in consultation with NERSA in relation to the requirement for, and procurement of, electricity new generation capacity. As indicated below, it appears that Government is intent on proceeding to procure nuclear new generation capacity absent compliance with section 34, notwithstanding the Judgment.

24. The second respondent is the NATIONAL ENERGY REGULATOR OF SOUTH AFRICA **(NERSA)**. NERSA's office is located at Kulawula House, 526 Madiba Street, Arcadia, Pretoria. NERSA is a regulatory authority, and organ of state, established in terms of section 3 of the National Energy Regulator Act 40 of 2004 (**NERA**). In terms of section 34 of the ERA it is required to take decisions in consultation with the Minister in relation to the requirement for, and procurement of, electricity new generation capacity. Section 10(1)(d) of the NERA states that every decision taken by NERSA must be in writing and 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.

25. The third respondent is ESKOM HOLDINGS SOC LTD (**Eskom**). Eskom is a state owned public company established in terms of the Eskom

Conversion Act 13 of 2001 with its principal place of business at Megawatt Park, Maxwell Drive, Sandton. This application will be served on Eskom's attorneys of record, Cliffe Dekker Hofmeyr (**CDH**) of 1 Protea Place, Sandown, Johannesburg by email and fax to Eskom's attorneys, Mr Jackwell Feris and Mr Rishaban Moodley.

26. The fourth respondent is the DEMOCRATIC ALLIANCE (**the DA**). The DA is a political party registered in terms of section 15 of the Electoral Commission Act 51 of 1996, and is the official opposition party in Parliament, with its offices at 2nd Floor, Theba Hosken House, 16 Mill Street, Gardens, Cape Town. At the time of launching this application news reports indicated that the DA had, like the Applicants, been seeking clarity from Government in relation to its nuclear procurement processes (I attach copies marked "**EJM2.1**" to "**EJM2.4**").[1] Thus, to the extent that the DA, as the official opposition, has requested and potentially received information that is relevant to Government's renewed haste to procure nuclear power plants (in conflict with the Judgment), then the Applicants believe that the DA may have an interest in the matter and the relief sought, and may be in a position to provide useful information to the Court, particularly if it has received any substantive responses from Government. In addition, the

[1] https://www.da.org.za/2017/11/ready-interdict-nuclear-deal/#; https://www.fin24.com/Economy/Eskom/well-interdict-any-nuclear-deal-da-20171105; https://www.enca.com/south-africa/da-monitoring-nuclear-deal-movements; https://www.iol.co.za/news/politics/da-ready-to-interdict-nuclear-deal-11864739

same news reports indicate that the DA has made clear that should it not receive appropriate assurances from Government, then it intends interdicting any nuclear procurement process from proceeding. This suggests that the DA may itself seek to bring urgent proceedings in relation to Government's actions in respect of the procurement of nuclear new generation capacity. Therefore, (a) given that the DA may have an interest in this matter, and (b) to avoid an unnecessary multiplicity of applications, potentially before different courts, the Applicants believe that it is appropriate and in keeping with the principle of judicial economy to cite the DA in this application.

27. Save in the event that the DA opposes the relief sought in this application, no order is sought against the DA.

28. The additional parties in the main application in which the Judgment was given by this Court are as described in the papers filed in the main application, but they have not been cited in this further application, since no relief is sought against or in relation to them, and they have not made any public statements that would suggest that they intend acting in conflict with the Judgment. Should they make such statements or join in supporting the other respondents in this application, then the Applicants reserve their rights to expand the relief sought to include any of the other respondents, and to seek costs against them.

IV KEY FINDINGS OF THE JUDGMENT

29. In the Judgment, this Court granted, in summary, the following substantive orders:

29.1 The Minister's decision on or about 10 June 2015 to table the Russian international governmental agreement (**IGA**) before Parliament in terms of section 231(3) of the Constitution was unconstitutional and unlawful, and was reviewed and set aside;

29.2 The Minister's decisions on or about 10 June 2015 to table agreements for cooperation between South Africa and the governments' of the United States of America (**America**) and the Republic of Korea (**South Korean**) were unlawful and unconstitutional, and were reviewed and set aside;

29.3 The determination under section 34(1) of the Electricity Regulation Act (**ERA**) gazetted on 21 December 2015 and made on or about December 2013 by the Minister of Energy with the concurrence of NERSA, in relation to the requirement and procurement of nuclear new generation capacity (**2013 Determination**) was unlawful and unconstitutional, and was reviewed and set aside; and

29.4 The determination under section 34(1) of the Electricity Regulation Act (**ERA**) gazetted on 14 December 2016 and made by the Minister of

Energy with the concurrence of NERSA, in relation to the requirement and procurement of nuclear new generation capacity (**2016 Determination**) was unlawful and unconstitutional, and was reviewed and set aside; and

29.5 Any Request for Proposals (**RFP**) or Request for Information (**RFI**) issued pursuant to aforesaid section 34 Determinations were set aside.

30. This relief was predicated on a series of findings. It is relevant to briefly set out certain of those findings as they are relevant for the current application.

31. This Court held (at paragraph 24) that section 34(1) of the ERA "*operates as the **legislative framework by which any decision that new electricity generation capacity is required*** is made and that "*any decision taken by the Minister in that regard, has no force and effect unless and **until NERSA agrees with the Minister's decision***".

32. The Court held further that "*... a rational and fair decision-making process [in relation to section 34] would have made provision for public input so as to allow both interested and potentially affected parties to submit their views and present relevant facts and evidence to NERSA before it took a decision on whether or not to concur in the Minister's proposed determination*" (at paragraph 45).

33. The Court went on to recognise that there are sectors of the public with either special expertise or a special interest regarding the issue of whether it is appropriate for extra generation capacity to be set aside for procurement through nuclear power, and emphasised that NERSA is also under a statutory duty to act in the public interest in a justifiable and transparent manner, and to utilise a procedurally fair process giving affected persons the opportunity to submit their views and present relevant facts and evidence. It held that NERSA had failed to do so, and that NERSA's decision failed to satisfy the test of rationality based on procedural grounds alone (at paragraph 50 of the judgment).

34. Given these findings, the Court accordingly held that it would be "*unnecessary and superfluous*" to declare that prior to the commencement of any procurement process for nuclear new generation capacity, NERSA would be required to determine (as provided in section 34), in accordance with a procedurally fair public participation process, that new generation capacity is required and that the electricity must be generated from nuclear power and the percentage thereof, since "*[t]he* ***finding that [NERSA] is under such a duty is central to this judgment and does not require restatement in a declarator***" (paras 141 and 142, emphasis added).

35. The Court confirmed that when NERSA decided whether to concur in a section 34 Determination, "*[i]n terms of ss 9 and 10 of NERA, Nersa was required, in exercising its discretion and its duty to decide whether to concur*

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or not, to ***form an independent judgment***", and "*Nersa was* ***not required to accept that the Minister's proposed determination was correct or appropriate***" (para 78, emphasis added).

36. The Court also held that the Minister's failure to gazette or otherwise make the 2013 section 34 determination "*public for two years not only breached the Minister's own decision, thus rendering it irrational and unlawful, but violated the requirements of open, transparent and accountable government*" (para 54).

37. The Court confirmed that a section 34 determination was in effect only made on publication, and therefore, "*the Minister's failure to consult NERSA anew in December 2015 on her decision to gazette the 2013 determination in unaltered form* ***constituted a breach of section 34 of ERA, a mandatory empowering section***" (para 54, emphasis added).

38. The Court also held (para 143) that it was "*self-evident that any large-scale procurement process initiated by the state or its agencies*" must

38.1 "comply with s 217 of the Constitution and other relevant legislative enactments", and

38.2 "***be specified before any procurement process commences.***" (emphasis added)

39. The key findings of this Court can be summarised as follows:

39.1 Section 34 sets the relevant framework for Government to determine whether South Africa requires any new generation capacity from nuclear energy;

39.2 Therefore, Government must first make a lawful section 34 determination, which determines the quantity of nuclear new generation capacity required by the country, before it begins any process to procure such new capacity;

39.3 Section 34 requires a determination to be made by the Minister and NERSA in concurrence – NERSA must independently apply its mind and determine the quantity of new generation capacity required;

39.4 NERSA is required to undertake a procedurally fair public participation process prior to concurring in any section 34 determination; and

39.5 Section 34 determinations must be made public, and any procurement process pursuant thereto must also be made public prior to the commencement thereof and must comply with section 217 of the Constitution.

V EVENTS SUBSEQUENT TO THE JUDGMENT

40. On 13 May 2017, the (former) Minister issued a media statement advising that she would not appeal the judgment ("**EJM3**").[2] The Minister stated that, prior to issuing the media statement, she consulted with officials within the Department as well as the legal representatives that were dealing with the matter. The Minister stated that "*major concerns were raised with regards to the Judgment and its implication to the department, in relation to the agreements that affects our counterparts and Section 34 determinations*". The Minister stated further that "***I have decided that I WILL NOT BE APPEALING the decision of the Western Cape High Court on this matter***" (original emphasis). The Minister stated that following this decision, she issued the following instruction to the department:

> "a) **Section 34 Determinations:** Amongst reparative measures agreed to as the Department, is the review of the processing of all future section 34 determinations **and review all determinations currently in place to ensure compliance with this judgment**.
>
> b) **Intergovernmental Agreements:** In accepting the ruling of the court, and ensuring that no impropriety is suggested in the future, the Department seek to apply standardization in both form and processing (relating to proper tabling before parliament and its committees), of all Intergovernmental Agreements to be concluded with international countries. **It is important to note that there is no intention to table the current agreements but will embark to sign new agreements with all the five countries and table them within reasonable time to parliament for consideration**."

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[2] http://www.energy.gov.za/files/media/pr/2017/MediaStatement-Earthlife-and-Judgement-13May2017.pdf

(emphasis added)

41. On 8 June 2017, the Minister issued a media statement advising that she had participated at the 8th Clean Energy Minister Conference (CEM8) in Beijing from 6-8 June 2017 (**"EJM4"**).[3] It is stated in the media statement that *"[i]n line with our commitment to restarting new intergovernmental agreements on nuclear programme, Minister Kubayi held bilateral discussions with heads of delegations of some nuclear vendor countries such as France, China and Russia that availed themselves for opportunity on broader nuclear cooperation matters."*

42. However, to date no new IGAs in relation to nuclear cooperation have been tabled before Parliament, nor have any of the previous Russian, South Korean and American IGAs been tabled afresh under section 231(2) of the Constitution (in order to seek approval from Parliament).

43. This is relevant, since in the main application, the Minister made clear that countries that had not entered into IGAs in relation to nuclear cooperation would **not** be allowed to participate and bid for the production of the new nuclear generation capacity to be procured by Government.[4]

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[3] http://www.energy.gov.za/files/media/pr/2017/MediaStatement-8th-Clean-Energy-Ministerial-Conference-and-2nd-Brics-Energy-Ministerial-Meetings.pdf

[4] Answering Affidavit para 125.73, Vol 3, p 882-3.

44. On 21 June 2017, the Minister issued a media release advising that she led the South African delegation to the 9th International Forum ATOMEXPO at Moscow in Russia from 19-21 June 2017 ("**EJM5**").[5] The Minister's statement indicates that:

> "As part of expanding the energy portfolio, Minister Kubayi held bilateral meeting with Minister of Energy for the Russian Federation, Honourable Minister Alexander Novak where they discussed various options in the nuclear and energy space within the context of the Energy Cooperation Agreement.
>
> She further met with the Director General of Rosatom Mr Alexey Likhachev where they agreed that the technical teams will initiate discussion on cooperation, and will report back progress to the Ministers.
>
> Minister emphasised that the government remains committed to ensuring energy security for the country, through the roll out of the nuclear new build programme as an integral part of the energy mix, as well as providing of reliable and sustainable electricity supply, as part of reducing the carbon emissions.
>
> **Minister further reiterates the department's openness, transparency as well as, engaging all spheres of Government and public in line with the country's legislation and policies**. However, it is critical to recognise that the nuclear new build programme will enable the country to create jobs, develop skills, create industries, more critically; we encourage the young people and women to participate in the energy sector." (emphasis added)

45. On 13 July 2017, the Treasury issued a press release entitled *Government's Inclusive Growth Action Plan* ("**EJM6**").[6] This action plan was developed to

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[5] http://www.energy.gov.za/files/media/pr/2017/Media-Statement-ATOMEXPO2017-(Final).pdf.

[6] http://us-

map a way forward following the release of Q1 2017 GDP data confirming an economic recession. Included in a table of energy-interventions forming part of this action plan is an intervention seeking to finalise a lowest cost Integrated Energy Plan (**IEP**) and Integrated Resource Plan (**IRP**), taking into account extensive comments received during public consultation, by February 2018; and to review the pace and scale of energy rollout under the circumstances of Eskom hardship and overcapacity up to 2021, by August 2017.

46. On 1 September 2017, the Minister issued a media statement advising that a technical team was established to help resolve an impasse on the signing of Power Purchase Agreements (**PPP**) between the Independent Power Producers for Bid Window 3.5 and Bid Window 4, and Eskom ("**EJM7**").[7] The Minister stated that:

> "It was brought to our attention that **Eskom has excess generation capacity of electricity and based on the current demand patterns the situation is projected to remain this way until 2021**... We further acknowledged that South Africa's Renewable Energy Power Producer Procurement Programme is world renowned and our model has been adopted by many countries including developed countries. While the programme has been a success, there are many lessons we have learnt and there are many areas of improvement to be looked at." (emphasis added)

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cdn.creamermedia.co.za/assets/articles/attachments/69915_government%E2%80%99s_inclusive_growth_action_plan.pdf.

[7] http://www.energy.gov.za/files/media/pr/2017/IPP-Media%20Statement-01September2017.pdf

47. On or about 29 September 2017, a *Memorandum from the Parliamentary Office* indicates that in reply to a question posed by Mr M M Dlamini (EFF) to the Minister of Energy, the Minister indicated that the target for promulgation of the IRP and IEP is the end of February 2018 ("**EJM8**").[8]

48. On 17 October 2017, President Jacob Zuma announced a Cabinet reshuffle in terms of which Minister Kubayi was replaced by former Minister of State Security, Minister Mohlobo as Minister of Energy ("**EJM9**").[9]

49. In a media statement dated 19 October 2017 entitled *Remarks by Minister of Energy Mr David Mohlobo, MP, on the Occasion of the 44th Policy Group Meeting of the Generation IV International Forum, Cape Town South Africa, 19 October 2017* "**EJM10**"),[10] the Minister stated that:

> "8. The Department of Environmental Affairs has recently issued a positive record of decision for Eskom to proceed with an Environmental Impact Assessment into the suitability of the same site to host 4000 MW of nuclear generated electricity.
>
> 9. We welcome this decision as it allows for a public participation process which we believe will propel the country towards the fulfilment of the government policy position on an all-inclusive energy mix....

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[8] http://www.energy.gov.za/PQS/2017/na/Response-to-PQ-2296.pdf

[9] https://www.dailymaverick.co.za/article/2017-10-17-cabinet-reshuffle-a-worried-south-africa-responds/#.WgMRXmdrxMs

[10] http://www.energy.gov.za/files/media/speeches/2017/Remarks-by-Minister-Mahlobo-44th-Policy-Group-Meeting-of-the-GenerationIV-International-Forum-19October2017.pdf

16. South Africa recognises the role of nuclear power in ensuring security of energy supply and meeting the challenge of climate change. We promote an energy mix of coal, gas, renewables and nuclear. Each of these options has their role; some of the energy sources are intermittent supply and while others, such as nuclear and coal, are base-load supply.

17. South Africa has made a policy decision to pursue nuclear energy as part of the energy mix and recognise the role of nuclear as a base-load source of energy in ensuring security of supply and climate change mitigation. Currently, nuclear constitutes about 6% of the South African energy mix – with 1 800 Megawatt electric of electricity supplied to the national grid by the Koeberg Nuclear Power Station in the Western Cape. The approved Integrated Resource Plan of 2010-30 provides for coal, gas, renewables and 9600 Megawatt nuclear as part of the energy landscape by 2030.

19. Being a developing country, our key driver to our policy decision for nuclear power is the economics of the energy source. Currently Koeberg is one of our lowest cost electricity sources, and generation III nuclear power plants remain a good economic choice for South Africa. Generation IV nuclear power plants promise improved economics and South Africa looks forward to deploying such advanced energy systems for its development."

50. On 25 October 2017, the Minister of Finance stated in his Medium-Term Budget Speech ("**EJM11**")[11] that:

> "Over the last decade, our economic growth was effectively capped by our electricity supply constraints, which we have now resolved. **Of course, we now have the problem of surplus capacity**, but that is a better problem to have. Eskom is addressing this by working with its intensive users to grow demand, as well as increasing exports to our neighbouring countries.

[11] https://www.biznews.com/budget/budget-2017/2017/10/25/sa-mid-term-budget-malusi-gigaba/

> It is Eskom's governance issues which are of major concern to government.
>
> The failures of governance, leadership and financial management Eskom are of grave concern.
>
> As government is guarantor over a significant portion of Eskom's debt, it has become a significant risk to the entire economy." (emphasis added)

51. On 26 October 2017, it was reported in the media ("**EJM12**") that the Minister of Finance had stated that South Africa will not have the money for a major nuclear programme for at least the next five years, and that in a pre-speech briefing to his Medium-Term Budget Speech the Minister of Finance had stated further that:

> "The economy can't afford the nuclear at the present moment. We've got access to electricity, there are no intensive users that are taking up the generation capacity that we have".[12]

52. Yet not even a week later, on 31 October 2017, it was reported in the media that the (new) Minister had directed his team (at the Department of Energy) to conclude the IRP with Cabinet with immediate effect, and that the Minister had indicated earlier on the same date (during a briefing of Parliament's oversight committee on energy) that he wanted the IRP to be concluded by November 2017 ("**EJM13**").[13]

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[12] http://ewn.co.za/2017/10/26/gigaba-no-money-for-nuclear-programme-for-at-least-5-years

[13] https://www.fin24.com/Economy/mahlobo-instructs-officials-to-fast-track-sas-energy-plan-20171031

53. On 5 November 2017, it was reported in the media that the "*integrated energy resource plan*" could be completed by as early as November 2017. Eskom spokesperson Khulu Phasiwe was reported as having stated that "*if the integrated energy resource plan showed the nuclear programme could go ahead, **they would begin the tender process immediately***" (**Eskom's media statement**) ("**EJM14**").[14]

54. This line of conduct, including that described in Eskom's media statement, evinces a clear intention to disregard the requirements that there should be a lawful and procedurally fair section 34 determination in place which determines how much nuclear new generation capacity is required, before a procurement process for that new generation capacity commences.

55. Therefore, should Eskom and Government act in accordance with Eskom's media statement, this would be in clear violation of the Judgment.

56. Of course,

56.1 neither the Minister nor NERSA has given any public notice of even intending to begin a section 34 determination process in relation to nuclear new generation capacity (which, in line, with this Court's

[14] https://www.news24.com/SouthAfrica/News/mahlobo-rushes-nuclear-deal-20171105-2

judgment would require NERSA to conduct a public participation process), and

56.2 since the previous nuclear section 34 determinations (the 2013 and 2016 Determinations) were set aside by this Court, no new section 34 determination in relation to nuclear energy has been gazetted.

57. In the circumstances, after considering Eskom's media statement, the Applicants' attorneys immediately wrote to the Government to obtain undertakings that no nuclear procurement process would proceed absent a lawful and procedurally fair section 34 Determination. I discuss this in the next section.

58. Various of the facts set out above rely on media reports recording the statements of various role-players involved in this matter. I submit that in the interests of justice, and given the urgency, the evidence plainly falls to be admitted. That is not only because of the critical nature of the issues at stake for the public at large and for the Constitution, but also because many of those quoted include Ministers of state who could not be expected to depose to confirmatory affidavits in a matter against other Ministers, and because many of the statements quoted are from the official media briefings of organs of state. Furthermore, the evidence is put up to confirm the urgency and opacity with which the Minister and/or Eskom is/are proceeding, and none of those quoted have ever sought to disavow or

10

correct the quotations concerned, and the Minister– despite repeated requests (discussed in the next section) – has not clarified the true position (if it is different to that quoted) or explained the need to move with such immediacy to begin calling for tenders for nuclear energy provision by the end of November.

59. Accordingly, given the circumstances and the urgency, and in light of our Constitution's commitment to accountability and transparency, and their duties to assist and protect the Courts, it will be incumbent on the government respondents to take the Court into their confidence by answering these allegations, notwithstanding that they may be contended to be hearsay.

Correspondence to the Minister, Eskom and NERSA

60. On 7 November 2017, the Applicants' attorney wrote to the Minister (by email, and subsequently by fax and courier) expressing the Applicants' deep concern following the press statements and reports alleging that the Honourable Minister is fast-tracking the IRP and rushing the nuclear deal, as well as expressing the applicants' equal concern that Eskom has signalled its intention to "*begin the tender process immediately*" if the IRP "*showed the nuclear programme could go ahead*" ("**EJM15**").

61. The Applicants' attorney drew the Minister's attention to relevant portions of

the Judgment, and (among other things) advised that:

> "Having regard to the complexities and costs (estimated at being in excess of R1 trillion) implicit in the proposed nuclear power programme, it would be inappropriate, unlawful and unconstitutional for government or any state owned entity to proceed with nuclear determinations or procurement in the absence of clarity, transparency and consistency regarding the decision-making processes. These decision-making processes necessarily require that meaningful opportunities are provided for public participation at every stage (which also requires access to relevant information, such as on affordability)...
>
> The Honourable Minister's reported intention to fast-track the IRP in circumstances where it is clear that there is currently an oversupply of electricity, no urgency and a lack of clarity on who will build, own and operate the power stations, is unexplained and irrational. It also undermines the constitutional imperatives of openness, reasonableness and transparency in government decision-making.
>
> In light of the abovementioned judgment, it would also clearly be unlawful and unconstitutional for Eskom to 'begin the tender process immediately' if the IRP 'showed the nuclear programme could go ahead'. Prior to Eskom commencing the nuclear tender process, the Honourable Minister of Energy, with the concurrence of NERSA, would be required to make a lawful, rational, and procedurally fair section 34 determination specifying (among other things) that new electricity generation capacity is needed (and how much), and that a specified percentage of this new generation capacity should be generated from nuclear energy.
>
> The statements to the press by the Honourable Minister of Energy and Eskom are particularly alarming in light of numerous and serious allegations that have surfaced since the judgment was handed down, including in respect of state capture and irregular procurements involving senior Eskom officials, which allegations are currently under scrutiny by Parliament's Public Enterprises Committee state capture inquiry. It has also emerged that Eskom is not in a financial position to procure new nuclear power stations

https://www.fin24.com/Economy/Eskom/live-state-capture-inquiry-begins-with-focus-on-eskom-20171017). The Honourable Minister of Energy's statements contradict statements made by the Honourable Minister of Finance that '[t]he economy can't afford the nuclear at the present moment, there are no intensive users that are taking up the generation capacity that we have' (http://ewn.co.za/2017/10/26/gigaba-no-money-for-nuclear-programme-for-at-least-5-years). They also contradict findings made by the Minister of Energy's Ministerial Advisory Council on Energy (MACE) Working Group, which reported in its 31 October 2016 Working Group Report was that '[a] least cost IRP model, free of any artificial constraints and before policy adjustments does not include any nuclear power generators. The optimal least cost mix is one of solar PV, wind and flexible power generators (with relatively low utilisation).' Should a policy adjustment be made to the IRP that imposes nuclear new generation capacity into the future energy mix, the IRP itself is likely to be contested and subjected to judicial scrutiny.

In the circumstances we are instructed to call upon you, as we hereby do, to provide an undertaking that no further steps will be taken towards procuring new electricity generation capacity derived from nuclear power until such time as:

(a) in terms of section 34, the Honourable Minister of Energy, with the concurrence of NERSA, makes a lawful, rational, and procedurally fair section 34 determination specifying (among other things) that new electricity generation capacity is needed (and how much), and that a specified percentage of this new generation capacity should be generated from nuclear energy; and

(b) there is clarity and transparency with regard to the general procurement and related processes (consistent with the order granted in the Earthlife Africa judgment) that will be followed (including, but not limited to, the public participation to be undertaken as part of the section 34 process and the processes in relation to any negotiating, renegotiating and/or tabling before Parliament under section 231 of any necessary IGAs).

Should we not receive your undertaking on or before Monday, 13 November 2017, it will be assumed that the Honourable

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> Minister is not committed to ensuring clarity, transparency and consistency in the nuclear determination and procurement process, and that there is a need for an urgent application to the High Court for constructive contempt of court and such other relief as we may be advised to pursue."

62. Similar letters dated 7 November 2017 were sent by email, fax and/or courier to Eskom and NERSA ("**EJM16**" and "**EJM17**" respectively).

63. The fact that the Applicants had written to the Government demanding responses failing which the Applicants would approach this Court urgently for appropriate relief, was widely reported in leading daily newspapers.[15]

64. At the time of launching this application, and notwithstanding that the Government was given a week to respond, that the national news media had reported on the Applicants' correspondence and that the responses were in the context of the prior litigation and Judgment in this matter, no substantive responses were given or undertaking provided.

65. For the sake of completeness, I note that on the afternoon of Monday, 13 November 2017, the Applicants' attorneys received, from the Legal Resources Centre, a copy of a letter from the Department of Energy. The Department's letter was addressed to the Legal Resources Centre, and was marked 'without prejudice'. I, therefore, do not disclose its contents, but note

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[15] https://www.businesslive.co.za/bd/national/2017-11-10-abide-by-nuclear-procurement-ruling-or-we-go-to-court-state-told/ and https://www.iol.co.za/business-report/halt-nuclear-tender-processes-or-we-go-to-court---npos-11947324;

that the Department's letter to the Legal Resource Centre confirmed that the Minister had received the Applicants' attorneys' letter of 7 November 2017, but the Department's letter did not deal with the substance of the Applicants' letter or provide the undertaking sought. I note that a similar letter was directed to the Applicants' attorney, Mr Adrian Pole, which was received on the morning of 14 November: it too was marked 'without prejudice' and I thus do not disclose its contents, save to note that it also does not deal with the substance of the Applicants' attorneys' letter of 7 November 2017 and does not provide the undertaking sought.

IV THE RELIEF SOUGHT AND THE BASIS FOR THAT RELIEF

66. Eskom's media statement clearly demonstrates an intention to proceed to procure nuclear power absent the specific statutory and constitutional safeguards that this Court detailed in the Judgment.

67. In short, it appears that Eskom, and by extension Government, intends to proceed with nuclear procurement, without NERSA determining, after a fair public participation process, that the country in fact requires further nuclear new generation capacity.

68. The Applicants sought assurances from the Minister, Eskom, and NERSA that this was not the case. But it received no such assurances.

69. It is therefore reasonable to apprehend that the Government does imminently intend to proceed with what Eskom's media statement announced, and which would amount to the most expensive procurement in South Africa's history, at a time when "*Eskom has excess generation capacity of electricity and based on the current demand patterns the situation is projected to remain this way until 2021*". All of that would occur absent a lawful section 34 determination that such new generation capacity is in fact required in the first place.

70. This apprehension is reasonable given the following:

70.1 That none of the Government respondents, despite being provided a reasonable time to do so, were willing to give a simple undertaking that did little more than confirm that the Government intended to act in accordance with this Court's Judgment.

70.2 As demonstrated by the main application, there is a history of unlawfulness and secrecy in relation to Government's headlong pursuit of nuclear power. For instance,

70.2.1 as this Court found, the Minister took a section 34 determination and then kept it secret for two years;

70.2.2 The Minister than gazetted that determination unchanged without

NERSA concurrence;

70.2.3 The two previous section 34 determinations in relation to nuclear energy, were not only kept secret until after they were finalised, but were taken without any public participation, and, *inter alia*, for this reason were set aside as unconstitutional;

70.2.4 The 2016 Determination which was intended to replace the 2013 Determination, was taken secretly, with NERSA providing its concurrence in mere days, and, without warning, was produced in court, for the first time, prior to it being gazetted, at the initial hearing of this matter in December 2016, which forced an adjournment of the matter at the Minister's cost (so that that determination could also be urgently challenged) – with the Court marking its displeasure in this respect by ordering costs against the government respondents on a punitive basis for the wasted costs of the adjournment.

71. In the circumstances of this case,

71.1 the rule of law (as enshrined in section 1(c) of the Constitution),

71.2 the requirements that the Government must assist and protect the courts to ensure their independence and effectiveness (section 165(4)

of the Constitution),

71.3 the principles of open and accountable government (see section 41(1), read with section 1(d) and section 195 of the Constitution),

71.4 the requirement that all constitutional obligations must be performed diligently and without delay (section 237),

71.5 and section 172(1)(a), which requires courts to declare any conduct inconsistent with Constitution invalid,

require this Court to declare plainly that section 34 must be complied with before Government can proceed with a nuclear procurement process.

72. To the extent that the Government claims that such relief is not required, since despite their silence and the Eskom media statement, they now claim that they intend complying with section 34 prior to beginning any nuclear procurement, then they are invited, on affidavit, to state this plainly.

73. In any event, even if this is now their position (made belatedly and in the face of this application), they can have no objection to this Court making a declaration to this effect, to avoid unnecessary future litigation, and to ensure certainty, as required by the rule of law and open and accountable government.

74. Given the media reports, and the lack of clarity in relation to what the true position is, and given that the Government has not sought to provide any public account of the steps it intends taking in the future, or has already taken, in relation to nuclear procurement, it is just and equitable for this Court, in terms of section 172(1)(b) of the Constitution to require the Minister and/or Eskom to report to the Court as to what steps they have taken and intend taking in relation to nuclear procurement. This is required, *inter alia*, by the rule of law, open and accountable government, and the need to ensure the independence and effectiveness of this Court and its judgments.

75. Evidently such a report should at least cover the following steps that have been or will be taken, in relation to nuclear procurement:

75.1 First, the section 34 process to be followed. The need for this is self-evident from the Judgment, and the fact that Government appears to be suggesting that it is about to bypass this process;

75.2 Second, the procurement process that will be followed pursuant to the constitutional requirements of section 217. The need for this, is made clear from the finding by this Court in the Judgment that any large-scale procurement process initiated by the state or its agencies, such as nuclear procurement, must be specified before it commences.

75.3 Third, steps in relation to any negotiating, renegotiating and/or tabling

before Parliament under section 231 of any intergovernmental agreements in relation to nuclear cooperation or procurement. In the papers in the main matter, as indicated above, the Minister made clear that Government required IGAs with all countries that would tender in any nuclear procurement process. It was on this basis that the Government tabled the Russia, American and South Korean IGAs in July 2015 before Parliament in terms of section 231(3) of the Constitution in preparation for the commencement of the original nuclear procurement process. This Court set aside the tabling of those three IGAs. It left it to Government to decide what further steps to take (including for instance tabling the IGAs under section 231(2) of the Constitution, which then requires parliamentary approval and public participation). To date, Government has not tabled any further IGAs before Parliament. Given that the Minister has made clear that such IGAs would be a prerequisite for tendering in any nuclear procurement process, and that Eskom has suggested that it intends imminently to commence with tendering for the nuclear power plants, it is therefore necessary for the Minister to set out what steps have or are intended to be taken in this regard.

76. Finally, the Eskom media statement indicates that Eskom and/or the Minister are intending to act in a way that would violate this Court's Judgment. If this is correct, that would be in contempt of court, if it were wilful and intentional. It would also violate the Minister's and Eskom's

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constitutional obligations under section 165(4).

77. At the time of launching this application, the Government's exact position and intentions remain unclear, given that despite the Applicants seeking relevant undertakings from the Minister and Eskom, none were received.

78. As dealt with above, the Applicants seek an order requiring the Minister and Eskom to report to this Court as to the steps they have taken, and will take, inter alia in relation to section 34. The Minister and Eskom may also file answering affidavits in this matter, should they wish to clarify the position under oath.

79. If in due course the evidence before this Court (inter alia, as set out in the report) reveals the Minister and/or Eskom has acted in contempt of this Court's Judgment, the order prayed for permits the Applicants leave to approach this Court on an urgent basis on duly supplemented papers for an order finding that the Minister and Eskom are in contempt of Court.

80. It is submitted that, in the circumstances, of the case, that is the just and equitable, and appropriate order for this Court to make.

VI URGENCY

81. The facts set out above, and in particular in Eskom's media statement, show

12

that Government appears intent on imminently and hastily commencing with the procurement of new nuclear power. Yet, this will be in the absence of any lawful section 34 process, after this Court set aside both of the previous section 34 determinations in relation to nuclear power. Therefore, if Government were to act in accordance with the Eskom media statement, that would amount to an abuse of power, and be in flagrant disregard of this Court's Judgment and a violation of the rule of law.

82. Not only that, but commencing with procurement of this nature, especially when it must be accepted that NERSA, after a public participation process, may not agree that new nuclear power is necessary at all, would lead to a significant waste of public money, since even preparing for such a complex procurement will entail significant expenditure. Moreover, evidently, the procurement of new nuclear generation capacity will have very significant cost implications. As this Court found in the Judgment:

> "There is no serious dispute that the decision to procure 9,6 GW of nuclear new generation capacity will have far-reaching consequences for the South African public and will entail very substantial spending on a particular type and quantity of new infrastructure. The applicants estimated that the costs, which will ultimately be met by the public through taxes and increased electricity charges, could be approximately one trillion rand, and this estimate was not disputed by the respondents. As the applicants point out, the allocation of such significant resources to the project will inevitably affect spending on other social programmes in the field of education, social assistance of health services and housing." (para 44)

83. It is precisely in these instances, that the courts have held there is a need for the court to consider the relief sought on an urgent basis.

84. Moreover, given that the Eskom media statement suggests that Eskom may begin procurement immediately after any IRP, which many news reports indicate the Minister wants to have completed in November 2017, it is essential that the relief sought in this matter be granted prior to the end of November 2017.

85. This will ensure that no procurement process is commenced without Government first complying with section 34, and without a proper report by Government of the relevant actions it has taken and intends to take.

86. The need to approach this Court urgently is also exacerbated by the fact that previously in relation to the procurement of new nuclear power, as made clear in the papers filed in the main application, Government acted secretly, and then so with improper haste. For instance, NERSA concurred in the 2016 Determination in mere days, and then only a few days after the 2016 Determination was gazetted (which then made Eskom the procurer for the nuclear build programme, whereas previously it had been the Department of Energy) Eskom issued the previous RFI in relation to the nuclear procurement.

87. It is therefore essential that this Court urgently grants the declaratory relief, and requires the Minister and/or Eskom to report to this Court, so that the principles of open, accountable and transparent government and the rule of law can be protected.

88. In addition, the nature of this case reveals, subject to further affidavits and reports being filed by the Government, that the Government may have acted or is imminently about to act in contempt of this Court's Judgment. This is a self-standing basis for this Court to determine the matter urgently.

89. Finally, the nature of nuclear procurement, as discussed above, is that it involves inter-governmental agreements and arrangements, which are entered into on the international plane. While the domestic exercises of power can be set aside by Courts, the actions and decisions which have already, or may be taken, on the international plane, may, as a matter of international law, bind South Africa, and have financial consequences, that are beyond the control of domestic courts. In particular, international disputes in relation to nuclear procurement processes may be subject to international arbitration, which may lead to binding internationally enforceable awards for compensation against South Africa. It is for this reason essential that this Court must urgently:

89.1 make clear to Government what requirements Government must comply with; and

89.2 require Government to report as to the steps it has and intends taking, so that these can be timeously considered by the Court, the Applicants and the public, so that any necessary actions can be taken.

90. The notice of motion makes provision for this matter to be heard in accordance with the urgency of the matter as discussed above, while still providing a reasonable time for the respondents to file any answering affidavits.

VII CONCLUSION

91. Wherefore, the Applicants seek the relief prayed for in the notice of motion delivered together with this affidavit.

ELIZABETH JANE McDAID

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 on this day of November 2017.

COMMISSIONER OF OATHS

COMMISSIONER OF OATHS
CANDIDATE ATTORNEY RSA
ABRAHAMS & GROSS INC
1st FLOOR, 56 SHORTMARKET STREET
CAPE TOWN

THE REPUBLIC OF SOUTH AFRICA

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

Case No: 19529/2015

Before the Hon. Mr Justice Bozalek and the Hon. Ms Justice Baartman

Hearing: 13 December 2016; 22 – 24 February 2017
Judgment Delivered: 26 April 2017

In the review application between:

EARTHLIFE AFRICA – JOHANNESBURG	**1st Applicant**
SOUTHERN AFRICAN FAITH COMMUNITIES' ENVIRONMENT INSTITUTE	**2nd Applicant**

and

THE MINISTER OF ENERGY	**1st Respondent**
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	**2nd Respondent**
THE NATIONAL ENERGY REGULATOR OF SOUTH AFRICA	**3rd Respondent**
SPEAKER OF THE NATIONAL ASSEMBLY	**4th Respondent**
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	**5th Respondent**
ESKOM HOLDINGS (SOC) LIMITED	**6th Respondent**

JUDGMENT

BOZALEK J (BAARTMAN J concurring)

[1] This application concerns challenges to various steps taken by the State between 2013 and 2016 in furtherance of its nuclear power procurement programme. The steps

AC 9

challenged are two separate determinations made by the Minister of Energy in 2013 and 2016, respectively, in terms of sec 34 of the Electricity Regulation Act, 4 of 2006 ('ERA'), whilst the second main focus of the challenge is the constitutionality of the tabling by the Minister before Parliament of three intergovernmental agreements (IGA's) during 2015.

THE PARTIES

[2] First applicant is Earthlife Africa – Johannesburg, a non-governmental non-profit voluntary association which mobilises civil society around environmental issues. The second applicant is the Southern African Faith Communities' Environmental Institute, a registered public benefit and non-profit organisation which also concerns itself with environmental and socio economic injustices.

[3] First respondent is the Minister of Energy ('the Minister') who issued the two sec 34 determinations in question and tabled the three IGA's relating to nuclear cooperation with other countries. The President of the Republic of South Africa ('the President') is cited as second respondent by reason of his decision in 2014 authorising the Minister's signature of an IGA concluded in 2014 with the Russian Federation. Third respondent is the National Energy Regulator of South Africa ('NERSA'), a statutory body set up in terms of the National Energy Regulator Act, 40 of 2004 ('NERA'), which body concurred in the sec 34 determinations made by the Minister. The Speaker of the National Assembly and the Chairperson of the National Council of Provinces are the fourth and fifth respondents, cited because of their interest in the question whether the IGA's were properly tabled before their respective houses. During the course of proceedings, Eskom Holdings (SOC) Limited ('Eskom') was joined as sixth respondent but it, as well as the fourth and fifth respondents, abide by the Court's decision. All the

relief sought is opposed by the Minister and the President to whom I shall refer as 'the respondents'.

BACKGROUND

[4] In late 2013, the Minister (with NERSA's concurrence), acting in terms of sec 34 of ERA determined that South Africa required 9.6GW ('gigawatts') of nuclear power and that this should be procured by the Department of Energy. The Minister purported to make the determination on or about 17 December 2013. It was, however, only gazetted on 21 December 2015 and delivered to the applicants as part of the record in this matter on or about 23 December 2015. The gazetting and production of this sec 34 determination was at least partly in response to the applicants' initial case in which, inter alia, a declarator was sought that, prior to the commencement of any procurement process for nuclear new generation capacity, the Minister and NERSA were both required in accordance with *'procedurally fair public participation processes'* to have determined that new generation capacity was required and must be generated from nuclear power in terms of sec 34(1)(a) and (b) of ERA.

[5] The applicants commenced their review application in October 2015. Prior thereto, on or about 10 June 2015, the Minister had tabled the three IGA's before Parliament which are the subject of the present constitutional challenge. In chronological order these were agreements between the Government of the Republic of South Africa and the United States of America, concluded in August 1995, the Government of the Republic of Korea, concluded in October 2010 and the Government of the Russian Federation, concluded in September 2014, all in regard to cooperation in the field of nuclear energy.

[6] On or about 8 December 2016, during these proceedings, the Minister issued a second sec 34 determination along similar lines to the previous sec 34 determination, but now identifying Eskom as the procurer of the nuclear power plants. The determination was made public at the commencement of the initial hearing in this matter on 13 December 2016, occasioning its postponement for several months, and was gazetted on 14 December 2016.

EVOLUTION OF THE LITIGATION

[7] The applicants' case has evolved through three stages. The relief initially sought was a review and setting aside of the Minister's decision to sign the Russian IGA, the President's decision authorising the Minister's signature, and the Minister's decision to table the Russian IGA before Parliament in terms of sec 231(3) of the Constitution. Certain declaratory relief was also sought in relation to how the nuclear procurement process should unfold in relation to the issuing of determinations under sec 34(1) of ERA and sec 217 of the Constitution which deals with the requirements for a fair procurement system for organs of state.

[8] After the respondents furnished the first sec 34 determination as part of the record, the applicants filed an amended notice of motion seeking the review and setting aside of that determination and any *'Request for Proposals'* issued by the Department of Energy pursuant thereto.

[9] Finally, after postponement of the proceedings in December 2016, the Minister filed a supplementary affidavit explaining the circumstances surrounding, and the rationale for, the second sec 34 determination. The applicants were afforded an opportunity to file answering affidavits to which they attached a draft order indicating

that further relief being sought was the review and setting aside of the Minister's sec 34(1) determination gazetted on 14 December 2016, and the setting aside of any Requests for Proposals or Requests for Information issued pursuant to either determination.

[10] The hearing resumed on 22 February 2017 when the matter was fully argued.

OUTLINE OF THE PARTIES' CASES

[11] In broad terms the applicants' challenge to the three IGA's is largely procedural in nature and based on the different procedures set out in sec 231(2) and 231(3) of the Constitution to render such agreements binding over the Republic. Section 231(2) provides that an IGA binds the Republic only after it has been approved by resolution in both the National Assembly ('the NA') and the National Council of Provinces ('the NCOP') *'unless it is an agreement referred to in subsection (3)'*. The latter subsection provides that IGA's of a *'technical, administrative or executive nature'* binds the Republic without the approval of the NA or the NCOP *'but must be tabled in the Assembly and the Council within a reasonable time'*. The applicants aver that inasmuch as the US IGA was entered into more than two decades before it was tabled in terms of sec 231(3), and nearly five years previously in the case of the Korean IGA, the delay in so tabling them rendered them non-compliant with sec 231(3) and therefore non-binding. The Russian IGA was also tabled in terms of sec 231(3) but in its case the applicants aver that it was not an international agreement as envisaged in sec 231(3) and thus should have been tabled before the two houses in terms of sec 231(2) with the result that it would only become binding after it had been approved by resolution of those houses.

[12] In regard to the challenge to all three IGA's the respondents raise various preliminary points, namely, that there has been a material non-joinder inasmuch as none

of the three countries have been joined as parties to the proceedings. In any event, the respondents contend that all three agreements, being international agreements, are not justiciable by a domestic court. As regards the Russian IGA the respondents contend in the alternative that upon a proper interpretation and construction thereof it is *'an international framework agreement for cooperation between sovereign states'* (and not a procurement contract) to cooperate on an executive level in the field of nuclear energy and nuclear industry; furthermore, the respondents contend, the decision of the Minister to table the Russian IGA in terms of sec 231(3) of the Constitution was beyond reproach inasmuch as it falls within the general category of a *'technical, administrative and executive agreement, not requiring ratification or accession'*. It is also contended by the respondents that, in any event, even if the Russian IGA was tabled in Parliament in terms of the incorrect procedure, the applicants have no standing to claim any relief in relation thereto, this being a matter for Parliament to take up with the Minister.

[13] In regard to the US and Korean IGA's the respondents, for the reasons given above, again assert that the applicants have no standing to claim any relief. They assert further that there was no unreasonable delay in tabling either IGA and that what is reasonable in any particular instance must depend on the facts and circumstances pertaining to each IGA. They contend further that, even if there was an unreasonable delay in the tablings, it is only the delay itself that is unconstitutional and this does not affect the validity or effectiveness of the tabling themselves nor render the two treaties without any binding effect.

[14] As regards to the sec 34 determinations, in broad outline, the applicants' case is that both the Minister's decision as contained in the determinations and NERSA's concurrence therein constituted administrative action but breached the requirements for

91

such action to be lawful, reasonable and procedurally fair. Amongst the grounds that they rely on in this regard are that neither the Minister's decision nor that of NERSA's was preceded by any public participation or consultation of any ground. Secondly, as regards the first sec 34 determination the applicants contend it was unlawful by reason of the two year delay in gazetting it; thirdly, they contend, both determinations were irrational, unreasonable and taken without regard to relevant considerations or with regard to irrelevant considerations.

[15] The applicants rely on certain additional grounds in relation to the 2016 determination, more specifically that NERSA's decision to concur therein was unlawful in that its key reason was that it believed that it would be *'mala fide for it not to concur in the Minister's proposed determination'* and was thus predicated on a material error of law or fact. It is also contended that NERSA failed to apply its mind to further relevant considerations, relating to the Minister's proposed determination, which arose after the 2015 determination.

[16] A further specific ground upon which the 2013 and 2016 determinations is challenged is the absence therein of any specific system for the procurement of nuclear new build capacity which is said to be in violation of sec 34 of ERA, read together with sec 217 of the Constitution.

[17] A further procedural ground of review is based on the applicants' contention that since the 2016 determination failed to withdraw or amend the 2013 sec 34 determination it resulted in the anomalous situation of two gazetted sec 34 determinations which are mutually inconsistent. As such the determinations violate the principle of legality and fall to be reviewed and set aside. The applicants contend, furthermore, that even if the

Minister's decisions as expressed in the sec 34 determination are not administrative but executive action they are nonetheless susceptible to review by virtue of the principle of legality and, even on this standard, fall to be set aside on the basis of irrationality.

[18] For their part the respondents contend that neither the decisions of the Minister nor those of NERSA in concurring with the sec 34 determinations constitute administrative action. Instead, they contend the determinations amount to *'encased policy directives'* and that a ministerial determination under sec 34 of ERA amounts to *'executive policy'*. They argue that no actual procurement decisions, nor a decision to grant a generation licence, were taken and the sec 34 determinations were in substance nothing more than policy decisions by the national executive binding only upon NERSA. The respondents dispute, furthermore, the specific grounds of the applicants' challenge to the sec 34 determinations and contend that there is no requirement that a determination must specify the procurement system for the nuclear new generation capacity. They contend further that neither the Minister's decision nor NERSA's decision was required to be made in accordance with a procedurally fair and public participation process. The respondents concede that the determinations are subject to review for rationality but contend that both determinations meet that standard.

[19] The respondents dispute, on various grounds, the specific bases upon which the applicants contend that NERSA's concurrence in the 2016 determination was unlawful, unreasonable or irrational. As regards the general ground advanced by the applicants that the 2013 and 2016 determinations are mutually inconsistent and stand to be struck down for this reason, the respondents' case is that, properly interpreted, the first determination was impliedly repealed by the second determination but that, in any event, even if both determinations stand separately from each other they are not mutually inconsistent.

THE ISSUES

[20] The following main issues fall to be determined:

1. Did the Minister and NERSA breach statutory and constitutional prescripts in making the 2013 and 2016 sec 34 determinations?

2. Did the President and the Minister breach the Constitution in deciding to sign the 2014 Russian IGA in relation to nuclear procurement and then in tabling it under sec 231(3) of the Constitution rather than sec 231(2)?

3. Did the Minister breach the Constitution in tabling the US IGA and South Korean IGA in relation to nuclear cooperation two decades and nearly five years, respectively after they had been signed?

CHRONOLOGY OF EVENTS

[21] Before dealing with the issues it is useful to set out a chronology of events as they relate to the sec 34 determinations and the various IGA's concluded by the respondents relating to nuclear issues.

1. In March 2011 the Minister gazetted the Integrated Resource Plan for Electricity 2010-2030 (IRP2010) which the Department of Energy itself stated should be revised every two years, but which, as at the date of hearing, had yet to be revised.

2. On 11 November 2013 the Minister signed a determination under sec 34(1) of ERA in relation to the requirement for and procurement of 9 600MW of electricity from nuclear energy which secured NERSA's concurrence on 17 December 2013.

3. On 20 September 2014 the President signed a minute approving the Russian IGA in relation to a strategic nuclear partnership and authorised the Minister to sign the agreement.

4. The following day, the Minister signed the agreement on behalf of the Government.

5. A day later, on 22 September 2014, the Department of Energy and Russia's atomic energy agency ('Rosatom'), released identical press statements confirming their joint understanding of what the two governments had agreed, and advising that on 22 September 2014 the Russian Federation and the Republic of South Africa had signed an Intergovernmental Agreement on Strategic Partnership and Cooperation in Nuclear Energy and Industry.[1]

6. The press releases recorded inter alia that:

'The Agreement lays the foundation for the large-scale nuclear power plants (NPP) procurement and development programme of South Africa based on the construction in RSA of new nuclear power plants with Russian VVER reactors with total installed capacity of up to 9.6 GW (up to 8 NPP units). These will be the first NPPs based on the Russian technology to be built on the African continent. The signed Agreement, besides the actual joint construction of NPPs, provides for comprehensive collaboration in other areas of the nuclear power industry, including construction of a Russian-technology based multipurpose research reactor, assistance in the development of South-African nuclear infrastructure, education of South African nuclear specialists in Russian universities and other areas.'

7. In a subsequent press release, however, the Department of Energy described the Russian IGA as initiating *'the preparatory phase for the procurement for the new nuclear build programme'* and stated that *'(s)imilar agreements are foreseen with other vendor countries that have expressed an interest in supporting South Africa in this massive programme'*.[2]

8. In further press releases in late 2014 and early 2015 the Department of Energy advised that it had conducted vendor parades in relation to nuclear procurement, first with Russia and then with China, France, South Korea and the United States.

[1] Media Release "Russia and South Africa sign agreement on strategic partnership in nuclear energy" Pretoria, 22 September 2014 – record volume 1 p 131.
[2] Media Release "Minister Joemat-Petterson concludes her visit to Vienaa, Austria" 23 September 2014 – record volume 4 p 1293.

9. After entering into the Russian IGA, the Government also entered into IGA's with China and France in late 2014.

10. On 10 June 2015 the Minister authorised the submission for tabling in Parliament of various IGA's signed with various nuclear vendor countries in accordance with sec 231(3) of the Constitution.

11. The following IGA's were tabled:

11.1 Agreement for Cooperation between the Government of the Republic of South Africa and the United States of America concerning Peaceful Uses of Nuclear Energy ('the US IGA'), signed on 25 August 1995;

11.2 Agreement between the Government of the Republic of Korea and the Government of the Republic of South Africa regarding Cooperation in the Peaceful Uses of Nuclear Energy ('the South Korean IGA'), signed on 8 October 2010;

11.3 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 ('the Russian IGA'), signed on 21 September 2014;

11.4 Agreement between the Government of the Republic of South Africa and the Government of the French Republic on Cooperation in the Development of Peaceful Uses of Nuclear Energy, dated 14 October 2014;

11.5 Agreement between the Government of the Republic of South Africa and the Government of the People's Republic of China on Cooperation in the field of Civil Nuclear Energy Projects, signed on 7 November 2014.

12. On 21 December 2015 the Minister's 2013 sec 34 determination was made public by publication in the government gazette.

13. On 8 December 2016 the Minister issued a further determination under sec 34(1) of ERA in relation to the requirement for and procurement of 9 600MW of electricity from nuclear energy with NERSA's concurrence, and published it in the government gazette on 14 December 2016.

THE SECTION 34 DETERMINATIONS

[22] Before setting out the terms of the 2013 sec 34 determination regard must be had to the relevant empowering legislation. The preamble to ERA records that its purposes were inter alia to establish a national regulation framework for the electricity supply industry and to make NERSA the custodian and enforcer of the national electricity regulatory framework. Section 2 provides that amongst the objects of ERA are to:

> *'(a) achieve the efficient, effective, sustainable and orderly development and operation of electricity supply infrastructure in South Africa;*
>
> *(b) ensure that the interests and needs of present and future electricity customers and end users are safeguarded and met, having regard to the governance, efficiency, effectiveness and long-term sustainability of the electricity supply industry within the broader context of economic energy regulation in the Republic;*
>
> ...
>
> *(g) facilitate a fair balance between the interests of customers and end users, licensees, investors in the electric supply industry and the public.'*

[23] Section 34 of ERA deals with the subject of new generation capacity and provides in part as follows:

> *'(1) The Minister may, in consultation with the Regulator –*
>
> *(a) determine that new generation capacity is needed to ensure the continued uninterrupted supply of electricity;*
>
> *(b) determine the types of energy sources from which electricity must be generated, and the percentages of electricity that must be generated from such sources;*

(c) determine that electricity thus produced may only be sold to the persons or in the manner set out in such notice;

(d) determine that electricity thus produced must be purchased by the persons set out in such notice;

(e) require that new generation capacity must:

(i) be established through a tendering procedure which is fair, equitable, transparent, competitive and cost-effective;

(ii) provide for private sector participation.

2. ...

3. The Regulator, in issuing a generation licence –

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

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

[24] Section 34(1) therefore operates as the legislative framework by which any decision that new electricity generation capacity is required and any decision taken by the Minister in that regard, has no force and effect unless and until NERSA agrees with the Minister's decision.

[25] Commenting on the role of administrative law in the field of electricity regulation Klees[3] states as follows:

> *'The significance of administrative law for environmental law is beyond dispute. Glazewski describes environmental law as "administrative law in action, as environmental conflicts frequently turn on the exercise of administrative decision-making powers". Something similar could be said of NERSA's decision-making powers under the ERA.'*

[3] A Klees *Electricity Law in South Africa* (2014) p 16 para 3.4.3.

[26] The Minister's 2013 determination read, insofar as it is relevant, as follows:

'The Minister of Energy ... in consultation with ... ("NERSA"), acting under section 34(1) of the Electricity Regulation Act 4 of 2006 ... has determined as follows:

1. *that energy generation capacity needs to be procured to contribute towards energy security and to facilitate achievement of the greenhouse gas emission targets for the Republic of South Africa, accordingly, 9 600 megawatts (MW) should be procured to be generated from nuclear energy ("nuclear programme"), which is in accordance with the capacity allocated under the Integrated Resource Plan for Electricity 2010-2030 ...;*

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;*

3. *the nuclear programme shall target connection to the Grid as outlined in the IRP2010-2030 (or as updated), taking into account all relevant factors including the time required for procurement;*

4. *the electricity may only be sold to the entity designated as the buyer in paragraph 7 below, and only in accordance with the power purchase agreements and other project agreements to be concluded in the course of the procurement programmes;*

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, request 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 closure which are within its control;*

7. *the electricity must be purchased by Eskom Holdings SOC Limited or by any successor entity to be designated by the Minister of Energy, as buyer (off-taker); and*

8. *the electricity must be purchased from the special purpose vehicle(s) set up for the purpose of developing the nuclear programme.'*

[27] On 11 November 2013 the Minister's predecessor wrote to the Chairperson of NERSA requesting its concurrence in the proposed determination as set out above. Some five weeks later, on 20 December 2013, the Chairperson advised the Minister's predecessor that NERSA had resolved to concur in the proposed determination. NERSA's decision was taken at a meeting of its board held on 26 November 2013, two weeks after receiving the Minister's proposed determination. Minutes of those meetings record its reasons for concurring with the Minister's proposed determination.

WERE THE SECTION 34 DETERMINATIONS ADMINISTRATIVE ACTION AND, IF SO, WERE THEY LAWFUL, REASONABLE AND PROCEDURALLY FAIR?

[28] The right to just administrative action is enshrined in sec 33 of the Constitution and provides that everyone has the right to *'administrative action that is lawful, reasonable and procedurally fair'* and that national legislation must be enacted to give effect to the right. Administrative action is then defined in section 1 of the Promotion of Administrative Justice Act, 3 of 2000 ('PAJA') in part as follows:

'...any decision taken, or any failure to take a decision, by -

(a) an organ of state, when -

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

...

which adversely affects the rights of any person and which has a direct, external legal effect, but does not include -

(aa) the executive powers or functions of the National Executive, including the powers or functions referred to in ...'

[29] Amongst the excluded powers or functions is sec 85(2)(b) of the Constitution which provides that the President exercises the executive authority, together with other members of the Cabinet by,

'(b) developing and implementing national policy'.

[30] On behalf of the applicants it was contended that it was unnecessary to determine whether the 2013 sec 34 determination amounted to executive action or administrative action since even if it was the former it was subject to rationality review; therefore, the argument continued, the real question was whether the determination amounted to nothing more than policy (or as it was put on behalf of the respondents - *'an encased policy directive'*). In *SARFU*[4] the Constitutional Court declared that the distinction between executive and administrative action boils down to a distinction between the implementation of legislation, which is administrative action, and the formulation of policy, which is not. The Court stated that where the line is drawn will depend primarily upon the nature of the power and the factors relevant to this consideration which are in turn, the source of the power, the nature of the power, its subject matter, whether it involves the exercise of a public duty and whether it is related to policy matters or the implementation of legislation.

[31] *Woolman*[5] cautions against the over extension of executive policy decisions so as to exclude a large range of actions from the application of the right to just administrative action. The authors contend that it is important to distinguish between policy in the narrow sense and policy in the broad sense, of which only the latter should be excluded

[4] President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1) SA 1 (CC).
[5] S Woolman and M Bishop *Constitutional Law of South Africa* 2nd ed vol 4 [original service: 06-08] p 63-32.

from the ambit of administrative action. In *Ed-U-College*[6] O'Regan J stated on behalf of the Court:

> *'Policy may be formulated by the Executive outside of a legislative framework. For example, the Executive may determine a policy on road and rail transportation or on tertiary education. The formulation of such policy involves a political decision and will generally not constitute administrative action. However, policy may also be formulated in a narrower sense where a member of the Executive is implementing legislation. The formulation of policy in the exercise of such powers may often constitute administrative action.'*

[32] In the present matter the source of the power exercised by the Minister was sec 34(1) of ERA and the nature of the power was one which had far reaching consequences for the public as a whole and for specific role-players in the electricity generation field. The determination also had external binding legal effect in that, at the very least, it bound or authorised NERSA to grant generation licences for nuclear energy subject to an overall limit of 9 600MW. Specific affected parties in this case would be not only those engaged in the field of nuclear energy generation but other electricity generation providers such as oil, gas or renewable energy inasmuch as their potential to contribute to the need for extra capacity would be removed. These factors all point towards the sec 34 determination constituting administrative action.

[33] Given the critical role that NERSA has in the making of a ministerial determination in terms of sec 34 of ERA, regard must also be had to its powers and the manner in which it is required to exercise these. NERSA itself was established in terms of NERA which was promulgated to establish a single regulator to regulate the electricity, piped-gas and petroleum pipeline industries.

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[6] *Permanent Secretary, Department of Education and Welfare, Eastern Cape, and Another v Ed-U-College (PE) (Section 21) Inc* 2001 (2) SA 1 (CC) para 18.

[34] Section 9 of NERA sets out the duties of members of the energy regulator who must inter alia:

> '(a) *act in a justifiable and transparent manner whenever the exercise of their discretion is required;*
>
> ...
>
> (c) *act independently of any undue influence or instruction;*
>
> ...
>
> (f) *act in the public interest.'*

[35] Section 10 of NERA, which plays an important role in this matter, sets out the requirements for the validity of NERSA's decisions and provides as follows:

> '1. *Every decision of the Energy Regulator must be in writing and be –*
>
> (a) *consistent with the Constitution and all applicable laws;*
>
> (b) *in the public interest;*
>
> (c) ...
>
> (d) *taken within a procedurally fair process in which affected persons have the opportunity to submit their views and present relevant facts and evidence to the Energy Regulator;*
>
> (e) *based on reasons, facts and evidence that must be summarised and recorded; and*
>
> (f) *explained clearly as to its factual and legal basis and the reasons therefor.*
>
> 2. *Any decision of the Energy Regulator and the reasons therefor must be available to the public except information that is protected in terms of the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000).*
>
> 3. *Any person may institute proceedings in the High Court for the judicial review of an administrative action by the Energy Regulator in accordance with the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000).*

> *4. a) Any person affected by a decision of the Energy Regulator sitting as a tribunal may appeal to the High Court against such decision.*
>
> ... '

[36] There is nothing to suggest that the decision taken by NERSA to concur in the Minister's proposed 2013 sec 34 determination was one which fell outside the ambit of sec 10 of NERA. An independent requirement for a valid decision of this nature was thus that it 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 the Energy Regulator'*. Section 10(3) specifically provides for judicial review of administrative action by NERSA.

[37] Against this background, when regard is had to the definition of administrative action in PAJA it is clear that all its elements are satisfied at least as far as NERSA's role in the sec 34 determination. NERSA is undoubtedly an organ of state which, in taking the decision to concur with the Minister's proposed determination, was *'exercising a public power or performing a public function'* in terms of legislation, namely, sec 34 of ERA and sec 10 of NERA. That decision had a direct, external legal effect and, at the least, adversely affected the rights of energy producers outside the stable of nuclear power producers. None of the exemptions or qualifications referred to in sec 1(b)(aa) – (ii) of PAJA are met.

[38] In regard to the requirement that the action must *'adversely affect the rights of any person'* there is authority that this threshold must not be interpreted restrictively. In *Grey's Marine*[7] the Supreme Court of Appeal dealt with this requirement, Nugent JA stating as follows:

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[7] *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA).

> *'While PAJA's definition purports to restrict administrative action to decisions that, as a fact, "adversely affect the rights of any person", I do not think that a literal meaning could have been intended. For administrative action to be characterised by its effect in particular cases (either beneficial or adverse) seems to me to be paradoxical and also finds no support from the construction that has until now been placed on s 33 of the Constitution. Moreover, that literal construction would be inconsonant with s 3(1)* [of PAJA], *which envisages that administrative action might or might not affect rights adversely. The qualification, particularly when seen in conjunction with the requirement that it must have a "direct and external legal effect", was probably intended rather to convey that administrative action is action that has the capacity to affect legal rights, the two qualifications in tandem serving to emphasise that administrative action impacts directly and immediately on individuals.'* [8]

[39] In *Steenkamp*[9] Moseneke DCJ held that a decision to award or refuse a tender constitutes administrative action because the decision *'materially and directly affects the legal interests or rights of tenderers concerned'* giving further weight to a non-restrictive interpretation of this requirement.

[40] The power exercised by the Minister in terms of sec 34(1) of ERA is unusual in that any decision on his part is inchoate until such time as NERSA concurs therein and the sec 34 determination is thereby made. It is, however, the sec 34 determination which is challenged as unfair, unlawful and unreasonable administrative action. Having concluded that NERSA's role in concurring in the proposed determination amounts to administrative action for the reasons furnished, it is conceptually difficult to view the sec 34 determination, as a whole, as anything other than administrative action. Moreover, if NERSA's action, as a vital link in the chain which makes up the sec 34 determination, does not meet the test for fair administrative action, little point is served in scrutinizing any decision by the Minister, prior to the sec 34 determination being made, for fair

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[8] *Grey's Marine* n 7 para 23.
[9] *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) para 21.

administrative action. One link, namely NERSA's action having proved to be fatally flawed from an administrative law point of view, the chain, i.e. the sec 34 determination, is broken.

[41] On behalf of the respondents it was contended that the requirement that *'every decision'* of NERSA had to comply with the requirements of sec 10 of NERA could not be taken literally. Although internal decisions of NERSA which fall outside the requirements of sec 10 can readily be imagined, its decision to concur in the Minister's proposed determination can hardly be categorised as a rote, everyday decision. Indeed the decision to formally expand the nuclear procurement programme to 9 600MW must surely rank as one of the most important decisions taken by NERSA in the recent past.

[42] Section 3 of PAJA echoes sec 10 of NERA to the effect that administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair. It stipulates that a fair administrative procedure will depend on the circumstances of each case. Also pertinent is sec 4 of PAJA which deals with administrative action affecting the public and provides that the administrator:

> *'(I)n order to give effect to the right to procedurally fair administrative action, must decide whether -*
>
> *(a) to hold a public inquiry 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) ... or;*
>
> *(e) to follow another appropriate procedure which gives effect to section 3.'*

[43] NERSA did not oppose the application and therefore offered no explanation as to what procedure, if any, it followed to give effect to the right to procedurally fair administrative action. The minutes of the meeting of NERSA at which the decision was

taken reveal no indication of any prior process whereby *'affected persons'* or the public had the opportunity to submit their views to NERSA. Nor is there any indication in the record of any such procedure having been followed. The short period of time between the Minister's request to NERSA to consider the proposed determination and its final decision, a matter of weeks, renders it most unlikely that a fair procedure could have been carried out even if NERSA had been minded to follow one.

[44] There is no serious dispute that the decision to procure 9.6GW of nuclear new generation capacity will have far reaching consequences for the South African public and will entail very substantial spending on a particular type and quantity of new infrastructure. The applicants estimated that the costs, which will ultimately be met by the public through taxes and increased electricity charges, could be approximately R1 000 000 000 000 (one trillion Rand) and this estimate was not disputed by the respondents. As the applicants point out, the allocation of such significant resources to the project will inevitably effect spending on other social programmes in the field of education, social assistance of health services and housing. They also point out that the decision embodied in the sec 34 determination has potentially far reaching implications for the environment.

[45] In my view, in light of these considerations, a rational and a fair decision-making process would have made provision for public input so as to allow both interested and potentially affected parties to submit their views and present relevant facts and evidence to NERSA before it took a decision on whether or not to concur in the Minister's proposed determination.

[46] For these reasons, I consider that NERSA's decision to concur in the Minister's proposed 2013 determination without even the most limited public participation process renders its decision procedurally unfair and in breach of the provisions of sec 10(1)(d) of NERA read together with sec 4 of PAJA.

[47] Even if I am wrong in concluding that NERSA's decision to concur (or the combined decision of the Minister and NERSA) amounted to administrative action, the decision/s still have to satisfy the test for rational decision-making, as part of the principle of legality. Applying this to the applicants' challenge on the basis of an unfair procedural process the question is whether the decision by either the Minister or NERSA (or the combined decision of the Minister and NERSA) fell short of constitutional legality for want of consultation with interested parties.

[48] Our courts have recognised that there are circumstances in which rational decision-making calls for interested persons to be heard. In *Albutt v Centre for the Study of Violence and Reconciliation, and Others*[10] the Court had to decide inter alia whether the President was required, before exercising a power to pardon offenders whose offences were committed with a political motive, to afford a hearing to victims of the offences. It was held that the decision to undertake the special dispensation process under which pardons were granted without affording the victims an opportunity to be heard had to be rationally related to the achievement of the objectives of the process.[11]

[49] In *Democratic Alliance v President of the Republic of South Africa and Others*[12] Yacoob ADCJ stated:

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[10] 2010 (3) SA 293 (CC).
[11] *Albutt* n 10 para 68-69.
[12] 2013 (1) SA 248 (CC) para 34.

'It follows that both the process by which the decision is made and the decision itself must be rational. Albutt is authority for the same proposition.'

He went on to state:

'The conclusion that the process must also be rational in that it must be rationally related to the achievement of the purpose for which the power is conferred, is inescapable and an inevitable consequence of the understanding that rationality review is an evaluation of the relationship between means and ends. The means for achieving the purpose for which the power was conferred must include everything that is done to achieve the purpose. Not only the decision employed to achieve the purpose, but also everything done in the process of taking that decision, constitutes means towards the attainment of the purpose for which the power was conferred.'[13]

[50] In the present matter NERSA must have been aware that there were sectors of the public with either special expertise or a special interest regarding the issue of whether it was appropriate for extra generation capacity to be set aside for procurement through nuclear power. In addition, in taking the decision, NERSA was under a statutory duty to act in the public interest and in a justifiable and transparent manner whenever the exercise of their discretion was required but also to utilise a procedurally fair process giving affected persons the opportunity to submit their views and present relevant facts and evidence. These requirements were clearly not met by NERSA in taking its far reaching decision to concur in the Minister's sec 34 determination. It has failed to explain, for one, how it acted in the public interest without taking any steps to ascertain the views of the public or any interested or affected party. For these reasons I consider that NERSA's decision fails to satisfy the test for rationality based on procedural grounds alone.

[13] *Democratic Alliance* n 12 para 36.

12

A FURTHER PROCEDURAL CHALLENGE BASED ON DELAY

[51] There is another procedural challenge to the 2013 sec 34 determination which is based on the delay in gazetting the decision. The facts were that the Director-General in the Department of Energy submitted a decision memorandum to the Minister on 8 November 2013. The recommendation to the Minister was that she:

> *'7.1. approves the sec 34 determination in annexure A for promulgation in the government gazette, so that the Nuclear Procurement process can be launched; and*
>
> *7.2. signs the attached letter to NERSA seeking their concurrence'.* [14]

[52] The Minister approved and adopted the recommendation on 11 November 2013 whilst NERSA concurred in the decision, sending a letter to this effect to the Minister on 20 December 2013.

[53] There was no suggestion in either the decision memorandum, the Minister's approval of the recommendation or in NERSA's concurrence in the decision that it should not be gazetted. This last aspect is not surprising given that sec 9 of NERA provides that NERSA must act in a *'justifiable and transparent manner and in the public interest'*. More pointedly sec 10 of NERA requires that any decision of NERSA and the reasons therefor *'must be available to the public'*. It was, however, only on 21 December 2015, some two years after the sec 34 determination was made that it was gazetted. This was the first occasion on which the 2013 sec 34 determination was made public. The gazetting followed a further decision memorandum from the Director-General to the

[14] Memorandum – Department of Energy "Determination in respect of the Nuclear Programme" (11 November 2013) – record volume 2 p 488 para 8.6.

Minister dated 1 December 2015[15] which sought to explain why the determination had not been gazetted earlier as follows:

> *'3.4 Although the determination process was completed in 2014 with NERSA and signed by the previous Minister of Energy, Ben Martins, the determination was not gazetted due to change in the leadership in the Ministry and to further conduct some work prior to gazetting. As a result 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 ...'*

There is, however, no indication what work had to be conducted prior to gazetting and no evidence thereof in the record.

[54] As the applicants point out, however, the sec 34 determination might never have been communicated had the present application not been launched and the record obtained from the respondents. This is borne out by the decision memorandum in which the Director-General explained to the Minister that the publishing of the determination had *'become urgent'* as the Department was facing the present litigation wherein the applicants claimed that *'the Minister has not published a Section 34 determination nor conducted a public participation process and therefore any decisions to facilitate, organise, commence or proceed with the procurement of nuclear new generation capacity is unlawful'*.[16] The memorandum proceeds:

> *'3.6 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.'*

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[15] Memorandum – Department of Energy "Determination under Section 34 (1) of the Electricity Regulation Act No. 4 of 2006 – Nuclear Procurement Programme" (1 December 2015) – record volume 7 p 108 document no. 19.2.
[16] *Memorandum* n 15 p 110 para 3.5.

[55] It requires mention that in July 2015 the applicants' attorney wrote to the Minister raising a number of questions regarding nuclear new generation capacity procurement and compliance with any related statutory or legal processes. One of the questions was whether the Minister had, in consultation with NERSA, made any determinations in terms of sec 34(1)(a) and (b) of ERA that new generation capacity was needed and must be generated from nuclear energy sources. No substantive reply was received from the Minister where after the present application was launched in October 2015.

[56] Various consequences flow from the Minister's failure to gazette the 2013 sec 34 determination after NERSA's concurrence therein. Firstly, until the gazetting in December 2015 the Minister was in breach of his/her own decision. Secondly, it is open to serious question whether the 2013 sec 34 determination could have had any legal effect until such time as it was gazetted. Although ERA does not require that a sec 34 determination be gazetted this is one of the recognised means for giving public notice of a decision. In *SARFU*[17] the Constitutional Court held in regard to the President's appointment of a commission of enquiry that:

> *'In law, the appointment of a commission only takes place when the President's decision is translated into an overt act, through public notification. [...] Section 84(2)(f) does not prescribe the mode of public notification in the case of the appointment of a commission of inquiry but the method usually employed, as in the present case, is by way of promulgation in the* Government Gazette. *The President would have been entitled to change his mind at any time prior to the promulgation of the notice and nothing which he might have said to the Minister could have deprived him of that power. Consequently, the question whether such appointment is valid, is to be adjudicated as at the time when the act takes place, namely at the time of promulgation.'*

[17] *SARFU* n 4 para 44.

[57] The inordinate delay in gazetting the 2013 sec 34 determination raises a further problem inasmuch as NERSA's consent to the gazetting in December 2015 was neither sought nor obtained. This raises the question of whether NERSA's concurrence in 2013 in the Minister's proposed determination necessarily constituted a valid concurrence in 2015. Developments in the intervening two years may well have afforded NERSA material reason to question whether nuclear new generation capacity was required, the amount required or other elements of the 2013 sec 34 determination. Furthermore, had NERSA's concurrence been sought afresh in December 2015, new factors which might have emerged from a fresh public participation process may have changed its initial views.

[58] In these circumstances the failure to gazette or otherwise make the determination public for two years not only breached the Minister's own decision, thus rendering it irrational and unlawful, but violated the requirements of open, transparent and accountable government. Furthermore, since the sec 34 determination was in effect only made on publication, the Minister's failure to consult NERSA anew in December 2015 on her decision to gazette the determination in unaltered form constituted a breach of sec 34 of ERA, a mandatory empowering section.

[59] These defects, in my view, rendered the Minister's 2013 sec 34 determination unconstitutional and unlawful, in the latter case by virtue of breaches of the principle of legality and thus liable to be set aside.

SUBSTANTIVE CHALLENGES TO THE 2013 SECTION 34 DETERMINATION

[60] Apart from the grounds relating to the procedural fairness of the 2013 sec 34 determination, the applicants raise several substantive grounds of review in challenging

the 2013 determination. They contend that the decision contained in the 2013 sec 34 determination was irrational, unreasonable and taken without regard to relevant considerations, or with regard to irrelevant considerations. Commencing with the Minister's decision, the applicants contend that he irrationally relied upon the outdated IRP2010. It would appear that at the time the Minister took the decision which led to the sec 34 determination, the IRP2010-had been updated although it was still in draft form and a further ground of review is that the Minister had failed to have regard to the contents of the draft update. A further ground is that the determination contained no specific procedure for the procurement of nuclear new build capacity, the applicants contending that this was in breach of sec 34 of ERA, read with sec 217 of the Constitution. As far as NERSA's role is concerned, the applicants' substantive challenges are firstly that NERSA erroneously viewed its role as no more than a rubber stamp for the Minister's initial decision and, secondly, that it too relied on the outdated IRP2010.

[61] Given the finding that the challenges based on the procedural fairness of the 2013 determination and its delayed publication must succeed, I consider that no point is served by considering the merits of the substantive challenges to the 2013 determination based on reasonableness or rationality.

THE 2016 DETERMINATION

[62] I turn now to deal with the challenge to the 2016 determination which was gazetted on 14 December 2016. The core of the 2016 sec 34 determination is the same as that of the 2013 determination, namely, *'that energy generation capacity needs to be procured to contribute towards energy security and to facilitate achievement'* of the country's *'greenhouse gas emission targets ... accordingly, 9 600 megawatts (MW) should be procured to be generated from nuclear energy'*; secondly, that the electricity so

produced is to be procured through *'fair, equitable, transparent, competitive and cost-effective'* tendering procedures. However, the 2016 determination provided *'that the procurer in respect of the nuclear programme shall be the Eskom Holdings (SOC) Limited or its subsidiaries'* as opposed to 2013 determination which appointed to the Department of Energy to this role.[18]

[63] The background to the 2016 determination appears from the Minister's supplementary affidavit and the documents that form the Minister's and NERSA's record of decision which were attached thereto. During September 2016 the Minister received legal advice with regard to the development of a procurement strategy for the nuclear programme. This advice *'resulted in revisiting of the appointment and role of the DOE (Department of Energy) as the designated procurement agency in respect of the nuclear procurement programme'*. Thereafter, on 29 September 2016, the Department's Director-

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[18] The 2016 sec 34 determination reads in full as follows:
'NUCLEAR PROGRAMME

DETERMINATION UNDER SECTION 34(1) OF THE ELECTRICITY REGULATION ACT 4 OF 2006

PART A

The Minister of Energy ("the Minister"), in consultation with the National Energy Regulator of South Africa ("NERSA"), acting under section 34(1) of the Electricity Regulation Act 4 of 2006 (as amended) (the "ERA") has determined as follows:

1. that energy generation capacity needs to be procured to contribute towards energy security and to facilitate achievement of the greenhouse gas emission targets for the Republic of South Africa, accordingly, 9 600 megawatts (MW) should be procured to be generated from nuclear energy ("nuclear programme"), 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" or as updated);
2. that electricity produced from the new generation capacity ("the electricity"), shall be procured through tendering procedures which are fair, equitable, transparent, competitive and cost-effective and provide for private sector participation;
3. that the nuclear programme shall target connection to the Grid as outlined in the IRP2010-2030 (or as updated), taking into account all relevant factors including the time required for procurement;
4. that the procurer in respect of the nuclear programme shall be the Eskom Holdings (SOC) Limited or its subsidiaries.'

General provided the Minister with a decision memorandum, for approval, in relation to the proposed 2016 determination.[19]

[64] The rationale for the 2016 determination is contained in paras 3.1 – 3.4 of the decision memorandum and which read as follows:

> *'3.1 On 27 September 2016, the Minister of Energy informed the Department that it was her intention to have Eskom Holdings (SOC) Limited (hereinafter referred to as "Eskom") procure and be the owner operator of the new nuclear power plants.*
>
> *3.2 It appeared that one of the factors the Minister considered in her decision, was that it was indicated in a legal opinion sought from Adv Marius Oosthuizen that the Minister and/or the Department of Energy is not empowered by law to directly procure on behalf of other juristic entities, which are also organs of state (such as Eskom) unless their consent is obtained. It was indicated by an authorised representative from Eskom that Eskom would not provide consent for the Minister and/or the Department of Energy to procure on their behalf.*
>
> *3.3 In order effect (sic) the Minister's desired change(s) to the Determination, it is required that the existing Section 34(1) Determination be amended.*
>
> *3.4 Accordingly, the attached revised Section 34(1) Determination (Annexure A) makes provision for Eskom (or its subsidiaries – in the event that a special purpose vehicle will be created and utilised by Eskom to procure new generation capacity from nuclear power) to be the procurement agency and be the owner operator of the new nuclear build programme.'*

[65] The Minister duly approved the 2016 decision memorandum on 18 October 2016. On 5 December 2016 a letter was sent to the Chairperson of NERSA, attaching a draft of the proposed 2016 determination and seeking its concurrence therein. The board of NERSA took its decision by way of a round robin resolution on or about 8 December

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[19] Decision Memorandum – Department of Energy "Determination under Section 34(1) of the Electricity Regulation Act 4 of 2006 – Nuclear Procurement Programme" (29 September 2016) – record volume 5A p 1546.

2016.[20] The resolution was approved by the acting CEO of NERSA on 5 December 2016 (the same day as the Minister's letter requesting NERSA's concurrence was sent) and subsequently by the Chairperson on 8 December 2016. On 13 December 2016, at the initial hearing of this matter the applicants, together with the public, learnt for the first time that the 2016 determination had been made and it was published in the government gazette the following day. The applicants seek to review the 2016 determination on various procedural and substantive grounds.

[66] Again, relying on sec 3 and 4 of PAJA and sec 10(1)(d) of NERA, they contend that the 2016 sec 34 determination was procedurally unfair inasmuch as it was not preceded by any public participation process or consultation, whether by way of a notice and comment procedure or otherwise.

[67] From the record it appears that NERSA gave its concurrence to the 2016 sec 34 determination within three days of being asked by the Minister and there was therefore no question of any public participation process or any form of external consultation prior to NERSA's decision. Given the elapse of two years since NERSA's concurrence in the 2013 determination and the changed format of the determination, most particularly in its designation of Eskom Holdings (SOC) Limited or its subsidiaries as the procurer in respect of the nuclear programme it was, in my view, incumbent upon NERSA to afford members of the public and/or interested and affected persons (including the applicants) an opportunity to influence the decision. My reasons for reaching this conclusion are in principle the same as those underlying the same conclusion in respect of the 2013 sec 34 determination.

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[20] Round Robin Resolution – NERSA "Confirmation of the Approval of the Round Robin Resolution: Concurrence with the Proposed Amendment of Section 34(1) of the Electricity Regulation Act, 2006 (Act No. 4 of 2006) Determination." (8 December 2016) – record volume 5A p 1566.

CAN THE 2013 AND THE 2016 SECTION 34 DETERMINATIONS CO-EXIST?

[68] A further procedural challenge to the 2016 sec 34 determination arises from the fact that it fails to expressly withdraw or amend the 2013 determination. When the Minister wrote to NERSA requesting its concurrence in the 2016 determination she indicated that the 2013 determination had to be *'amended'*. According to its resolution, NERSA similarly took the view that it was concurring in an amendment to the 2013 sec 34 determination. The recommendation which it approved was that *'(c)oncurrence with the proposed amendment by the Minister ...'* and the *'amendment of the decision of the Energy Regulator of 26 November 2013'*.[21] However, the determination does not on its own terms amend, revise or withdraw the 2013 sec 34 determination and nor does it purport to do so. It makes no reference at all to the 2013 sec 34 determination which results in the anomalous situation of there being two gazetted sec 34 nuclear determinations which are mutually inconsistent. By way of example, the first designates the Department of Energy as the procuring agency in the nuclear power programme whilst the second designates Eskom.

[69] In these circumstances, contend the applicants, the 2016 determination is irrational or based on material errors of law or fact, thereby violating the principle of legality. In response, the respondents contend that this ground of review is based on no more than semantics since the 2016 determination was in substance an amendment and was intended and accepted as such by the Minister and NERSA respectively.

[70] This line of argument does not, however, take into account the consequences of this Court finding that the 2013 determination was unconstitutional and invalid. In that event, the earlier determination was valid *ab initio* i.e. a nullity from the outset and could

[21] Round Robin Resolution n 20 p 1570 para 6.1.

not be amended.[22] This principle was confirmed by the Constitutional Court in *Kruger v President of the Republic of South Africa*[23] which dealt with a proclamation issued by the President which the High Court had held to be null and void and of no force and effect. The President issued a second proclamation in substitution for the first in order to correct a bona fide and acknowledged error in the first and was worded as *'amending'* the first proclamation.

[71] The Court found that the first proclamation was objectively irrational and therefore regarded as a nullity from the outset. It found further that whilst the President could have withdrawn it before it came into force he did not have the power to amend it inasmuch as it was void from its commencement and thus could not be amended. In so finding the Court dismissed an argument that the second proclamation should be judged on its substance and not on its form, Skweyiya J stating in this regard:

> *'While I support in general the principle that substance should take precedence over form, that principle must yield in appropriate cases to the rule of law'.*[24]

Accordingly, if notwithstanding that the 2016 sec 34 determination does not purport to be an amendment of the 2013 determination, it in fact was, and given the finding that the 2013 determination was invalid and unconstitutional, the 2016 determination is also invalid as an impermissible attempt to amend a nullity.

[72] I understand the respondents to also advance the argument that the 2016 determination impliedly repealed the 2013 determination. However, as the applicants point out, it does not purport to repeal the 2013 determination and neither NERSA nor

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[22] C Hoexter *Administrative Law in South Africa* 2nd ed (2012) at p 547: 'An invalid act, being a nullity, cannot be ratified, "validated" or amended'.
[23] 2009 (1) SA 417 (CC) para 61- 64.
[24] *Kruger* n 23 para 62.

the Minister claim that they intended to repeal the 2013 determination, which remains gazetted.

[73] On the assumption that the 2013 and 2016 sec 34 determinations (or at least part thereof) remain valid, their co-existence is in my view, highly problematic. What is the reader or interested member of the public to make of them? Are there two procurement agencies i.e. both Eskom Holdings (SOC) Limited and the Department of Energy? To whom may the electricity generated from the 9.6 GW of nuclear energy be sold? Are there no constraints in this regard (as per the 2016 determination) or must it only be sold to Eskom Holdings (SOC) Limited (as per the 2013 determination)? What is the role of the procurer? Is it as set out in para 6 of the 2013 determination or does it remain unspecified, as per the 2016 determination?

[74] Possible answers to these questions can be advanced but the lack of certainty and the need for conjecture is inimical to the rule of law. Although vagueness is not specified in PAJA as a ground of review, under the common law such a ground appears to have been recognized under the new constitutional dispensation.[25] This ground requires administrative action to be reasonably capable of meaningful construction for it to be valid although absolute clarity is not required.[26] In any event the grounds of review set out in PAJA are not exhaustive, sec 6(2)(i) being a catch-all provision providing that administrative action may be reviewed on other than the listed grounds if it is *'otherwise unconstitutional or unlawful'*.

[75] Given the mutual inconsistency of the 2013 and 2016 sec 34 determinations, and the failure of the latter to expressly withdraw or amend the earlier determination, I

[25] See in this regard *SARFU* n 4 para 227-231.
[26] *Durban Add-Ventures Ltd v Premier, KwaZulu-Natal, and Others (No 2)* 2001 (1) SA 389 (N) at 400C-D.

consider that the 2016 determination was irrational and must be set aside on this basis as an independent ground of review.

SUBSTANTIVE CHALLENGES TO THE 2016 SECTION 34 DETERMINATION

[76] The applicants also challenge the 2016 determination on various substantive grounds, contending that the Minister's decision was irrational and/or unreasonable and taken without regard to relevant considerations or with regard to irrelevant considerations. These attacks are largely based on what the applicants contend was the Minister's and NERSA's reliance on the outdated IRP2010 and the designation of Eskom as the procurer, apparently because it refused to give its consent to allow the Department of Energy to procure on its behalf. Given the finding that the 2016 determination falls to be reviewed and set aside both by reason of NERSA's failure to hold any public participation process and for its inherent irrationality, I consider it necessary to consider only one of these substantive grounds.

[77] The ground in question is directed at NERSA's role in concurring with the 2016 determination and the basis of the challenge is that the key reason for NERSA giving its concurrence was that it believed that it would be *'mala fides'* for it not to concur in the Minister's proposed determination. This contention was based on an extract from NERSA's round robin resolution approving its concurrence in the Minister's proposed determination by the acting CEO of NERSA on 8 December 2016 and reads in part as follows:[27]

> *'2.1 Background*
>
> *2.1.4 The Minister has proposed an amendment to the determination regarding the Department of Energy as the procuring agency and to be replaced by Eskom. The*

[27] Round Robin Resolution n 20 p 1568-1570.

amendment of the determination cannot be complete without the concurrence of the Energy Regulator therefore the Minister is requesting the Energy Regulator to concur.

2.2 Issues

2.2.1 Without a decision by the Energy Regulator on the proposed amendment, the determination will not be in compliance with the Act and can negatively impact on the nuclear procurement programme.

...

2.3 Problem Statement

2.3.1 Without the Energy Regulator decision to concur with the proposed amendment, the nuclear procurement programme can be negatively affected.

2.3.2 Considering that the proposed amendment is on a determination that the Energy Regulator has already concurred (sic), it can be viewed as mala fide for the Energy Regulator to delay or refuse to concur with the proposed amendment by the Minister.

2.4 Motivation

2.4.1 The proposed amendment is procedurally and legally valid at (sic) the Energy Regulator can concur and bring finality to the implementation of the nuclear procurement programme.

...

6 RECOMMENDATIONS

It is recommended that Electricity Subcommittee approve the:

6.1 Concurrence with the proposed amendment by the Minister in relation to clause 5 of the Energy Regulator decision of 26 November 2013.

6.2 The amendment of the decision of the Energy Regulator of 26 November 2013.'

[78] It was submitted on behalf of the applicants that the key reason for NERSA giving its concurrence was that it believed that it would be *'mala fides'* for it not to concur or, put differently, on the basis that since it had previously concurred some three years earlier in the 2013 sec 34 determination, it was under an obligation to approve the amendment or be seen to be acting *'mala fides'*. However, the applicants contend, there was no legal or factual basis for any understanding that it would be *'mala fides'* for NERSA not to concur. The 2016 sec 34 determination was, as was the 2013 determination, a culmination of the exercise of a discretionary statutory power vested in NERSA irrespective of whether it was an amendment of the prior sec 34 determination or not. In terms of sections 9 and 10 of NERA, NERSA was required, in exercising its discretion and its duty to decide whether to concur or not, to form an independent judgment and was not bound by its past concurrence in the 2013 determination. NERSA was not required to accept that the Minister's proposed determination was correct or appropriate particularly since three years had passed since it had concurred in the 2013 determination and thus underlying circumstances may well have changed. It bears repeating that sec 9(c) of NERA provides that the members of the Energy Regulator must *'act independently of any undue influence or instruction'*.

[79] In the absence of any further explanation by NERSA as to why it took its decision to concur, and bearing in mind that the terms of NERSA's resolution was clearly an attempt to comply with sec 10(1)(f) of NERA i.e. *'to explain clearly its factual and legal basis and the reasons'* for its concurrence, these expressed reasons must be accepted. On its own version, NERSA's concern was that it would be seen as acting *mala fides* if it did not concur with the Minister's proposed determination and this was one of its prime, if not the primary reason, for its decision. In these circumstances the applicants have, in my

view, established that NERSA's concurrence was predicated on a material error of law or fact and/or that it failed to act independently, as required by NERA.

THE IGA'S

[80] Two further issues to be determined in this matter are:

1. Whether the President and the Minister violated the Constitution when deciding to sign and then table the 2014 Russian IGA in relation to nuclear issues under sec 231(3) of the Constitution rather than sec 231(2)?

2. Whether the Minister violated the Constitution in tabling the US and South Korean IGA's in relation to nuclear cooperation 20 years and almost five years respectively after they had been signed?

[81] Against the factual background set out in para 21 above, I deal firstly with the question of whether the Russian IGA was properly tabled under sec 231(3) of the Constitution. In relation to this IGA the applicants seek an order declaring:

1. the President's decision to authorise the Minister's signature, and the Minister's decision to sign, and;

2. the Minister's decision to table the IGA under sec 231(3), (rather than sec 231(2)),

unconstitutional and invalid, and reviewing and setting aside these decisions.

[82] This relief is sought on the basis that the Russian IGA contains binding commitments in relation to nuclear procurement when no similar commitments were made in the IGA's concluded with other governments in relation to nuclear cooperation and it should therefore have been tabled under sec 231(2) in order to give Parliament an opportunity to consider whether to approve the agreement. The contents of the Russian IGA will be discussed below.

[83] As mentioned earlier in response to the applicants' case, the respondents raise a number of preliminary points, namely non-joinder of the foreign governments, the alleged non-justiciability of the IGA's and the applicants alleged lack of standing to challenge the manner of tabling the IGA's in terms of sec 231 of the Constitution. On the merits, the respondents contend that failing the upholding of any of these preliminary points the Russian IGA is, upon a proper interpretation, not a *'procurement contract'* with immediate financial application and falls within the category of a *'technical, administrative or executive agreement'* as envisaged by sec 231(3) of the Constitution, thus not requiring ratification or accession, and was therefore properly tabled.

[84] Section 231 of the Constitution deals with international agreements and provides, in part, as follows:

> *'(1) The negotiating and signing of all international agreements is the responsibility of the national executive.*
>
> *(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).*
>
> *(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.*
>
> *(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.*
>
> *(5) ...'*

NON-JOINDER

[85] The respondents maintain that the foreign contracting states – Russia, the United States of America and South Korea – are *'essential parties'* which have a direct and substantial interest in any orders which the Court might make and which thus cannot be made or carried into effect without prejudicing such parties. They contend further that the relief sought in relation to the Russian IGA is in substance an order to invalidate it by nullifying the conduct of the South African government in entering therein. As regards the US and South Korean IGA's, the respondents contend that the order sought by the applicants declaring the manner of their tabling unconstitutional and unlawful and reviewing and setting these tabling decisions aside, is also in substance an attempt to invalidate the two treaties and thus by the same token these two governments are also necessary parties.

[86] Our law recognises a limited right to object to non-joinder, the limits of which were defined as follows by Brand JA:[28]

> *'The right to demand joinder is limited to specified categories of parties such as joint owners, joint contractors and partners, and where the other party(ies) has (have) a direct and substantial interest in the issues involved and the order which the court might make.'*

[87] A full bench of this Court has held that:

> *'It is well established that the test whether there has been non-joinder is whether a party has a direct and substantial interest in the subject-matter of the litigation, that is, a legal interest in the subject-matter which may be prejudicially affected by the judgment or the order.'*[29]

[88] In the present matter, leaving aside the relief relating to the Minister's signature of the agreement, no order is sought against any foreign government, the Court being asked

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[28] *Burger v Rand Water Board and Another* 2007 (1) SA 30 (SCA) para 7.
[29] *Tlouamma and Others v Speaker of the National Assembly and Others* 2016 (1) SA 534 (WCC) para 159.

rather to determine whether the Minister's actions in terms of sec 231 of the Constitution were lawful, as a matter of domestic law. The Minister's obligations to act constitutionally and in accordance with sec 231 are owed to the citizens of this country and not to foreign governments. Seen from this perspective none of the foreign governments that are party to the IGA's have any direct and substantial legal interest, as a matter of South African domestic law, in the constitutionality of the Minister's actions. This view is borne out by recent decisions of our courts which have never required the joinder of foreign governments even where the judicial review of the executive's exercise of its domestic powers related to affairs with a foreign government.

[89] In *President of the Republic of South Africa and Others v Quagliani,*[30] the Constitutional Court was required to determine the validity of the government's actions in entering into an international agreement in relation to extradition with the USA in circumstances where it had been alleged that the agreement had not been validly entered into because the President had delegated his own responsibility in that regard to members of his cabinet. The Court ultimately held that the government had acted lawfully in entering into the international agreement but it was noteworthy that the United States government was not a party to the litigation and there was no suggestion that it should be, merely because the constitutional validity of the South African government's action in entering into the international agreement was to be determined.

[90] Furthermore, our courts have never required a joinder of foreign governments in cases involving challenges to the legality of executive conduct which directly implicated

[30] 2009 (2) A 466 (CC).

foreign governments.[31] In my view, it is a misnomer on the part of the respondents to state that the applicants seek orders to *'invalidate'* any international agreements. The relief sought by the applicants is, at its broadest, a declaration that the decisions by the Minister and the President in signing, approving and tabling the IGA's before Parliament were unconstitutional and invalid, this as a matter of domestic constitutional law. Section 172(1)(a) of the Constitution places an obligation on the courts to declare any law or conduct inconsistent with the Constitution invalid to the extent of its inconsistency. The Court has not been asked to determine whether the IGA's are valid as a matter of international law at the international level. In the circumstances the relevant foreign governments have, as a matter of South African law, no legal interest in the domestic constitutionality of the actions of the South African government. It is not surprising therefore that the respondents were unable to cite any direct authority for the proposition that a foreign government should be joined in a matter such as the present. Instead they rely only on the authorities relating to the validity of domestic contracts enforceable as a matter of South African law.

[91] In the circumstances of this matter I consider that there is no need to join the foreign states and therefore the joinder point has no merit.

DO THE APPLICANTS HAVE STANDING?

[92] The respondents contend that the applicants have no standing to claim any relief in relation to the tabling of the Russian IGA since, if the incorrect tabling procedure has

[31] See in this regard *Mohamed and Another v President of the Republic of South Africa* and Others (Society for the Abolition of the Death Penalty in South Africa and Another Intervening) 2001 (3) SA 893 (CC); *Kaunda and Others v President of the Republic of South Africa and Others* 2005 (4) SA 235 (CC); *Geuking v President of the Republic of South Africa and Others* 2003 (3) SA 34 (CC); *National Commissioner of Police v Southern African Human Rights Litigation Centre and Another* 2015 (1) SA 315 (CC); *Krok and Another v Commissioner, South African Revenue Service* 2015 (6) SA 317 (SCA); and *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* 2016 (3) SA 317 (SCA).

been utilised, this is a matter for Parliament to take up with the Minister. By implication this contention extends also to the relief sought in relation to the US and South Korean IGA's. If this proposition were correct one might expect that the Speaker of the NA and the Chairperson of the NCOP would enter these proceedings and assert that point of view but instead neither opposes the relief sought in this regard.

[93] Whilst it is correct that in terms of sec 92 of the Constitution, members of the cabinet, which includes the President, are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions, it does not follow that the applicants lack standing in relation to these issues, either acting in their own interests or in the public interest. The first applicant, Earthlife Africa-Johannesburg, is a non-governmental, non-profit voluntary association having the power to sue and be sued in its own name. The second applicant is a registered public benefit and non-profit organisation and both brought this application in terms of sec 38 of the Constitution in their own right and in the public interest as contemplated by sec 38(d).

[94] Section 38 deals with the enforcement of rights and, insofar as it is material, reads as follows:

> '38 *Enforcement of rights*
>
> *Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are –*
>
> *(a) anyone acting in their own interest;*
>
> *(b) ...*
>
> *(c) anyone acting as a member of, or in the interest of, a group or class of persons;*

(d) anyone acting in the public interest; and

(e) an association acting in the interest of its members.'

[95] It has been held that the provisions of sec 38 *'introduces a radical departure from the common law in relation to standing. It expands the list of persons who may approach a court in cases where there is an allegation that a right in the Bill of Rights has been infringed or threatened ...'*[32]

[96] Section 19 of the Bill of Rights guarantees every citizen certain political rights. Many of these rights find fulfilment in the representation of such citizens in Parliament which, in terms of sec 42(2) of the Constitution, consists of the NA and the NCOP. Section 42(3) provides that the NA *'is elected to represent the people to ensure government by the people under the Constitution'*. On these grounds alone, I consider that parties other than Parliament or members of Parliament have a legitimate interest in the question of whether IGA's have been properly tabled in Parliament in terms of the Constitution.

[97] In making their argument the respondents placed reliance on *Metal and Allied Workers Union and Another v State President of the Republic of South Africa and Others*[33] where the court dealt with a challenge to certain emergency regulations made in terms of sec 3 of the Public Safety Act, 3 of 1953 which had been promulgated in the government gazette but not tabled in Parliament within 14 days of promulgation as required by the Act. Didcott J, on behalf of the full bench, held that the purpose of tabling was to inform members of Parliament and therefore conceived for the benefit of, and enforceable by, no one but such members. However, apart from the fact that this

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[32] *Kruger* n 23 paras 20–23.
[33] 1986 (4) SA 358 (D).

judgment obviously predates the new constitutional dispensation, the court took this view *'with some hesitation'*, recognising the force of the argument to the contrary.[34]

[98] In any event the Constitutional Court has now repeatedly confirmed the broad grounds of standing in relation to constitutional challenges, including those relating to executive action.[35] Furthermore, the fact that the executive is accountable to Parliament in relation to the exercise of its power does not detract from the principle that the exercise of all public powers must be constitutional, comply with the principle of legality and that these powers are subject to judicial review at the instance of the public. This was well illustrated by *Economic Freedom Fighters v Speaker, National Assembly and Others*[36] where Parliament and the President's failure to fulfil a constitutional obligation was vindicated at the instance of a political party. As was contended on behalf of the applicants, any action by the President and the Minister in violation of the Constitution are matters of legal interest to the public and to applicants representing that interest and are not merely a concern of Parliament.

[99] Finally, as the Constitutional Court has held, it is the courts that must ultimately determine whether any branch of government has acted outside of its powers. This was made clear by the following dictum of Moseneke DCJ on behalf of the Constitutional Court in *International Trade Administration Commission v SCAW South Africa (Pty) Ltd*[37]:

> *'In our constitutional democracy all public power is subject to constitutional control. Each arm of the state must act within the boundaries set. However, in the end, courts must determine whether unauthorised trespassing by one arm of the state into the*

[34] *Ibid* at 364C-D.
[35] *Kruger* n 23 paras 20 – 23.
[36] 2016 (3) SA 580 (CC) paras 22-24.
[37] 2012 (4) SA 618 (CC) para 92.

terrain of another has occurred. In that narrow sense, the courts are the ultimate guardians of the Constitution. They do not only have the right to intervene in order to prevent the violation of the Constitution, they also have the duty to do so.'

[100] In short, if the challenge to the constitutionality of the procedure whereby the relevant IGA's have been placed before Parliament has merit, such conduct must be declared unconstitutional irrespective of at whose behest this relief is sought. In the circumstances, I find that the applicants have standing both in their own right and in the public interest to challenge the constitutionality of the tabling of the relevant IGA's.

IS THE RUSSIAN IGA JUSTICIABLE?

[101] The respondents contend that the Russian IGA, being an international agreement, is not or should not be justiciable by a domestic court, which may not even interpret or construe such an agreement nor may it determine the legal consequences arising therefrom. In doing so they rely primarily on the authority of *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others*[38] where it was held that a domestic court may not interpret or construe an international agreement nor determine the true agreement allegedly concluded between South Africa and another sovereign state.

[102] The role of the international treaty in *Swissborough* appears to have been quite different to that in the present matter. The plaintiffs had instituted action against the defendants, the first of which was the South Africa government, arising out of an alleged interference with certain mining rights held by the plaintiffs in Lesotho. The alleged interference related to the implementation of a treaty between the South African government and Lesotho's government which provided for the Lesotho Highlands Water

[38] 1999 (2) SA 279 (T) at 329J-330C.

19

project. It became necessary for the court to decide whether the determination of the true agreement between the South Africa government and the Lesotho government, as an international law agreement between two sovereign states and not incorporated into South African municipal law, was a justiciable issue. The rationale for the court's approach was that it would have to be a very particular case, even if such a case could exist, that would justify a court interfering with a foreign Sovereign. However, the court did find that it could take cognisance of the agreements between the governments of the two countries as well as the contents thereof as facts. The court was unwilling, however, to take decisions in regard to the alleged unlawful conduct of the government of Lesotho, the control of the government of Lesotho, and its relationship with the South African government. It found, as far as the latter was concerned, that there could be little doubt that this was not an area for the judicial branch of government.

[103] The situation in the present matter is quite different inasmuch as the scope of the enquiry into the Russian IGA is limited to a determination of whether it should have been tabled in Parliament in terms of sec 231(2) or 231(3) of the Constitution. There are a number of reasons why, at least for this limited purpose, the Russian IGA cannot be regarded as non-justiciable. Firstly, the conclusion and tabling of an international agreement before Parliament in terms of either sec 231(2) or 233 of the Constitution is an exercise of public power and the Constitutional Court has made clear that all such exercises of public power are justiciable in that they must be lawful and rational. These include exercises of public power relating to foreign affairs.[39] Secondly, should an international agreement be tabled incorrectly under sec 231(3) rather than sec 231(2) the review of any such decision can be seen as upholding rather than undermining the

[39] See *Kaunda and Others v President of the Republic of South Africa and Others* 2005 (4) SA 235 (CC) para 78.

separation of powers. The separate but interrelated roles of the executive and the legislature in relation to international agreements were clarified by Ngcobo CJ in *Glenister v President of the Republic of South Africa and Others*[40] as follows:

> *'[89] The constitutional scheme of s 231 is deeply rooted in the separation of powers, in particular the checks and balances between the executive and the legislature. It contemplates three legal steps that may be taken in relation to an international agreement, with each step producing different legal consequences. First, it assigns to the national executive the authority to negotiate and sign international agreements. But an international agreement signed by the executive does not automatically bind the Republic, unless it is an agreement of a technical, administrative or executive nature. To produce that result, it requires, second, the approval by resolution of Parliament.*
>
> ...
>
> *[95] To summarise, in our constitutional system, the making of international agreements falls within the province of the executive, whereas the ratification and the incorporation of the international agreement into our domestic law fall within the province of Parliament. The approval of an international agreement by the resolution of Parliament does not amount to its incorporation into our domestic law. Under our Constitution, therefore, the actions of the executive in negotiating and signing an international agreement do not result in a binding agreement. Legislative action is required before an international agreement can bind the Republic.'*

[104] Accepting that the constitutionality and lawfulness of the exercise of powers under sec 231(2) or (3) of the Constitution by the President and the Minister is justiciable, then clearly a review of the lawfulness and rationality of the exercise of those powers may well require a court to consider the content of the relevant international agreement. It would not be possible for a court to determine whether or not a particular IGA should have been tabled under sec 231(2) or 231(3) of the Constitution without it having regard

[40] 2011 (3) SA 347 (CC).

to the nature and contents of that agreement. If this Court were to be precluded from having regard to the contents of the Russian IGA for the limited purposes of determining whether it should have been tabled under sec 231(2) or 231(3) of the Constitution, this would render nugatory its power to subject the executive's conduct to constitutional scrutiny. An argument to the contrary was rejected by the Constitutional Court in *Mohamed v the President of the Republic of South Africa.*[41]

[105] For these reasons I consider that not only is it permissible for this Court to interpret the Russian IGA to determine its proper tabling procedure and whether the Minister acted unconstitutionally or not, but it is the Court's duty to do so. I find therefore that the respondents' contention that the Russian IGA is non-justiciable is without merit.

THE TERMS OF THE RUSSIAN IGA

[106] In broad outline the applicants' case is that the Russian IGA contains binding commitments in relation to nuclear procurement, including providing the Russian Federation with an indemnification, which takes the IGA well outside the category of those of a *'technical administrative or executive nature'* requiring only tabling in the NA and the NCOP within a reasonable time to bind the country. They contend further that the terms of the Russian IGA are much more far-reaching than those in any of the comparable IGA's relating to nuclear cooperation that were either tabled before Parliament at the same time or earlier. The applicants contend that as a result it was irrational for the President to approve the signature of the Russian IGA and for the Minister to sign it. They contend further that, at the very least, the Russian IGA should

[41] *Mohamed* n 32 paras 70 and 71.

have been tabled under sec 231(2) of the Constitution, thereby requiring Parliamentary approval.

[107] For their part the respondents contend that should the Court find that the Russian IGA is indeed justiciable or not, a subject for the exercise of judicial restraint, it is not a procurement contract of any sort but an *'international framework agreement for cooperation between sovereign states'*. They submit that the Russian IGA makes it clear that it is a bilateral international agreement providing for cooperation between two sovereign states and is not, nor was it ever intended to be, a binding agreement in relation to the procurement of new nuclear reactor plants from a particular country; the only purpose for such cooperation being the creation of conditions in which the establishment of a self-sufficient nuclear programme can be pursued.

[108] Turning to the contents of the Russian IGA certain key provisions stand out:

1. Both the overall description of the agreement and the preamble refer to the establishment of a *'strategic partnership'* in the field of nuclear power and industry between the two countries;

2. The preamble records by way of background, furthermore *'the intentions of the Government of the Republic of South Africa for the implementation of a large-scale national plan for the power sector development, involving the construction by 2030 of new nuclear power plant (hereinafter referred to as "NPP") units in the Republic of South Africa'*;

3. The preamble concludes with a reference to the *'legal fixation'* of the strategic partnership in the field of nuclear power before setting out the terms of the agreement.

4. Article 1 provides that the agreement '*creates the foundation for the strategic partnership in the fields of nuclear power and industry... aimed at the successful implementation of the national plan for the power sector*

20

development of the Republic of South Africa...'. It is noteworthy that none of the other IGA's make reference to the agreements creating a *'strategic partnership'*.

5. Article 3, using peremptory language, provides that:

'The Parties shall create the conditions for the development of strategic cooperation and partnership in the following areas:

i. development of a comprehensive nuclear new build program for peaceful uses in the Republic of South Africa, including enhancement of key elements of nuclear energy infrastructure ...;

ii. design, construction, operation and decommissioning of NPP units based on the VVER reactor technology in the Republic of South Africa, with total installed capacity of about 9.6 GW;

iii. design, construction, operation and decommissioning of the multi-purpose research reactor in the Republic of South Africa. ...'

It is common cause that the VVER reactor technology is unique to Russia.

6. Article 4 of the agreement is noteworthy for its specificity and detail, providing:

'1. 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 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 centre located at Pelindaba, Republic of South Africa. The mechanism of implementation of these priority projects <u>will</u> be governed by separate intergovernmental agreements, in which the Parties <u>shall</u> agree on the sites, parameters and installed capacity of NPP units planned to be constructed in the Republic of South Africa.' [my underlining]

10

7. Article 6.1 provides for the establishment of a Joint Coordination Committee *'to provide guidance, to coordinate and to control the implementation of this Agreement'*.

8. Article 6.4 provides as follows:

   'In three years of entry into force of this Agreement the co-chairs of the Joint Coordination Committee shall make comprehensive review of the progress in the implementation of this Agreement and provide appropriate recommendations to the Competent Authorities of the Parties regarding further implementation of this Agreement'.

9. Article 7 provides that:

   'Cooperation in areas as outlined in Article 3 of this Agreement, will be governed by separate agreements between the Parties, the Competent Authorities' and goes on to state *'(t)he 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.'*

It was contended on behalf of the applicants that the latter part of this clause would appear to preclude, absent Russia's consent, a situation where at least some of the proposed nuclear power plants are constructed or operated by other countries in addition to Russia.

10. Article 9 provides as follows:

    'For the purpose of implementation of this Agreement the South African Party will facilitate the provision of a special favourable regime in determining tax and non-tax payments, fees and compensations, which will be applied to the projects implemented in the Republic of South Africa within the areas of cooperation as outlined in Article 3 of this Agreement, subject to its domestic legislation'.

This commitment by the South African government to afford Russia a favourable tax regime in relation to the construction of new nuclear power plants is not to be found in any other IGA under consideration.

11. On behalf of the applicants it was contended that in terms of Article 15 the government of the Republic of South Africa agreed to incur liability arising out of any nuclear incident occurring in relation to any nuclear power plant to be constructed in terms of the agreement, or agreements arising therefrom, and also provides an indemnification to Russia and its entities from any ensuing liability. Insofar as it is relevant, Article 15 reads:

> *'1. The authorized organization of the South African Party at any time at all stages of the construction and operation of the NPP units and Multi-purpose Research Reactor shall be the Operator of NPP units and Multi-purpose Research Reactor in the Republic of South Africa and be fully responsible for any damage both within and outside the territory of the Republic of South Africa caused to any person and property as a result of a nuclear incident ... and also in relation with a nuclear incident during the transportation, handling or storage ... of nuclear fuel and any contaminated materials ... both within and outside the territory of the Republic of South Africa. The South African Party shall ensure that, under no circumstances shall the Russian Party or its authorized organization nor Russian organizations authorized and engaged by their suppliers be liable for such damages as to the South African Party and its Competent authorities, and in front of its authorized organizations and third parties.'*

It is unnecessary to analyse in detail the structure of liability indemnification which this Article provides. Its suffices to state that it clearly has potentially far-reaching financial implications for the South African government or state agencies, quite apart from any persons or instances which may be involved in a nuclear incident.

12. Article 16 provides for all disputes arising from the interpretation or implementation of the agreement to be settled *'amicably'* by *'consultations or negotiations through diplomatic channels'*. Significantly, it provides that *'(i)n*

case of any discrepancy between this Agreement and agreements (contracts), concluded under this Agreement, the provisions of this Agreement shall prevail'. This provision appears to make it clear that the Agreement is to take precedence over any subsequent agreement, underscoring the importance of its provisions.

13. Article 17 provides in part as follows:

'This Agreement shall enter into force on the date of the receipt through diplomatic channels of the final written notification of the completion by the Parties of internal government procedures necessary for its entry into force'.

14. It provides further that the agreement shall remain in force for a period of 20 years and thereafter be renewed automatically for a period of 10 years unless terminated by either party giving one year written notice thereof. Article 17.4 provides, significantly, *'(t)he termination of this Agreement shall not affect the rights and obligations of the Parties which have arisen as a result of the implementation of this Agreement before its termination, unless the Parties agree otherwise'* and further provides that its termination *'shall not affect the performance of any of the obligations under agreements (contracts) which arise during the validity period of this Agreement and are uncompleted at the moment of such termination, unless the Parties agree otherwise'*.

[109] Apart from the tone and content of these provisions, which speak for themselves, as a whole they illustrate that three hallmarks of the Agreement are its degree of specificity, the frequent use of peremptory language and the scope and importance of key elements which form the bedrock of the Agreement. All these factors combine to

suggest a firm legal commitment by the contracting parties to the *'strategic partnership'* which the Agreement establishes between the two countries, as well as in relation to the future, steps and developments which the far-reaching Agreement clearly foreshadows. Although it is clear that the Agreement could or will be followed by further agreements, the importance and permanence of many of its provisions are, in my view, unmistakeable.

[110] It may well be difficult to delineate the precise line between an agreement relating to the procurement of new nuclear reactor plant as distinct from one dealing with cooperation towards this end. In my view, however, seen as a whole, the Russian IGA stands well outside the category of a broad nuclear cooperation agreement and, at the very least, sets the parties well on their way to a binding, exclusive agreement in relation to the procurement of new reactor plants from that particular country.

[111] It would appear that the competent authorities under the agreement, the Department of Energy and Rosatom, laboured under a similar apprehension when, the day after the Agreement was concluded, they issued a joint press statement announcing that the *'Agreement lays the foundation for the large-scale nuclear power plants (NPP) procurement and development programme of South Africa based on the construction in RSA of new nuclear power plants with Russian VVER reactors with total installed capacity of up to 9,6 GW (up to 8 NPP units)'* which would be *'the first NPPs based on the Russian technology to be built on the African continent.'*[42] Be that as it may, whatever its true nature the Russian IGA is, in my view, clearly more than a mere *'framework'* or non-binding agreement as contended by the respondents.

[42] Media Release n 1 p 131.

[112] The conclusion which I have reached in this regard is reinforced by a comparison of the 2014 Russian IGA with the 2004 Russian IGA and each of the other IGA's tabled in June 2015. The 2004 Russian IGA contains no liability or indemnification clause in relation to the construction and operation of nuclear power plants indemnifying the Russian government or its agencies from any damages and placing responsibility on the South African government both within and outside the country. Nor is there firm commitment, let alone any reference, to the construction of new nuclear plants based on Russian reactor technology. Likewise there is no prohibition, save with the consent of Russia, on involving third countries' organisations in the construction, operating or decommissioning of nuclear power plants. The 2004 IGA contains no undertaking by the South African government to facilitate a special tax regime applying to the construction and operation of new nuclear power plants in South Africa. Nor is there any provision envisaging the conclusion of further *'agreements (contracts)'* under the 2004 IGA or that its provisions would prevail over the terms of later contracts. The presence of the above-mentioned terms in the 2014 Russian IGA begs the question why it was concluded when a general nuclear cooperation agreement, concluded in 2004, already existed.

THE CORRECT PROCEDURE TO RENDER THE RUSSIAN IGA BINDING

[113] The structure of and rationale behind sec 231 of the Constitution has been addressed by academic writers. Professor Dugard has commented that *'the practice of the government law advisors is to treat agreements 'of a routine nature, flowing from daily activities of Government departments' as not requiring parliamentary approval. Where, however, there is any doubt the agreement is referred to Parliament'.*[43] Professor Botha,

[43] J Dugard *International Law – A South African Perspective* 4th ed (2011) p 417.

[44] noting that the Constitution is silent on the question of who makes the classification as to whether an IGA is to be tabled under sec 231(2) or (3), comments as follows:

> *'Current practice is that the determination of whether a treaty falls under section 231(3) and therefore does not require parliamentary approval, vests in the line-function minister within whose portfolio the subject matter of the treaty falls. This decision must be taken in conjunction with the law advisors of the Departments of Justice and Foreign Affairs..*[45]

However, Professor Botha expresses his reservations about the wisdom of this practice insofar as the party negotiating the treaty also decides upon its classification for tabling purposes.

[114] I agree with the argument made on behalf the applicants that sec 231 and, in particular, the interplay between sec 231(2) and 231(3), must be interpreted in order to give best effect to fundamental constitutional values and so as to be consistent with the constitutional scheme and structure.[46] The tabling of an IGA under sec 231(3) permits the executive to bind South Africa to an agreement without parliamentary approval or the public participation that often accompanies any such parliamentary approval process.

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[44] N Botha 'Treaty making in South Africa: A reassessment' (2000) 25 South African Yearbook of International Law 69 p 77-78.

[45] Professor Botha goes on to state at p 77 that: *'Ideally, this decision should lie outside of the party negotiating the treaty. Without in any way impugning the integrity of these decision-makers, one must question the wisdom of a process in terms of which the party who negotiated a treaty at the same time decides on its nature and therefore on the way in which it will be dealt with by parliament. There is, after all, a considerable difference between an agreement being subjected to parliamentary approval (with the possibility of rejection which this process holds) and the mere tabling of a provision in both houses which, although allowing an opportunity for debate and criticism, is in the final instance no more than a process of notification of a* fait accompli. *The provisions of sec 231(2) imply a democratisation of the treaty process unprecedented in South African law before 1993. In terms of this section, the individual citizen has, through parliamentary representation, at least as much say in what treaties will bind the Republic as he or she has in what laws will govern his or her life. It would appear that by failing to specify the instance which must decide on the nature of a treaty, section 231(3) holds the potential for the manipulation of the system and the undermining of this democratisation in a very real sense.'*

[46] See *Matatlele Municipality and Others v President of the RSAand Others (No 2)* 2007 (6) SA 477 (CC) para 36-37 where Ngcobo J stated, *'Our Constitution embodies the basic and fundamental objectives of our constitutional democracy. [...] Individual provisions of the Constitution cannot therefore be considered and construed in isolation. They must be construed in a manner that is compatible with those basic and fundamental principles of our democracy. Constitutional provisions must be construed purposively and in the light of the Constitution as a whole. [...] Any construction of a provision in a constitution must be consistent with the structure or scheme of the Constitution.'*

Limiting those international agreements which may be tabled under sec 231(3) to a limited subset of run of the mill agreements (or as Professor Dugard puts it, agreements *'of a routine nature, flowing from daily activities of government departments'*) which would not generally engage or warrant the focussed attention or interest of Parliament would give optimal effect to the fundamental constitutional principles of the separation of powers, open and accountable government, and participatory democracy. For the reasons given earlier the Russian IGA is, in my view, certainly not an agreement of a routine nature.

[115] The treatment of the Russian IGA by the State Law Advisor (International Law) (and presumably the drafter or co-drafter of the IGA) also casts light on the issue of the correct procedure to be followed in laying it before Parliament. In an explanatory memorandum which served before the Minister and the President, the senior State Law Advisor concluded: *'The Agreement falls within the scope of section 231(2) of the Constitution and Parliamentary approval is required'*. The Minister's decision not to act in accordance with this view but rather to table the Russian IGA under sec 231(3) of the Constitution is explained on behalf of the respondents on the basis that the State Law Advisor's view *'was and is wrong'*. There is no indication in the record however that the Minister sought or obtained any alternative legal advice and her decision to proceed in terms of sec 231(3) is not explained in any documents forming part of the record.

[116] Having regard to all these factors I consider that the Russian IGA cannot be classified as falling within that category of international agreements which become binding by merely tabling them before Parliament. I am unable to accept that the Russian IGA can notionally be considered a routine agreement. The Agreement's detail and ramifications are such that it clearly required to be scrutinised and debated by the

legislature in terms of sec 231(2) of the Constitution. It follows that the Minister's decision to table the agreement in terms of sec 231(3) was, at the very least, irrational. At best the Minister appears to have either failed to apply her mind to the requirements of sec 231(2) in relation to the contents of the Russian IGA or at worst to have deliberately bypassed its provisions for an ulterior and unlawful purpose.

THE ALLEGED UNLAWFUL AUTHORISATION BY THE PRESIDENT AND SIGNATURE, BY THE MINISTER, OF THE RUSSIAN IGA

[117] The relief sought by the applicants in relation to the Russian IGA is not confined to its review and setting aside on the basis that the Minister employed the incorrect procedure in placing it before Parliament. They seek also a declaration that the Minister's decision to sign the agreement and the President's decision to authorise the Minister's signature were unconstitutional and unlawful, as well as the reviewing and setting aside of these decisions.

[118] The applicants' case in this regard is based on the argument that the Agreement violates sec 217 of the Constitution which requires that when the national sphere of government *'contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective'*. The applicants contend that, viewed as a whole the Russian IGA contains sufficient particularity and commitment as to fall within the ambit of a contract *'for goods and services'* under sec 217 although, at the time the Minister signed and the President authorised her signature, there was no procurement system in place that complied with sec 217 in relation to the procurement of nuclear new generation capacity. It will be recalled that the 2013 sec 34 determination (and the 2016 determination) merely repeated the key wording of sec 217(1) of the Constitution without specifying the tendering procedures. In the alternative,

the applicants contend that even if the Russian IGA did not fall within the meaning of a contract under sec 217, at the very least it expressly formed part of the first steps of a procurement process.

[119] In my view it is neither necessary nor desirable to address this ground of review in these proceedings. Doing so at this stage could well offend against the doctrine of the separation of powers and could be an instance of the court interpreting an international agreement when it would be appropriate for it to exercise judicial restraint. In this regard it will be recalled that the findings in relation to the nature of the Russian IGA were made solely for the purposes of determining whether the Agreement was one which should have been put before the legislature in terms of sec 231(2) or 231(3) of the Constitution.

[120] The underlying reason why the applicants' argument in this respect should not be entertained at this stage arises from the nature of the further relief they seek in relation to the Russian IGA, namely, that the decision to table it under sec 231(3) be reviewed and set aside. If such relief is granted the effect thereof will be that the Agreement will have no binding effect in domestic law. Should the executive then choose to table the Agreement before Parliament in terms of sec 231(2), a parliamentary/political process will follow in which the Agreement will be debated in both the NA and the NCOP with a view to its approval or disapproval by Parliament. It may very well also be the subject of a process of public participation conducted through Parliament. The outcome of this process cannot be foreseen nor should it be anticipated. In these circumstances it would be invidious if the Court were, at this stage, to declare that certain of its provisions are inconsistent with the Constitution and, more specifically, sec 217 thereof. This is not to suggest, however, that the Court will lack jurisdiction to deal with such a question in future if the need should arise.

12

[121] For these reasons I consider that the principle of separation of powers calls for the Court to exercise judicial restraint at this stage and to decline to consider the further relief sought by the applicants in relation to the Russian IGA.

WERE THE US AND SOUTH KOREAN AGREEMENTS PROPERLY TABLED IN TERMS OF SEC 231(3)?

[122] The final issue to be addressed is whether the IGA's concluded with the United States of America and South Korea relating to nuclear cooperation were properly tabled in Parliament in terms of sec 231(3) of the Constitution.

[123] The parties appeared to be in agreement that in the ordinary course the two IGA's would properly fall to be tabled in Parliament in terms of sec 231(3) in that they were treaties or agreements of a *'technical, administrative or executive nature'* or not requiring either ratification or accession. Where they differed was on the consequences of the delay in tabling the agreements. It will be recalled that on or about 10 June 2015 the Minister decided to table five separate IGA's relating to nuclear matters before Parliament in accordance with sec 231(3) of the Constitution. Three of these IGA's, the Chinese, the French and the Russian, were signed or concluded in late 2014 but the remaining two, the US and the South Korean IGA's were signed on 25 August 1995 and 8 October 2010, respectively. They were, therefore, as at the date of tabling, concluded more than two decades previously and just more than four years and eight months, respectively.

[124] The applicants' challenge to the constitutionality of the tabling of the US and South Korean IGA's is based upon what they consider to be the unlawful and unconstitutional delay in tabling those agreements before Parliament. They contend that the only reasonable inference to be drawn from these delays is that the two IGA's in

question were tabled as *'mere window dressing'* and to minimise the damage caused by the revelations regarding the Russian IGA and the joint press statement portraying it as a *fait accompli* that Russia would construct nuclear power plants in South Africa. The applicants contend that this ulterior purpose rendered the Minister's decision unlawful and unconstitutional since it was not rationally connected to the purpose for which the power was conferred and was therefore in breach of the principle of legality. In the view that I take of this matter, however, it is not necessary to determine whether the Minister acted with an ulterior motive in tabling the US and South Korean IGA's under sec 231(3) of the Constitution.

[125] The second leg of the applicants' challenge is simply that the length of the delay could not constitute a *'reasonable'* period and therefore the tablings violate sec 231(3). For their part the respondents seek to justify the delays on the basis that the reasonableness thereof must be determined with regard to the relevant surrounding circumstances and, secondly, contend that the purpose of tabling under sec 231(3) is simply to notify or inform Parliament of a treaty that binds the Republic and that, at worst, it is only the delay itself that is unconstitutional.

[126] I cannot agree with this latter interpretation which seeks to remove the obvious linkage in sec 231(3) between the tabling of the agreement in Parliament, and thus it being rendered binding, and the requirement that this be done within a reasonable time. As was stated by Ngcobo CJ in *Glenister*, *'The constitutional scheme of s 231 is deeply rooted in the separation of powers, in particular the checks and balances between the executive and the legislature'*[47]. Section 231(3) establishes a procedure whereby the State is bound by a particular class of international agreements without the formal approval of

[47] *Glenister* n 41 para 89.

Parliament. The requirement that the tabling takes place *'within a reasonable time'* and the use of the word *'must'* clearly indicates that this is a prerequisite for the lawful invocation of sec 231(3) or, put differently, a jurisdictional requirement of the procedure. The interpretation contended for on behalf of the respondents would result in a situation where the executive can, as one arm of government, bind the State on the international plane whilst at the same time keeping another arm of government, the legislature, in the dark about such international agreements. Such an interpretation pays scant respect to the principles of openness and accountability which are enshrined in the Constitution. Section 41(1) requires all spheres of government and all organs of state within each sphere to *'provide effective, transparent, accountable and coherent government for the Republic as a whole'* whilst sec 1 of the Constitution sets out these attributes as founding values in a multi-party system of democratic government.

[127] Seen in this light it is clear that where the national executive utilizes sec 231(3) to render the Republic bound under an international agreement, its exercise of the power is subject to the requirement that it makes such agreement public and tables it before Parliament within a reasonable time. In this sense it is a composite requirement, the power not being properly exercised unless the agreement is tabled before Parliament within a reasonable time.

[128] On behalf of the respondents the delays were explained on the basis that although the two IGA's were signed much earlier there was no need to rely on them as binding agreements until 2015 since prior thereto there was *'no practical or immediate need for nuclear cooperation'*. This explanation fails to explain why, in the first place, if there was no need for nuclear cooperation at those times, the IGA's were concluded in 1995 and 2010. Nor does it offer an adequate explanation as to why, having gone to the trouble of

signing the two IGA's, they were then not simply tabled in Parliament and thereby rendered binding, against the eventuality that the *'practical need'* for cooperation might arise in due course. However, even if one accepts at face value the respondents' explanation for the delays, they are in my view of such magnitude that they could never qualify as reasonable, not least because accepting such delays would render the time requirement in sec 231(3) meaningless.

[129] The respondents also contend that any alleged unreasonable delay in the tabling of the US and South Korean IGA's in Parliament is a matter for that body to deal with. However, as was pointed out on behalf of the applicants, the Speaker of the NA and the Chairperson of the NCOP are also respondents in this matter and have neither opposed the relief sought nor made any submissions regarding Parliament's disagreement with the interpretation of sec 231(3) contended for by the applicants. In any event, as stated earlier, it is the duty of the courts to determine whether the executive has failed to comply with the Constitution and declare such failure invalid and/or unconstitutional to that extent. For these reasons I conclude that the tabling of the US and South Korean agreements violated the provisions of the Constitution and fall to be set aside.

THE APPROPRIATE RELIEF

[130] Largely as a result of the introduction by the respondents of the two sec 34 determinations well after the commencement of the litigation, the applicants amended the relief initially sought. For the sake of convenience the applicants put up a draft order in which they set out the range of relief sought.

[131] In considering the appropriate relief to be granted the Court is guided firstly by sec 172 of the Constitution which provides that:

'(1) When deciding a constitutional matter within its power, a court -

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including –

....

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.'

[132] The respondents have not suggested that any declarations of invalidity sought in this matter should be suspended or offered a justification as to why any such suspension would be just and equitable. The Constitutional Court has emphasised, moreover, that *'the Constitution, and the binding authority of this court all point to a default position that requires the consequences of invalidity to be corrected or reversed where they can no longer be prevented. It is an approach that accords with the rule of law and the principle of legality.*[48]

[133] In the applicants' draft order there are four sections dealing respectively with the Russian IGA, the tabling of the US and South Korean IGA's, the processes to be followed by the Minister in regard to a procedurally fair public participation process prior to the commencement of any procurement process for nuclear new generation capacity and, finally, the sec 34 determinations. I shall deal with them in that order.

THE RUSSIAN IGA

[134] The applicants seek an order declaring unlawful and unconstitutional, and reviewing and setting aside, the Minister's decision to sign the Russian IGA, the President's decision to authorise the Minister's signature thereof, and the Minister's

[48] *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* 2014 (4) SA 179 (CC) para 30.

decision to table the Russian IGA before Parliament in terms of sec 231(3) of the Constitution.

[135] As concluded earlier, the Minister's decision to table the Russian IGA before Parliament in terms of sec 231(3) of the Constitution must be declared unlawful and unconstitutional and reviewed and set aside. However, for the reasons given relating to the separation of powers and the Court's reluctance to consider at this stage whether the Russian IGA in its present form is unconstitutional for lack of compliance with sec 217, the balance of the relief is refused.

THE TABLING OF THE US AND SOUTH KOREAN IGA 'S

[136] The applicants seek a declaration that the tabling of the US and South Korean IGA's in terms of sec 231(3) was unlawful and unconstitutional and reviewing and setting aside the Minister's decision to so table them. In this regard the respondents submitted that, on its interpretation of sec 231(3), namely that tabling within a reasonable time is not a jurisdictional requirement, the Court should, at worst for the respondents, merely declare that the Minister's delay in the tabling of the IGA's was unconstitutional. No such order is competent, however, given the finding which this Court has made, namely that tabling within the reasonable period is a jurisdictional requirement for compliance with sec 231(3).

[137] The question of what steps the respondents should or might take in consequence of our holding the Minister's tabling decision invalid is not a matter which we have been asked to consider, leaving the Minister free to take whatever steps, including steps on the international plane, may be considered necessary in the light of the Court's order. A consequence of such a finding is that the US and South Korean IGA's in their present

form cannot be tabled under sec 231(3). It is apposite to point out, however, that it may well be open to the executive to utilise the more onerous procedure set out in sec 231(2) of the Constitution with a view to rendering the US and South Korean IGA's binding. In my view that procedure is non-exclusive in the sense that the executive is not precluded from utilising its provisions in relation to treaties which fall within the ambit of sec 231(3). If I am correct in this view it serves to emphasise that the executive will not be stultified by the Court's order.

[138] In the result the applicants are entitled to the declarator which they seek and the review and setting aside of the Ministers' decisions to table the US and South Korean IGA's under sec 231(3) of the Constitution.

THE 2013 AND 2016 SEC 34 DETERMINATIONS

[139] The applicants seek a declaration that the 2013 and 2016 sec 34 determinations are unlawful and unconstitutional and reviewing and setting them aside. For the reasons given the basis for such relief has been established and in my view it would be just and equitable to grant such relief.

[140] The applicants seek an order setting aside any *'Requests for Proposals'* or *'Requests for Information'* issued pursuant to the aforesaid determinations. There is limited information in the papers on the extent to which such Requests have been issued and the consequences thereof. However the 2013 sec 34 determination makes it clear that part of the procuring agency's role is to prepare, and presumably issue, Requests for Proposals. Since both sec 34 determinations fall to be set aside as unlawful and unconstitutional, it follows that identifiable steps taken pursuant to those determinations

must suffer the same fate and thus relief sought in this regard is appropriate and must be granted.

FUTURE PUBLIC PARTICIPATION PROCESSES

[141] The applicants seek a declarator that, prior to the commencement of any procurement process for nuclear new generation capacity, which stage they define, the Minister and NERSA:

> *'are required in consultation, and in accordance with procedurally fair public participation processes, to have determined that:*
>
> *(a) new generation capacity is required and that the electricity must be generated from nuclear power and the percentage thereof;*
>
> *(b) the procurement of such nuclear new generation capacity must take place in terms of a procurement system which must be specified and which must be fair, equitable, transparent, competitive and cost effective.'*

[142] This Court has not dealt specifically with the question of whether the Minister must follow a procedurally fair public participation process before exercising his/her powers under sec 34(1) of ERA and accordingly it would be inappropriate to make any order in this regard. It has, however, considered the question of whether NERSA, before concurring in any such decision, must follow a public participation process. The finding that it is under such a duty is central to this judgment and does not require restatement in a declarator and to that extent the declaratory relief sought in this regard is unnecessary and superfluous.

[143] Similarly, the Court has not found it necessary to address to the question of whether any sec 34 determination must specify the terms of the procurement system which must apply to nuclear new generation capacity. Given that the 2013 and 2016 sec

34 determinations fall to be set aside and that the Minister must, so to speak, start with a clean slate it would in our view be inappropriate for the court to prescribe to the Minister the form of any procurement process to be adopted. In any event it is self-evident that any large scale procurement process initiated by the state or its agencies must comply with sec 217 of the Constitution and other relevant legislative enactments and that it be specified before any procurement process commences. In my view it would be unnecessary to restate these obvious requirements and indeed, both sec 34 determinations provided that the electricity produced from such new generation capacity should be procured through a tendering procedure with the aforementioned attributes although the procedure was not specified. For these reasons the declaratory relief sought in this section is refused.

COSTS

[144] The applicants have achieved substantial success in the application and therefore it is appropriate that they are awarded their costs. The applicants sought the costs of three counsel. Given the complexity, novelty and importance of the matter there can be no quarrel with an order on such terms. Although the applicants sought a costs order against both the President and the Minister, jointly and severally, and the application was opposed by the President, no specific relief was granted against him or in relation to any conduct on his part. In the circumstances any costs order should be against the Minister alone.

[145] The applicants sought also a special order of costs in relation to that aspect of the relief in which it sought a declarator on the assumption of there being no relevant sec 34 determination in place. The Minister only revealed in the Rule 53 record that such a determination was in place, despite having been pertinently asked about the existence of

any such determination prior to the commencement of the litigation. For these reasons the applicants contend that the Minister should be held responsible for the wasted costs associated with them having to amend their relief and the delays created by having to supplement their challenge. The circumstances in which the 2013 sec 34 determination was only revealed at a comparatively advanced stage in this litigation, and apparently in order to gain some advantage, have been set out earlier. In my view it is appropriate that the Minister should have to pay the extra costs on the scale of attorney and client as a mark of this Court's displeasure at the manner in which this issue was handled on her behalf.

[146] In the result the following order is made:

1. It is declared that:

1.1 The first respondent's (the Minister's) decision on or about 10 June 2015 to table the Russian IGA before Parliament in terms of sec 231(3) of the Constitution is unconstitutional and unlawful and it is reviewed and set aside;

1.2. The first respondent's decisions on or about 10 June 2015 to table the following agreements before Parliament in terms of sec 231(3) of the Constitution:

1.2.1 The Agreement for Cooperation between the Government of the Republic of South Africa and the United States of America concerning Peaceful Uses of Nuclear Energy; and

1.2.2 the Agreement between the Government of the Republic of Korea and the Government of the Republic of South Africa regarding Cooperation in the Peaceful Uses of Nuclear Energy;

are unlawful and unconstitutional, and are reviewed and set aside.

1.3. the determination under sec 34(1) of the Electricity Regulation Act, gazetted on 21 December 2015 (GN 1268, GG 39541) in relation to the requirement and procurement of nuclear new generation capacity, made by the first respondent on 11 November 2013, with the concurrence of NERSA given on 17 December 2013, is unlawful and unconstitutional, and it is reviewed and set aside;

1.4. the determination under sec 34(1) of Electricity Regulation Act gazetted on 14 December 2016 (GNR 1557, GG 40494) in relation to the requirement and procurement of nuclear new generation capacity, signed by the first respondent on 5 December 2016, with the concurrence of NERSA given on 8 December 2016, is unlawful and unconstitutional, and it is reviewed and set aside;

2. Any Request for Proposals or Request for Information issued pursuant to the determinations referred to in paras 1.3 and 1.4 above are set aside;

3. The first respondent is to pay the costs of this application;

4. The first respondent is to pay those costs incurred by the applicants as a result of the late disclosure of the 2013 sec 34 determination, on an attorney and client scale.

BOZALEK J

BAARTMAN J

APPEARANCES

For the Applicants	:	*Adv D Unterhalter (SC)* *Adv M Du Plessis* *Adv A Coutsoudis* *Adv S Magardie*
As Instructed by	:	*Adrian Pole Attorneys* *Ref: A Pole*
For the 1st & 2nd Respondents	:	*Adv MM Oosthuizen (SC)* *Adv K Warner* *Adv RM Molea*
As Instructed	:	*State Attorney: Pretoria* *Ref: E Snyman*

EJM2.1

NOVEMBER 5, 2017 *in* NEWS (HTTPS://WWW.DA.ORG.ZA/CATEGORY/NEWS/)

We are ready to interdict the nuclear deal

About this Article

Gordon Mackay MP
Shadow Minister of Energy

News (https://www.da.org.za/category/news/)

David Mahlobo (https://www.da.org.za/tag/david-mahlobo/), Energy Department (https://www.da.org.za/tag/energy-department/), Integrated Resource Plan (https://www.da.org.za/tag/integrated-resource-plan/), Jacob Zuma (https://www.da.org.za/tag/jacob-zuma/), Minister of Energy (https://www.da.org.za/tag/minister-of-energy/), Nuclear Deal (https://www.da.org.za/tag/nuclear-deal/)

Print this item

The DA will not hesitate to interdict any attempt by Minister of Energy, David Mahlobo, to force through a nuclear deal despite the fact that South Africa does not need or afford the estimated R1 trillion deal.

Media reports today indicate that the Energy Department has been forced to work overtime to ensure the Integrated Resource Plan (IRP) is ready by 14 November, a full four months ahead of when it was due.

With each passing day, it becomes clear that Minister Mahlobo was appointed to make sure that the necessary nuclear deal would be pushed through.

We will not allow Mahlobo to appease his friends, the Russians, at the expense of millions of South Africans who are struggling to survive with no jobs in a flat economy.

The DA will use every legal and Parliamentary tool at our disposal to ensure that the generations to come will not be shackled to massive debt that will compromise South Africa's future.

EJM2.2

All data is delayed

EUR/ZAR
- 15.89 (0.16%)

GBP/ZAR
- 18.85 (-0.66%)

JPY/ZAR
- 0.13 (-0.51%)

USD/ZAR
- 14.37 (-0.47%)

AUD/ZAR
- 11.00 (-0.17%)

We'll interdict any nuclear deal - DA

Nov 05 2017 13:05 Liesl Peyper

Cape Town – The Democratic Alliance (DA) says it is ready to interdict any attempt by Energy Minister David Mahlobo to force through a nuclear deal

The party's energy spokesperson Gordon Mackay said in a statement the DA will use "every legal and Parliamentary tool at its disposal" to ensure that South Africans won't be "shackled" to the massive debt that will flow from an unaffordable and unnecessary nuclear deal, estimated at around R1trn.

City Press reported on Sunday that officials at the Energy Department have been forced to work overtime, including weekends, to complete the Integrated Resource Plan (IRP) by November 14 – four weeks ahead of schedule.

The IRP, which will determine the energy mix the country needs, was expected to be finalised in February next year, but will now be finished in the next two weeks.

READ: Mahlobo instructs officials to fast-track SA's energy plan

"We would have been talking February, but now we are talking November 14," City Press quoted an unnamed source as saying

The IRP would enable Mahlobo to make projections of the country's future energy demands based on "empirical evidence"

Khulu Phasiwe, Eskom spokesperson told Fin24 that Eskom will take its cue from the Department of Energy as the policymaker about the way forward for any energy needs. "The Department of Energy, once it is done with revising the IRP and related energy roadmap documents, will decide on the scale and pace of the energy mix requirements of the country. Eskom as an implementing agency of government, will duly execute any new energy plans as directed by government."

Last week, Finance Minister Malusi Gigaba told City Press that nuclear energy was neither affordable for the sluggish economy, nor immediately necessary

The stance was repeated by National Treasury deputy director general Michael Sachs who told Parliament on Friday that neither South Africa's budget nor the country can afford nuclear

Sachs said National Treasury in 2015 already said 9.6GW of nuclear energy would have a negative effect on the total debt burden and the balance of payments.

READ: Gigaba says no to nuclear

"It would not be prudent to proceed with that prior to the stabilisation of national debt and that stabilisation has been pushed out. All I can say over medium term we haven't allocated resources. Our view is that it's not affordable at present. I can't give categorical commitments, but we don't foresee it being affordable over the current medium term expenditure framework."

Mahlobo, however, who has been in his new job for just more than two weeks after three years as state security minister, has contradicted Gigaba and National Treasury about South Africa's pursuit

(File photo)

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The new Energy Minister told members of the National Council of Provinces (NCOP) on Wednesday November 1 that he does not give preference to "one energy source over another", but that he needs to look after South Africa's energy security.

"I'm not in the business of tenders, but to ensure we have energy security and I won't be deterred," he said at the time, adding that nuclear energy would be pursued at a "scale and pace" the country could afford

Mahlobo was appointed Energy Minister early in October during a surprise Cabinet reshuffle, which some commentators took as a sign that SA wanted to fast-track its nuclear ambitions.

The DA's Mackay said in his statement that "with each passing day", it becomes clear that Mahlobo was appointed to make sure that the necessary nuclear deal would be pushed through.

"We will not allow Mahlobo to appease his friends, the Russians, (by pushing through nuclear) at the expense of millions of South Africans who are struggling to survive with no jobs in a flat economy."

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EJM 2.3

DA monitoring nuclear deal movements

SOUTH AFRICA Monday 23 October 2017 - 7:01am

File: Democratic Alliance supporters during the party's march to the Constitutional Court. The DA said it would keep a close watch on developments relating to the nuclear build program following reports of Russian intervention. Photo: eNCA / Bafana Nzimande

CAPE TOWN – The Democratic Alliance will keep a close watch for any developments on the proposed R1-trillion nuclear build deal and will not hesitate to go to court to interdict it if the process is tainted, the party said on Sunday.

"The allegations in the media [on Sunday] regarding the high-level Russian delegation who met with President Jacob Zuma shortly before the second cabinet reshuffle in seven months which saw David Mahlobo appointed as energy minister, ostensibly to push through the nuclear deal in favour of the Russians, are startling to say the least," DA spokesman Gordon Mackay said.

The previous minister of energy Mmamoloko Kubayi committed on record to abide by the Western Cape High Court's ruling in April of this year, which declared that all requests for information (RFI) and potential RFP pursuant to the outdated integrated resource plan (IRP) and section 34 ministerial determinations were set aside with immediate effect. Mahlobo was reminded that he too was bound by the court judgment and any deviation would be illegal, Mackay said.

READ: Cape High Court sets aside SA-Russia nuclear deal

In order for the nuclear deal to be approved, five key pieces of legislation/regulations would have to be updated and amended, which would require Parliament's participation. These were the integrated resource plan; the electricity pricing path; the procurement regulations; the framework agreements; and changes to the energy act to allow for a different funding/ownership model. In addition, the court ruling made clear the need for a substantial public participation process.

"The fact is that we cannot afford nor do we need the nuclear deal. In any event, it is doubtful that we need nuclear in the energy mix bearing in mind that by the time reactors come online green energy will be able to fill the gap sufficiently.

"The DA will be keeping a very close eye out for any such amendments and will also push for the entire process to be open and competitive. Should the details of any progress on pushing through this costly and unnecessary nuclear build not be open to the public, the deal will be tainted and the DA will not hesitate to go to court to interdict it," Mackay said.

The Sunday Times reported that Zuma reshuffled his cabinet on Tuesday after meeting a high level delegation from the Russian government the day before.

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Government insiders said the group came to the country to warn Zuma's administration to implement the R1-trillion new nuclear build project, the newspaper reported.

READ: Russia's Rosatom submits bid for nuclear project in SA: report

Following the meeting, Zuma announced the removal of Kubayi from the energy portfolio to the communications ministry. She was replaced by former state security minister Mahlobo, who was trained in Russia before taking up the intelligence post in 2014.

African News Agency

US Dollar	14.373	0.024
GB Pound	18.8338	0.055
Euro	16.8532	-0.0545
Japanese Yen	0.1264	0.0002
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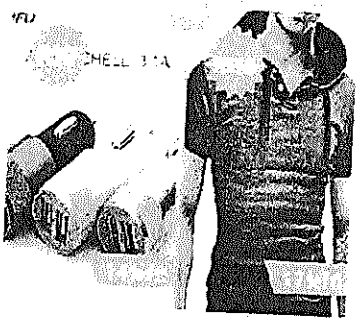

DA ready to interdict nuclear deal

EJM 2.4

POLITICS / 5 NOVEMBER 2017, 3:01PM / ANA REPORTER

File image: New Energy Minister David Mahlobo. IOL. (Bongani Mbatha).

Cape Town - The Democratic Alliance will not hesitate to interdict any attempt by new Energy Minister David Mahlobo to force through a nuclear deal despite the fact that South Africa does not need nor can afford the estimated R1 trillion deal, the DA said on Sunday.

Media reports on Sunday indicated that the energy department had been forced to work overtime to ensure the Integrated Resource Plan (IRP) was ready by November 14, a full four months ahead of when it was due, DA spokesman Gordon Mackay said.

"With each passing day it becomes clear that minister Mahlobo was appointed to make sure that the necessary nuclear deal would be pushed through. We will not allow Mahlobo to appease his friends, the Russians, at the expense of millions of South Africans who are struggling to survive with no jobs in a flat economy," he said.

The DA would use every legal and parliamentary tool at its disposal to ensure that the generations to come would not be shackled to massive debt that would compromise South Africa's future, Mackay said.

Earlier on Sunday, City Press reported that officials in Mahlobo's department were working weekends to finalise the reviewed IRP four months ahead of schedule. The plan to determine the energy mix the country needed was expected to be finalised in February next year, but would now be finished in the next two weeks.

READ MORE: Fast-track SA's energy plan with "immediate effect" - David Mahlobo

This would enable Mahlobo to make projections of the country's future energy demands based on "empirical evidence", the newspaper reported.

Last week, Finance Minister Malusi Gigaba told City Press that nuclear energy was unaffordable for the sluggish economy, nor immediately necessary.

When Mahlobo's predecessor Mmamoloko Kubayi was moved out of the department in the cabinet reshuffle last month there was widespread speculation that it was because she was not moving with haste on the nuclear programme, City Press reported.

African News Agency

EJM3

energy
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MEDIA STATEMENT BY THE MINISTER OF ENERGY

13 MAY 2017

On 26 April 2017, two Judges of the Western Cape High Court hearing an Application by Earthlife Africa and Another versus the Minister of Energy and five (5) Others, handed down Judgment in the following terms: -

1. The Section 34 Determination of 2013, is unlawful and unconstitutional and is reviewed and set aside;
2. The Section 34 Determination of 2016 is unlawful and unconstitutional and is reviewed and set aside.
3. Any Request for Proposal or Request for Information issued pursuant to the 2013 or 2016 Determinations are set aside.
4. The Minister's decision to table the Russian Intergovernmental Agreement in terms of section 231(3) of the Constitution is unconstitutional and unlawful and is reviewed and set aside;
5. The Minister's decisions to table the US and South Korea Intergovernmental Agreements in terms of section 231(3) of the Constitution is unlawful and unconstitutional and are reviewed and set aside;
6. Costs were ordered against the Minister, and those cost occasioned by the First Respondent as a result of the late disclosure of the 2013 Determinations are on a more punitive attorney and client scale.

I have, prior to the issuing of this communication, consulted with the officials within the Department as well as the legal representatives that were dealing with this matter. Major concerns were raised with regards to the Judgment and its implication to the department, in relation to the agreements that affects our counterparts and Section 34 determinations.

Energy mix: Government and the Department remains committed to the currently approved energy mix policy and will continue to strive to implement all forms of energy sources to secure the supply and availability of energy in the country. We

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appeal to our stakeholders to stop the temptation to divide the sector between Nuclear and Renewables.

I have decided that I WILL NOT BE APPEALING the decision of the Western Cape High Court on this matter.

Following this decision I have issued the following instruction to the department:

a) **Section 34 Determinations:** Amongst reparative measures agreed to as the Department, is the review of the processing of all future section 34 determinations and review all determinations currently in place to ensure compliance with this judgment.

b) **Intergovernmental Agreements:** In accepting the ruling of the court, and ensuring that no impropriety is suggested in the future, the Department seek to apply standardization in both form and processing (relating to proper tabling before parliament and its committees), of all Intergovernmental Agreements to be concluded with international countries. It is important to note that there is no intention to table the current agreements but will embark to sign new agreements with all the five countries and table them within reasonable time to parliament for consideration.

End

Issued by the Department of Energy

For more details contact Nomvula Khalo on 082 468 2834 or email: nomvula.khalo@energy.go.za; mediadesk@energy.gov.za; 012 406 7870

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MEDIA ADVISORY

Ministerial Media Briefing

Media Statement

Date issued: 8 June 2017

8TH CLEAN ENERGY MINISTERIAL CONFERENCE AND 2ND BRICS ENERGY MINISTERIAL MEETINGS; BEIJING, JUNE 2017

Minister Mmamoloko Kubayi participated at the 8th Clean Energy Ministerial Conference (CEM8) in Beijing from the 6th to the 8th of June 2017. The Clean Energy Ministerial Conference brings together 25 countries with the purpose of deliberation over matters of common interest on areas of clean energy development. South Africa is one of the countries constituting the Clean Energy Ministerial.

The purpose of the CEM8 is for the various participating countries to share their experiences, lobbying, initiatives and programmes in the renewable energy sector and energy efficiency space, in line with their efforts to reduce greenhouse gas emissions and to make the transition to a low carbon economy.

Having acceded to the Paris Agreement, South Africa is also keen to learn from the best practices that would assist us in meeting our energy objectives, including improving our energy security, creating jobs, localization of technologies, increasing access to energy, reducing water consumption, reducing greenhouse gas emissions, improving energy efficiency and diversifying the energy mix.

On the side lines of CEM8, BRICS Energy Ministers meeting was convened. The BRICS Energy Ministers reiterated their belief that renewable and clean energy, research and development of new technologies and energy efficiency can constitute an important driver to promote sustainable development, create new economic growth and reduce energy costs. The Ministers agreed to explore the feasibility of establishing a BRICS Energy Research Cooperation Platform on the basis on which member countries can carry out joint studies on the energy cooperation potential and fully take advantage of each country's strength in resources, markets, funds, technologies and capabilities. The next BRICS Energy Ministerial Meeting will be held in South Africa in 2018.

Social Media Accounts:
https://www.facebook.com/DoERSA
Twitter: @Energy_ZA
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Promoting an energy mix which aims to reduce electricity demand reduction for business and household.

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In line with our commitment to restarting new intergovernmental agreements on nuclear programme, Minister Kubayi held bilateral discussions with heads of delegations of some nuclear vendor countries such as France, China and Russia that availed themselves for opportunity on broader nuclear cooperation matters.

Issued by Department of Energy

For further details contact Nomvula Khalo on 082 468 2834 or email:
Nomvula.khalo@energy.gov.za

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Instagram @doesouthafrica
Promoting an energy mix which aims to reduce electricity demand reduction for business and household.

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MEDIA RELEASE

21 June 2017

Minister of Energy, Ms Mmamoloka Kubayi Participated at the 9th International Forum ATOMEXPO from the 19th to the 21st at Moscow in Russia.

Minister Mmamoloko Kubayi led the South African delegation to the 9th International Forum ATOMEXPO at Moscow in Russia from the 19th to the 21 where she participated in commissions as well as held bilateral with her counterparts.

The ATOMEXPO brings together more than 60 countries with the purpose of exchange views over matters of common interest in regard to nuclear energy development. South Africa has been a consistent participant at the ATOMEXPO because of its existing nuclear programme and to gain experiences in preparation for the expansion of the nuclear new build programme in line with government energy mix policy.

The purpose of the ATOMEXPO is for the various participating countries to share their experiences, lobbying, different initiatives regarding their programmes in the nuclear energy sector to reduce greenhouse gas emissions and to make the transition to a low carbon economy.

Having acceded to the Paris Agreement, South Africa is also keen to learn from the best practices that would assist us in meeting our energy objectives, including improving our energy security, creating jobs, localization of nuclear technologies, increasing access to energy, reducing water consumption, reducing greenhouse gas emissions, and diversifying the energy mix.

As part of expanding the energy portfolio, Minister Kubayi held bilateral meeting with Minister of Energy for the Russian Federation, Honourable Minister Alexander Novak where they discussed various options in the nuclear and energy space within the context of the Energy Cooperation Agreement.

She further met with the Director General of Rosatom Mr Alexey Likhachev where they agreed that the technical teams will initiate discussion on cooperation, and will report back progress to the Ministers,

Minister emphasised that the government remains committed to ensuring energy security for the country, through the roll out of the nuclear new build programme as an integral part of the energy mix, .as well as providing of reliable and sustainable electricity supply, as part of reducing the carbon emissions.

Minister further reiterates the department's openness, transparency as well as, engaging all spheres of Government and public in line with the country's legislation and policies. However, it is critical to recognise that the nuclear new build programme will enable the country to create jobs, develop skills, create industries, more critically; we encourage the young people and women to participate in the energy sector.

The Minister also met with Honourable William Owuraku Aidoo, the Deputy Minister of Power in the department of Energy, who was leading a delegation from Ghana. At this meeting Minister and Honourable William Owuraku Aidoo agreed on establishing relations and synergies in the Energy sector, sharing of lessons.

Minister also interacted with Dr Anthonie Cilliers, who was representing the North West University at the ATOMEXPO, congratulated the University for being the third University in the World to achieve International Nuclear Management Academy (INMA) peer review endorsed by the International Atomic Energy Agency (IAEA) for their nuclear technology management program.

Issued by Department of Energy for further details contact Nomvula Khalo on 082 468 2834 or email Nomvula.khalo@energy.gov.za

national treasury
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EJM6

PRESS RELEASE

GOVERNMENT's INCLUSIVE GROWTH ACTION PLAN

Following the release of Q1 2017 GDP data confirming an economic recession, the Minister of Finance has engaged with various stakeholders to map a way forward. It is acknowledged that failure to set the economy on a higher and more sustainable growth path will disadvantage a large portion of our population and undermine efforts to rapidly address unemployment, inequality and poverty.

In our engagements with various stakeholders several major concerns were raised, amongst others:

- Continued slow growth, the recession and the potential impact on the fiscal framework;
- Rising government debt;
- The state of State Owned Companies (SOC) and risks to contingent liabilities; and
- Policy uncertainty and low business and consumer confidence.

Government has been deeply engaged with the issue of low economic growth and the recession, analysing its impact on social welfare, and considering an appropriate response. There have since been several engagements in Cabinet and amongst the Economic Cluster Ministers to craft an appropriate government response.

The President hosted a meeting of several ministers on the 28th of June 2017. At the meeting, the President stressed the urgency of a coordinated response, and to this end an agreement was reached on implementation timelines for key structural reforms related to the nine point plan.

These would support both business and consumer confidence thereby laying the foundation for an economic recovery. *Details of the key areas are listed in the table attached.*

These interventions are the beginning of a response programme that will be unpacked in the MTBPS and the 2018 Budget.

The President will monitor and coordinate implementation to ensure these timelines are met.

The Minister of Finance has also committed to exploring an economic support package within existing fiscal resources. The support package will be designed to enhance the nine-point plan structural reform programme, and will depend on the government's ability to find resources through reprioritisation from areas of slack towards areas with higher potential for growth and employment. Any support package will be dependent on progress in implementing these interventions.

At the medium-term budget policy statement (MTBPS) we will be able to more comprehensively speak to our economic outlook and growth prospects. It is critical that we go into the MTBPS having demonstrated progress in unlocking growth.

We've made progress on resolving electricity constraints, and improving labour relations and the ease of doing business. The global economy presents opportunities, including growth in some of our major trading partners, a recovery in commodity prices, and strong capital inflows into emerging markets.

Let's take advantage of these opportunities.

We also call upon all social partners to engage proactively on practical initiatives to bring about inclusive growth and economic transformation. We need all our collective leadership, initiative, imagination, and ingenuity. Achieving the NDP's Vision 2030 requires all of us to find common cause, for the sake of all South Africans.

Intervention	Responsible authority	Timelines
Fiscal Policy		
- Finalise a sustainable wage agreement	Minister of DPSA	February 2018
- Finalise infrastructure budget facility	Minister of Finance	October 2017
Financial sector and tax policy		
- Convene Financial Sector Summit to quantify transformation targets, including for low-income housing and transformational agriculture	Minister of Finance	December 2017
- Bring down banking costs by implementing Twin Peaks	Minister of Finance	February 2018
- Work with DTI on targeted debt relief for most vulnerable (e.g. in cases of reckless lending)	Minister of Finance	February 2018
- Introduce micro-insurance framework and review Cooperatives Bank framework	Minister of Finance	February 2018
Leverage public procurement		
- Implement Preferential Procurement Regulations, which took effect on 1 April 2017.	Minister of Finance	July 2017
- Finalise Public Procurement Bill	Minister of Finance	March 2018
- Finalise complementary government fund aimed at financing SMMEs in start-up phase	Minister of Small Business	February 2018
Recapitalisation of SOEs and government guarantees		
- Continue engagements on framework for the disposal of non-core assets	Minister of Finance	March 2018

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Tel: (012) 315 5944

- Conduct detailed audit of non-strategic assets of SOEs aimed at strengthening SOE balance sheets	Minister of Finance	March 2018
- Finalise recapitalisation of South African Airways and South African Post Office	Minister of Finance	August 2017
- Reduce the issuance of government guarantees, especially for operational reasons	Cabinet	October 2017
- Determine the consequences of SOE non-adherence to the guarantee conditions	Cabinet	October 2017
Broader State Owned Entity (SOE) reforms		
- Implement private sector participation framework	Minister of Finance	March 2018
- Implement the remuneration framework	Minister of DPE	March 2018
- Finalise the board appointment framework	Minister of DPSA	March 2018
- Table draft Shareholder Bill	Minister of DPE	March 2018
- Implement a framework for the determination and costing of developmental mandates	Minister of Finance	March 2018
- Approve ToR for implementation of the Remuneration Standards oversight committee	Cabinet	September 2017
Private Sector Participation (PSP) Framework		
- Engage other departments on PSP framework	Minister of Finance	July 2017
- Provide broader guidance on sectors or asset classes for PSP and decide whether sector specific PSP frameworks are needed	All Shareholder Ministries	October 2017
- Present potential projects for PSP to line departments, Technical Task Team and Inter-Ministerial Committee	All SOEs	November 2017
- Approve PSP projects as outlined in the governance framework proposed in the PSP framework	All Shareholder Ministries	March 2018
- Include PSP projects in Shareholder Compacts and Corporate Plan for subsequent implantation	All Shareholder Ministries	March 2018
Costing Developmental Mandates		
- Consult other SOEs on costing of developmental mandate	Minister of Finance	August 2017
- Implement mechanisms to effect outcomes through Corporate Plans (e.g. Instruction notes)	Minister of Finance	August 2017

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- Roll-out the template for inclusion in the 2018 corporate plans	Minister of Finance	September 2017
- Monitor implementation through quarterly reports, annual reports and corporate plans	Minister of Finance	March 2018
Energy		
- Approach NERSA regarding Eskom hardship	Eskom	July 2017
- Develop the case for Eskom soft support until tariff adjustment in 2018 and submit to Treasury and Eskom Board	Eskom	July 2017
- Finalise lowest cost IEP and IRP, taking into account extensive comments received during public consultation	Minister of Energy	February 2018
- Review the pace and scale of rollout under the circumstances of Eskom hardship and overcapacity up to 2021	Minister of Energy	August 2017
- Review the level of participation by black industrialists and develop a strategy to increase it	Minister of Energy	August 2017
South African Airways (SAA)		
- Finalise CEO Appointment	Minister of Finance	July 2017
- Finalise and implement 5 year Turnaround plan	Minister of Finance	December 2019
- Negotiate with lenders to extend debt to longer-term	Minister of Finance	October 2017
Telecommunications		
- Conduct high level study on WOAN spectrum needs with a view to license the remainder to the industry	Minister of DTPS (CSIR)	August 2017
- Issue policy directive mandating ICASA to commence the licensing process	Minister of DTPS	December 2017
- Complete the spectrum licensing process	Minister of DTPS	December 2018
- Direct Competition Commission to investigate the data prices	Minister of DTPS/EDD	July 2017
- Commence rollout of phase 1 of SA Connect Broadband programme	Minister of DTPS	August 2017
Postbank Licensing		

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- Amendment of the enabling legislation for licensing of Postbank.	Minister of DTPS/Minister of Finance	December 2017
Minerals and Petroleum Resources Development Act Amendment Bill		
- Finalise MPRDA Amendment Bill in a manner that reflects the inputs of civil society, labour and industry solicited through the public consultation process	Minister of Mineral Resources	December 2017
Broad-based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry		
- Conduct further engagements with civil society, labour and industry	Minister of Mineral Resources	Charter gazetted
The Regulation of Land Holdings Bill		
- Table Regulation of Land Holdings Bill in parliament (after processing by a multi-disciplinary Ministerial Think Tank, the NJSC and NEDLAC)	Minister of Rural Development and Land Reform	October 2017

Issued on behalf of National Treasury

Date: 13 July 2017

Enquiries: Communications Unit
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EJM 7

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REPUBLIC OF SOUTH AFRICA

Life and legacy of
OR TAMBO.
100 YEARS

2030 NDP

Media Statement

01 September 2017

Deputy Minister, Thembi Majola

Acting DG, Tseliso Maqubela

Acting DDG, Jacob Mbele,

Senior officials from all stakeholders behind this outcome

Ladies and Gentlemen

Media houses represented

In May this year we established a technical team to help us resolve the impasse on the signing of the Power Purchase Agreements between Independent Power Producers for Bid Window 3.5 and Bid Window 4 and Eskom.

We must acknowledge that the matter remains complex and there are no easy solutions to it. However, it is our commitment as government to try to find a balanced solution in the interest of all parties involved.

Ladies and gentlemen, the technical team met and provided a report of its work this past Wednesday. In that meeting myself and my colleague in Cabinet, Minister Brown, were present and were supported by representatives from DOE, DPE, NT, ESKOM and the IPP Office.

It was brought to our attention that Eskom has excess generation capacity of electricity and based on the current demand patterns the situation is projected to remain this way until 2021. Eskom has submitted a tariff application which is under consideration by the Regulator. The Constitutional Court judgement with regard to the Regulatory Clearance Account (RCA) in favour of Nersa has also now paved the way for NERSA to implement tariff adjustments in line with the approved RCA.

1 R

We further acknowledged that South Africa's Renewable Energy Power Producer Procurement Programme is world renowned and our model has been adopted by many countries including developed countries. While the programme has been a success, there are many lessons we have learnt and there are many areas of improvement to be looked at.

We had to look at all the matters raised by the team and the recommendations. After lengthy deliberations we came to a conclusion on the following actions;

a. That the PPA for Bid Window 3.5 and 4 will be signed by the end of October 2017
b. DoE through the IPP office to engage with all affected parties for Bid Window 3.5 and 4 to re-negotiate not above 77c per kilowatt hour. This assist greatly in assist in reducing the requirements for additional government guarantees that would impact negatively in the current economic climate and constraints in the fiscus.
c. Eskom to ensure that all contracts are in place for signing on 28 October 2017
d. That I as the Minister of Energy meet with all IPPs participants in all Bid Windows, to discuss issues of concerns from IPP and for government to give feedback on concerns before the date of signing.
e. With regard to the review of the pace and scale of rollout under the circumstances of overcapacity up to 2021; the Departments agree that majority of the projects in Bid Window 3.5 and 4 will be commissioned closer to 2021 and will therefore have minimal contribution to the overcapacity up to 2021.
f. With regard to the review of the level of participation by the historically disadvantaged, there is work underway in this regard that will inform the implementation of the programme
g. All future programmes to be put on hold until a proper review is done and to allow the IEP and IRP to be concluded that will give us indication of the capacity we need.

It is worth noting that, while taking this decision and communicating our stance as government, we are cognisant of the interdict by the Coal Sector and the Section 77 notice filed by COSATU at Nedlac. We are hoping that all parties will consider this position.

In Conclusion;

- It must be noted that there are other issues that have been raised with us and will need to be addressed with the IPPs.
- Of importance is lack of transformation particularly regarding local ownership of some of these projects. This has to be reconsidered and adequately addressed. Allocations of projects and the ownership structure must be in line with South African transformation policies
- Furthermore, the issue of loan conditions given to black South African participants need to be reviewed as well.
- Lastly there is a need to restructure the community trust dividends

We further reiterate our position that transformation of the Energy Sector is long overdue and we can't compromise on it any longer.

We hope that all parties will understand that it was not easy to arrive at this position as a lot of compromise had to be made.

We hope all parties affected will positively receive this news and cooperate with us as government to build a Sustainable Energy Sector.

THANK YOU

CJM8

MINISTRY OF ENERGY

REPUBLIC OF SOUTH AFRICA

PRIVATE BAG x 96, PRETORIA, 0001, Tel (012) 406 7658

PRIVATE BAG x 9111, CAPE TOWN, 8000 (021) 469 6412, Fax (021) 465 5980

Enquiries: Lebohang .Tshabalala@energy.gov.za

Memorandum from the Parliamentary Office

2296. Mr M M Dlamini (EFF) to ask the Minister of Energy:

1) Whether the draft Integrated Resource Plan (IRP) and Integrated Energy Plan (IEP) as contemplated in the Electricity Regulation Act, Act 4 of 2006, will be re-published for comment; if not, why not;

2) on what dates will the IRP and IEP be promulgated;

3) whether she intends to remove the restraints on renewable energy from the draft IRP and IEP before it is published; if not, why not;

4) why does the draft IRP and IEP make provision for new coal-fired and nuclear power when it has comprehensively been shown by the Council for Scientific and Industrial Research that renewable energy with additional storage capacity and gas is the most cost-effective and feasible plan for South Africa's energy future?

NW2535E

Reply:

(1) The process for consultation on IRP and IEP has been concluded with the public. The current process is to finalise the policy document and gazetting the final document for implementation. Consultation on the policy is concluded and final documents will be published.

(2) Target for promulgation is end of February 2018.

(3) Minister will not interfere with the policy development process outside the prescribed laws, as this will be illegal.

(4) The final IRP and IEP will be communicated and promulgated once concluded, currently we don't have a final position to communicate.

EJM9

Cabinet Reshuffle: A worried South Africa responds

- Rebecca Davis

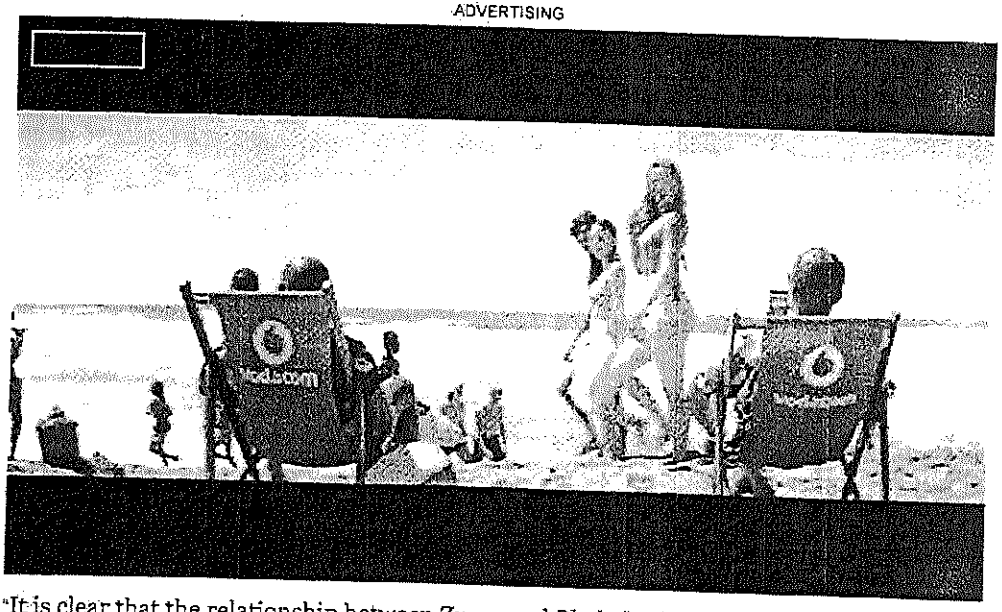
(http://twitter.com/becsplanb)
Rebecca Davis
Rebecca Davis studied at Rhodes University and Oxford before working in lexicography at the Oxford English Dictionary. After deciding she'd rather make up words than define them, she returned to South Africa in 2011 to write for the Daily Maverick, which has been a magnificilious decision.

- South Africa (https://www.dailymaverick.co.za/section/south-africa/)
- 17 Oct 2017 11:30 (South Africa)

President Jacob Zuma's Tuesday Cabinet reshuffle was greeted with almost unanimous concern from quarters unconnected to the ANC. While the axing of Higher Education Minister Blade Nzimande is widely seen as the underlying motive, particular unease also accompanies the move of State Security Minister David Mahlobo to the vexed Energy portfolio. And aside from the specifics of the new appointments, one fact is obvious: it serves nobody's interests, except the President's, to have such a rapid turnover of ministers in such key positions. By REBECCA DAVIS.

"It has just proven that Zuma is going to purge anyone who attacks him, or who is in his way to elect a successor," United Democratic Movement leader Bantu Holomisa told *Daily Maverick* on Tuesday.

Holomisa was referring specifically to the axing of Higher Education Minister and South African Communist Party general secretary Blade Nzimande, with Nzimande having been an increasingly vocal critic of Zuma in recent months.



"It is clear that the relationship between Zuma and Blade [Nzimande] has broken completely," Holomisa added.

His view was reiterated by numerous opposition party politicians following Tuesday's Cabinet reshuffle. The DA's Mmusi Maimane characterised the shuffle as "the latest move in Zuma's war against anyone who opposes his project of State Capture".

"We know that Blade [Nzimande] has been a thorn in the flesh [of Zuma], especially with the SACP," the Inkatha Freedom Party's Narend Singh told *Daily Maverick*, while Freedom Front Plus leader Pieter Groenewald described the shuffle as "revenge on the SACP".

This line of thinking was voiced most forcefully by the SACP itself, with deputy general secretary Solly Mapaila terming Nzimande's removal as "an attack on the SACP".

Not everyone was shedding tears for Nzimande, however. Deputy leader of the Congress of the People (Cope) Willie Madisha told *Daily Maverick* that Nzimande's ousting was "history repeating itself".

Said Madisha: "What is being done to [Nzimande] now is exactly what he did to Thabo Mbeki 11 years ago, [Nzimande] was together with his friends, including Zuma, mobilising against Thabo Mbeki."

Madisha has some skin in this game: he was booted out of the SACP in 2008 following a dispute between him and Nzimande over a R500,000 donation which Madisha claimed he handed to Nzimande, who denied ever seeing the money.

In the immediate aftermath of the shuffle, the emphasis of analysis was placed on the possible implications of Nzimande's sacking for alliance politics, with little time for reflection on Nzimande's term as Higher Education Minister.

The DA's shadow education minister Belinda Bozzoli told *Daily Maverick*: "Blade has run out of steam and I would suspect is probably quite relieved."

She suggested that his tenure as Higher Education Minister will probably be largely remembered for the #FeesMustFall unrest.

"He was warned by many people, including me, of the risks of not increasing government subsidies [for universities] over the years and brushed those aside," Bozzoli said. "His is not a great legacy, but on the other hand he has overseen a relatively stable department, certainly not riddled with corruption. By the ANC's low standards, he's done a reasonable job."

His replacement in the Higher Education portfolio is Hlengiwe Mkhize, who has been Home Affairs Minister for the last six months. With the government's report on student fees yet to be released, Mkhize takes on an unenviable role at a difficult time.

"I don't think Mkhize has got any oomph rather than just academic qualifications," the UDM's Holomisa said.

The IFP's Narend Singh voiced the hope that Mkhize's academic background – she holds higher degrees in Psychology – would at least stand her in good stead in her new position.

Bozzoli pointed out that Mkhize has been the chair of the board of the University of Zululand during an extremely troubled time for the university, which has seen the institution put into administration twice.

Overshadowing the movement of Mkhize, however, was the transfer of State Security Minister David Mahlobo to the Energy portfolio.

Reflecting on Mahlobo's time at the State Security Agency, Right2Know's Murray Hunter told *Daily Maverick*: "In three years, Mahlobo went from being a little-known Mpumalanga MEC to being one of Zuma's most prominent allies. During that time, we saw a dangerous creep of state security into our politics and public life: serious allegations of a rogue SSA unit targeting rival politicians, the use of SSA slush funds to set up a bogus union, and the rise of paranoid accusations of 'regime change' against critics of the government."

It is Mahlobo who is now being handed the reins to one of South Africa's most important

government departments.

"There is speculation of course that moving Mahlobo from where he was was occasioned by the fact that [Zuma] might want to send him to Russia now and again," said Holomisa – a reference to the nuclear deal with Russia that President Zuma is said to be desperate to conclude before the end of his term in office.

Makoma Lekalakala, an activist from the anti-nuclear group Earthlife, told *Daily Maverick* that the shifting of Mahlobo to Energy may be read as a sign that "the project of nuclear expansion has got to happen, through thick and thin". She said the group would be scrutinising matters around nuclear very closely.

Mahlobo's replacement in the State Security portfolio is Bongani Bongo, a relatively low-profile ANC MP.

"What is of significance is that [Bongo] is from Mpumalanga," suggested the FF+'s Groenewald. Mpumalanga is shaping up as a critical province in the ANC's leadership race, because it will send the second greatest number of delegates to the December electoral congress.

Groenewald also points out that Bongo has been deployed by the ANC to sit on a number of ad hoc Parliamentary commitees – including those looking into the selection of the public protector and the funding of political parties – which Groenewald interprets as a sign that Bongo is happy to do Zuma's bidding.

Zuma's appointment of a new Communications Minister, in the form of Mmamoloko Kubayi, came on the same day as a court ruling set to curtail that minister's powers in future. The case was brought by Media Monitoring Africa, which argued that the ability of the Communications Minister to have the final say in appointing senior executives at the SABC radically undermined the power of the SABC board. On Tuesday, the courts agreed.

"It's a massive, massive gain," Media Monitoring Africa's William Bird told *Daily Maverick*. "Go back through all these [SABC] crises over the last decade and you'll see ministerial interference has been one of the biggest challenges."

Bird's enthusiasm over the court ruling was tempered by the news of the new Communications Minister – the seventh one in seven years.

"It's just extraordinary that the communications sector can be treated with such contempt that (ministers) can be changed in this manner," Bird said. He charged that the rapid turnover of ministers is a "deliberate strategy to create overriding chaos – to make sure the SABC is in the state that it's in, and push through other deals".

Possibly the most surprising aspect of Tuesday's reshuffle, however, was the fact that presidential contender Nkosazana Dlamini Zuma did not emerge with a ministerial post – as had been widely speculated would happen in order to strengthen her hand in her leadership bid.

"Nkosazana Dlamini Zuma is not stupid," was Holomisa's comment on the matter. "She has been at pains to try and be seen as herself, and not as a lackey of Zuma."

Groenewald suggested that there was still time for Zuma to act to promote Dlamini Zuma. "It is not impossible that in November, Zuma can replace Cyril Ramaphosa as deputy president [with Dlamini Zuma]," he speculated.

From some of those within the ANC, a positive spin was put on the day's events.

"The replacement of comrade Blade Nzimande is long overdue," stated the Western Cape's ANC Youth League. "It has been clear for some time that he was distracted by the SACP's debate on whether it should participate in the 2019 general election from driving the ANC's agenda of free higher education."

The ANC branch also commended President Zuma on the appointment of Buti Manamela as Deputy Minister of Higher Education, as "yet another indication that a younger crop of leaders are being given greater responsibility in the state".

Its statement concluded with a call to Cabinet members to "not allow themselves to be used as cannon fodder in the run-up to the conference in December".

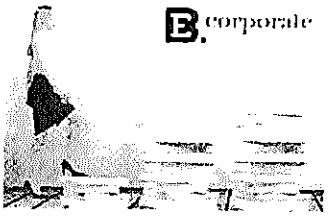
With the new appointments seemingly motivated in large part by narrow political interests, that may be easier said than done. **DM**

- Rebecca Davis

(http://twitter.com/becsplanb)
Rebecca Davis
Rebecca Davis studied at Rhodes University and Oxford before working in lexicography at the Oxford English Dictionary. After deciding she'd rather make up words than define them, she returned to South Africa in 2011 to write for the Daily Maverick, which has been a magnificilious decision.

- South Africa (https://www.dailymaverick.co.za/section/south-africa/)

Do Not Miss



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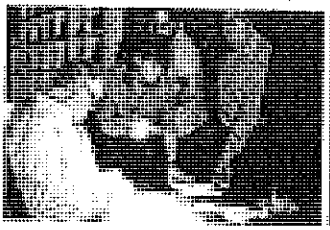
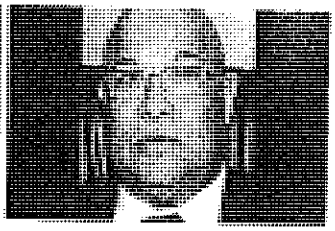


Newsflash: Hawks probe information leak linked to Jacques Pauw's book (https://www.dailymaverick.co.za/article/2017-11-09-newsflash-hawks-probe-information-leak-linked-to-jacques-pauws-book)



Spooks and Spies: The PAN progamme, Arthur Fraser and eight years of investigations (https://www.dailymaverick.co.za/article/2017-11-09-spooks-and-spies-the-pan-progamme-arthur-fraser-and-eight-years-of-investigations)

EJM10

REMARKS BY MINISTER OF ENERGY MR DAVID MAHLOBO, MP, ON THE OCCASION OF THE 44TH POLICY GROUP MEETING OF THE GENERATION IV INTERNATIONAL FORUM , CAPE TOWN SOUTH AFRICA, 19 OCTOBER 2017

Programme Director

Chairperson of the Generation IV International Forum, Mr Francois Gauché

Distinguished Policy Group Representatives from member countries,

Honourable Guests,

Ladies and Gentlemen,

Good Morning to all

Introduction

1. On behalf of HE President Zuma, his Government and the people of the Republic of South Africa, it gives me great pleasure to welcome you to South Africa, for the 44th Policy Group Meeting of the Generation IV International Forum. It is our pleasure to host this meeting for the second time, the first being in 2010.

2. Please feel free to enjoy our country, and the city of Cape Town with its natural beauty bound to leave you with a memorable experience.

3. As a country and her people, South Africa is proud to host this important conference which seeks to provide policy solutions for the continued sustainable use of nuclear as an energy resource.

92

4. As a peace loving country, anchored in the noble principles of our constitution, we are the first country to voluntarily disarm our nuclear weapons programme in the early 1990s, and more recently received an international award for being the first to convert our SAFARI-1 research reactor and medical isotope production through the use proliferation resistant nuclear fuel.

5. South Africa is of the firm view that there are no safe hands for Weapons of Mass Destruction. The only viable solution to the problems of nuclear weapons is their total elimination as expressed in the recently UN adopted Treaty banning Nuclear Weapons. This is the view expressed by HE President Zuma at when he addressed the Un General Council in last month. He said, and I quote:

It can no longer be acceptable that some few countries keep arsenals and stockpiles of nuclear weapons as part of their strategic defence and security doctrine, while expecting others to remain at their mercy. We are concerned that any possible accidental detonation would lead to a disaster of epic proportions.

We continue to make a clarion call to all Member States of the UN to sign and ratify the Ban Treaty in order to rid the World and humanity of these lethal Weapons of Mass Destruction. We reaffirm, at the same time, the inalienable rights of states to peaceful uses of nuclear energy as reinforced in the Non Proliferation Treaty.

End quote

6. In July 2017, the UN adopted the treaty to ban nuclear weapons. A majority of states has voted in favour of eliminating and banning those weapons because of their devastating effects on human health and the environment. Even though the pathway towards their actual abolition may be another arduous task, this development surely marks a significant step in deligitimising nuclear arms.

Policy Matters

7. Chairperson, Cape Town is home to the Koeberg Nuclear Power Station, the only one on the African continent. I understand that some of the delegates visited this power plant yesterday.

8. The Department of Environmental Affairs has recently issued a positive record of decision for Eskom to proceed with an Environmental Impact Assessment into the suitability of the same site to host 4000 MW of nuclear generated electricity.

9. We welcome this decision as it allows for a public participation process which we believe will propel the country towards the fulfilment of the government policy position on an all-inclusive energy mix.

10. The nuclear industry has over decades been an integral part of the world economic development, evolving from import to export oriented industry, providing a central impetus to technological innovation as well as to socio-economy developments such as infrastructure, health and education.

11. South Africa has accumulated extensive experience in nuclear technology development and nuclear power generation.

12. South Africa is one of the founding members of the Generation IV International Forum back in the early 2000s. In 2015, we signed the 10 year extension of the Framework Agreement of the Generation IV International to re-affirm our strong interest and commitment to pursue collaborative research and development on Generation IV reactor technology.

13. On that note, I also wish to officially congratulate Australia on depositing their instrument of accession into the Framework Agreement of the Generation IV Forum. We look forward to working with you at all developing the next Generation of nuclear reactors.

14. I applaud continued collaborative research and development under the GIF seeking to develop economic, innovative, safe and flexible nuclear reactor systems to meet both the current and future energy needs.

15. The multifaceted nature of the energy policy requires for factors such as economic, social and environmental concerns to be considered in energy planning. There are therefore different sets of variables that inform energy planning nationally, regionally and globally and there cannot be a one-source fits all approach.

16. South Africa recognises the role of nuclear power in ensuring security of energy supply and meeting the challenge of climate change. We promote an energy mix of coal, gas, renewables and nuclear. Each of these options has their role; some of the energy sources are intermittent supply and while others, such as nuclear and coal, are base-load supply.

17. South Africa has made a policy decision to pursue nuclear energy as part of the energy mix and recognise the role of nuclear as a base-load source of energy in ensuring security of supply and climate change mitigation. Currently, nuclear constitutes about 6% of the South African energy mix – with 1 800 Megawatt electric of electricity supplied to the national grid by the Koeberg Nuclear Power Station in the Western Cape. The approved Integrated Resource Plan of 2010-30 provides for coal, gas, renewables and 9600 Megawatt nuclear as part of the energy landscape by 2030.

18. As you may be aware, the Clean Energy Ministerial, during the June 2017 conference in Beijing, China, received and endorsed a proposal by the United States of America for the inclusion of nuclear as a work stream. South Africa supported this initiative and we look forward to working with our counterparts on advancing the nuclear energy at the Clean Energy Ministerial and ensuring that the role nuclear towards decarbonisation of the world is recognised and made practical.

19. Being a developing country, our key driver to our policy decision for nuclear power is the economics of the energy source. Currently Koeberg is one of our lowest cost electricity sources, and generation III nuclear power plants remain a good economic choice for South Africa. Generation IV nuclear power plants promise improved economics and South Africa looks forward to deploying such advanced energy systems for its development.

20. Sustainability of our environment is key, and being a committed party to the Paris Convention, South Africa has set ambitious carbon reduction targets, which Generation IV reactors will continue the tradition of nuclear power being the lowest carbon emitter from all energy sources. With the advent of reduced waste from these systems, there is no doubt that nuclear power itself will be more sustainable than ever.

21. One of the most important facet of nuclear power is – Safety. With most of the reactors globally still being Generation II, South Africa has taken a decision to deploying only Generation III or above type technology going forward. Although the Fukushima disaster had catastrophic consequences, nuclear power continues to be the safest source of electricity. The further improved safety of Generation IV systems will surpass this benchmark, and hopefully cure the myth that nuclear is an unsafe source of energy.

22. As you know, South Africa previously embarked on a Generation IV type reactor project known as the Pebble Bed Modular Reactor. This project was put into care and maintenance in 2010, however, we remain interested to still deploy such technology into the future. At this stage, we are focusing on readily deployable technologies to address our electricity demand needs going into the future as our coal fired power plants become decommissioned.

23. Chairperson, I am very pleased that the plans for the 4th GIF Symposium 2018 to be held in Paris around the same time next year is taking shape, more-especially the involvement of youth. As you may be aware, South Africa's nuclear industry is re-inventing itself with many young people now becoming the bulk of our nuclear industry.

24. This conference must also focus on the need for increased involvement of women at the GIF, because looking around this room; I can see that much needs to be done about this. If we talk about the next generation of nuclear reactors, we should also be talking about the next generation of women in nuclear.

Conclusion

25. Chairperson, let me wish you successful discussions and decisions over the next two days and that these lead us ever closer to the next generation of nuclear energy with improved safety, economics, and proliferation resistance.

26. It is our responsibility as this current generation to produce knowledge systems that enhances the sustainable use of nuclear power to drive a developmental agenda and bequeath to the next generation a world they are proud to call home.

27. In our hands therefore, we hold the future of this world. We dare not fail them.

28. I thank you.

EJM11

BUDGET 2017 OCTOBER 25, 2017

In Full: SA Finance Minister Malusi Gigaba's 2017 mid-term budget

PRETORIA — Finance Minister Malusi Gigaba delivered his maiden Medium Term Budget Policy Statement today. He faces the country's biggest tax revenue shortfall since 2009 (a massive R50.8bn) as well as a rising debt-to-GDP ratio which is currently at 54.2% but which is forecast to top 61% by 2022. To add fuel to his fire National Treasury also revised growth for 2017 downwards from 1.3% to 0.7%. There is a lot on Gigaba's plate and below is his full speech. - Gareth van Zyl

South Africa's finance minister Malusi Gigaba. Photographer: Andrew Harrer/Bloomberg via Getty Images

South African medium Term Budget Policy Statement 2017 delivered by Malusi Gigaba, Minister of Finance, 25 October 2017

It is my privilege to present the twentieth *Medium Term Budget Policy Statement* for consideration of the House and all South African

I also table:

- The Adjusted Estimates of National Expenditure, and
- The Adjustments Appropriation Bill
- The Division of Revenue Amendment Bill
- Taxation Laws Amendment Bill
- Tax Administration Laws Amendment Bill
- Rates and Monetary Amounts and Amendment of Revenue Laws Bill

Introduction

As we consider the medium-term outlook, one is reminded of a poem by Ben Okri, entitled 'Poetic Fight', which I quote:

"Will you be at the harvest,

The trend of SOCs seeking bailouts to finance operational expenditure, inefficiency and waste must also be brought to an end.

In due course, National Treasury will make proposals to make our government guarantee framework more stringent.

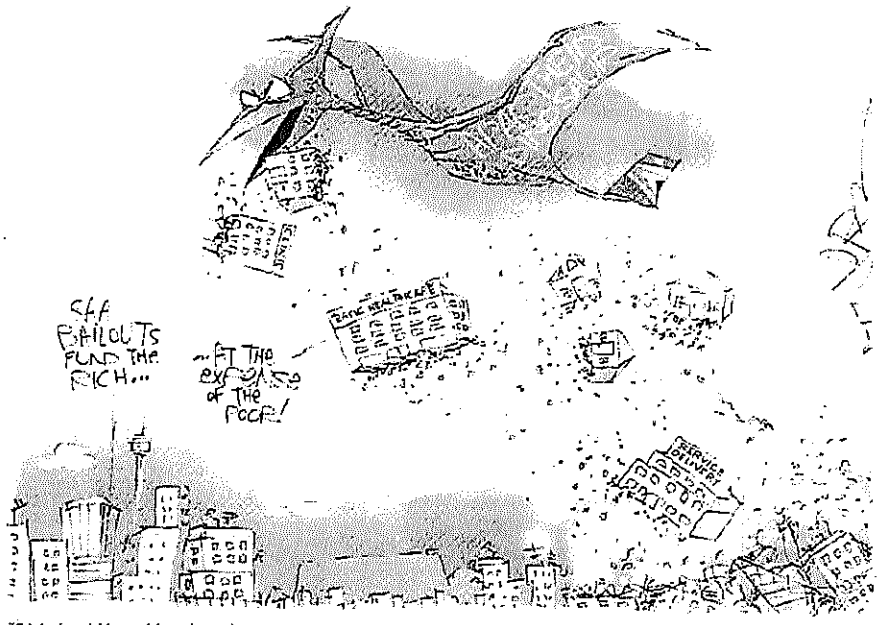
It is imperative that government ensures that the Boards of Directors in the SOCs are properly qualified, ethical and provide the requisite skill sets that will ensure that the SOCs are soundly and profitably run, to properly serve their mandates. This needs to be done without delay.

If board members do not exercise the leadership, good governance and financial management expected of them, government must act quickly and decisively.

Last week, government appointed a new board at the SABC, and overhauled the board of South African Airways.

These entities now have trusted, capable boards which will be supported and expected to guide their institutions back to healthy and sustainable operating states.

I would like to take this opportunity to thank the lenders to SAA, especially our local banks, for the understanding and patriotism they have shown, and the constructive role they continue to play in SAA's turnaround.



"SAA should be sold to the private sector so that more travellers can benefit". More magic available at jerm.co.za.

After we meet the new board of SAA, we will pronounce on our plans to consolidate aviation assets and bring in a strategic equity partner. We believe a strategic equity partner can play an important role in SAA's turnaround, as well as unlocking value for the fiscus which has invested significantly in the airline over the years.

Despite its current challenges, government remains convinced that retaining a national carrier, is in the public interest.

It is in our national interest, to have influence over our connectivity to all parts of the world, and not have to rely exclusively on the profit and scheduling considerations of global airlines.

SAA sells South Africa's economy, tourism and culture to every one of its passengers. Global airlines do not, and will not, perform this priceless marketing and branding role for us.

So let us not ignore the contribution SAA is making to our nation's development, even as we insist on dramatic improvements in its governance, strategy and operations.

Similarly, Eskom is critical to our development, with the link between electricity infrastructure and economic growth being well established.

Over the last decade, our economic growth was effectively capped by our electricity supply constraints, which we have now resolved. Of course, we now have the problem of surplus capacity, but that is a better problem to have. Eskom is addressing this by working with its intensive users to grow demand, as well as increasing exports to our neighbouring countries.

An electricity pylon stands beyond an Eskom sign at the entrance to the Grootvlei power station. Photographer: Dean Hutton/Bloomberg

It is Eskom's governance issues which are of major concern to government.

The failures of governance, leadership and financial management Eskom are of grave concern.

As government is guarantor over a significant portion of Eskom's debt, it has become a significant risk to the entire economy.

Eskom is simply too important to the country to fail, and we will not allow it to.

National Treasury will work closely with the Department of Public Enterprises to strengthen governance and financial management at Eskom.

Government commits to the following urgent steps.

We will appoint a new board at Eskom before the end of November this year.

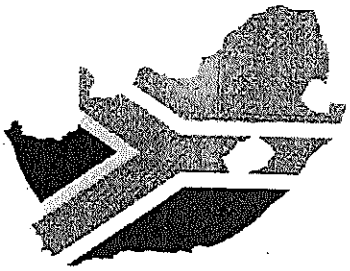
Working with the new board, we will ensure a credible executive management team is in place.

We will ensure its financial management complies with the Public Financial Management Act (PFMA), and that irregular expenditure is accounted for.

Conclusion

Five years on from the adoption of the NDP Vision 2030, the fast growth that will enable us to make substantial progress in eliminating unemployment, poverty and inequality remains elusive.

We must find the wisdom, the humility and the perspective to ask how must we remake ourselves in order to build the South Africa we want?



The global economy is growing again after the turbulence of the financial crisis and ensuing recovery. While not without risks, global conditions are favourable for South African growth.

To take advantage of this, we must get out of our own way and forge a working coalition for inclusive growth and economic transformation.

Restoring confidence is the cheapest form of stimulus we can inject.

Delivering on the 14 confidence-boosting measures announced in July is a start.

It must be followed up with structural and microeconomic reforms.

Government must move at the pace required by society and the economy, not expect it to slow down and wait on our behalf.

We were once one of the world's great mining countries; we can be that again, this time with the benefits shared across our entire society.

We can reindustrialise our economy with manufacturing as a platform,

EJM 12

EYEWITNESS NEWS

GIGABA: NO MONEY FOR NUCLEAR PROGRAMME FOR AT LEAST 5 YEARS

He spoke at an event in Cape Town on Thursday morning following his inaugural MTBPS speech on Wednesday.

Finance Minister Malusi Gigaba at a briefing. Picture: AFP

SA Economy (http://ewn.co.za/Topic/SA-Economy) Finance Minister Malusi Gigaba (http://ewn.co.za/Topic/Finance-Minister-Malusi-Gigaba)
Rahiela Essop (http://ewn.co.za/Contributors/rahiela-essop) | 19 days ago (19 days ago)

CAPE TOWN - Finance Minister Malusi Gigaba (http://ewn.co.za/Topic/Finance-Minister-Malusi-Gigaba) says that South Africa won't have the money for a major nuclear programme for at least the next five years.

He spoke at an event in Cape Town on Thursday morning following his inaugural MTBPS speech on Wednesday.

In it, he painted a bleak picture of the nation's finances (http://ewn.co.za/2017/10/25/alert-malusi-gigaba-there-are-tough-times-ahead-for-sa) with little light at the end of the tunnel.

Gigaba spoke to journalists and business people in Cape Town this morning.

He was asked to explain his stance on the nuclear build programme amid seemingly mixed signals from his Cabinet colleague in the Energy portfolio, David Mahlobo.

Mahlobo has suggested that South Africa remains committed to expanding the country's existing nuclear capacity.

In response, Gigaba insisted that ministers in government are on the same page.

"The economy can't afford the nuclear at the present moment. We've got access to electricity, there are no intensive users that are taking up the generation capacity that we have."

Gigaba says there's less pressure on government to deliver more energy into the grid as Eskom has 5,700 megawatts of surplus electricity because our low growth environment has made for a slowdown in demand for power.

NUCLEAR NOT OFF THE AGENDA

In his speech on Wednesday, Gigaba quoted President Jacob Zuma (http://ewn.co.za/2017/10/22/reports-russian-delegation-met-with-zuma-before-cabinet-reshuffle), who told Parliament in May that the nuclear build programme would proceed at a pace and scale the country can afford.

In his pre-speech briefing, Gigaba gave more details: "It is not off the agenda, the country at the present moment can't afford nuclear and the budget also can't. We have 5,700MW of electricity surplus. That's bigger than our biggest power station, Medupi, which is the fourth-largest power station in the world and which when fully commissioned will produce 4,800MW."

Gigaba says the Department of Energy is reviewing the integrated resource plan and nuclear is expected to be part of the proposed energy mix.

But he says a decision will only be taken once the economy has recovered and the country's energy needs dictate a need for nuclear.

Additional reporting by Gaye Davis.

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EJM13

Enemy of the People

In Enemy of the People, ex-treasury DG Lungisa Fuzile recalls the confusion during Nene firing

Public funds

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All data is delayed

EUR/ZAR	GBP/ZAR	JPY/ZAR	USD/ZAR	AUD/ZAR
▲ 16.94 (0.40%)	▼ 18.88 (-0.53%)	▼ 0.13 (-0.33%)	▼ 14.41 (-0.29%)	▼ 11.01 (-0.08%)

Mahlobo instructs officials to fast-track SA's energy plan

Oct 31 2017 19:54 Liesl Peyper

Cape Town – New Energy Minister David Mahlobo has told his department to conclude the Integrated Resource Plan (IRP) - which will serve as South Africa's blueprint for future energy needs - with "immediate effect"

Mahlobo faced a grilling from members in the National Council of Provinces in Parliament on Tuesday, answering questions about the sale of South Africa's strategic fuel stocks late 2015, and how government intended to proceed with its nuclear build programme.

"I directed my team (at the Energy Department) to conclude the IRP with Cabinet with immediate effect so that we have policy certainty and we can boost investor confidence," Mahlobo said in one of his responses.

Mahlobo, who was appointed energy minister earlier this month, said SA's security of energy supply was paramount and that the IRP should continue to inform these security requirements.

"Because of the development of our economy adjustments needed to be made (to the IRP). We need to be clear about our supply of energy," he said

He also asked members not to "politicise" the nuclear issue.

READ: David Mahlobo: The nuclear deal's new best friend?

Mahlobo indicated earlier on Tuesday during a briefing of Parliament's oversight committee on energy, that he wanted the IRP to be concluded by November this year.

His predecessor Mmamoloko Kubayi had undertaken to present a finalised version of plan ahead the main budget in February 2018.

David Mahlobo

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Gigaba says no to nuclear

Gigaba: SA can't afford nuclear - yet

Suspicious

DA spokesperson on energy Gordon Mackay however said this haste with the IRP was "suspicious", especially because it is such an extensive document.

"Indications by the new Energy Minister, David Mahlobo, that the Integrated Resource Plan will be moved forward and ready by the end of November are alarming and are yet another instance of government sending mixed signals on nuclear energy," he said in a statement.

Mahlobo said in the NCOP that government has never said it would prioritise one energy option over another.

"Our energy policy remains the same. There is space for renewables and we're investing in base load (such as coal-fired power stations and nuclear.) Price is a determinant, plus uptake (demand)."

READ: Nuclear: Mahlobo may be the bulldozer Zuma needs

The Minister added that energy was a "weighty issue"

"This preoccupation with nuclear has nothing to do with our policy positions. I'm not in the business

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COMPANY SNAPSHOT

GO

President Jacob Zuma and Finance Minister have also repeated this stance on numerous occasions.

Mahlobo was appointed Energy Minister early in October during a surprise Cabinet reshuffle, which some commentators took as a sign that SA wanted to fast-track its nuclear ambitions.

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VOTING BOOTH

Mahlobo rushes nuclear deal

2017-11-05 06:00

Setumo Stone - City Press

As Energy Minister David Mahlobo forces his nuclear power plans into action, officials at his department are working weekends to finalise the country's reviewed integrated energy resource plan – four months ahead of schedule.

The plan to determine the energy mix the country needs was expected to be finalised in February next year, but will now be finished in the next two weeks.

"We would have been talking February, but now we are talking November 14," said an insider, vouching for the level of hard work the minister was putting into his job.

This would enable Mahlobo to make projections of the country's future energy demands based on "empirical evidence".

Last week, Finance Minister Malusi Gigaba told City Press that nuclear energy was neither affordable for the sluggish economy, nor immediately necessary.

Mahlobo, who has been in his new job for just more than two weeks after three years as state security minister, is now on a collision course with Gigaba and Treasury.

The nuclear energy plan is expected to cost South Africa about R1 trillion, an amount that economists and politicians from across the spectrum – including the ANC – say the country's struggling economy cannot afford.

Mahlobo told City Press yesterday morning that government should not be "reckless", but energy was central to the country's security and shouldn't only be treated as an economic issue.

In the opposite room, a group of senior managers waited for Mahlobo to join them for a meeting on the integrated energy resource plan.

"People who say we should not invest do not understand that, each and every day, more companies are closing down and more young people are getting out of employment and even more out of the education system. We are creating soldiers of unemployment," Mahlobo said.

"Any responsible government will plan well because it is becoming a national security issue. One day these people would have nothing to lose and they will take this government out. The ANC must never be deterred in the face of political parties who want to stop us from implementing our programme."

Mahlobo said much of the criticism against the nuclear project was based on an "unfounded narrative" about "who is going to win the tender", which was none of his concern because, "if there is [illegible] procurement that is going to be done, the South African laws are going to be followed".

David Mahlobo (File, Netwerk24)

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President Jacob Zuma's cosy relationship with his Russian counterpart Vladimir Putin, as well as Mahlobo's own close ties to the Kremlin and its security establishment, has already tilted the scales in that country's favour.

When Mahlobo's predecessor Mmamoloko Kubayi was moved out of the department in the Cabinet reshuffle last month, there was widespread speculation that it was because she was not moving with haste on the nuclear programme.

"An energy solution"

Mahlobo confirmed his close ties with "the leadership of the Russian federation", adding that not many people have access to the Kremlin, but he does because in his previous job they worked closely together on intelligence operations. However, he denied taking convicts-turned-businessmen Kenny Kunene and Gayton Mackenzie to the Kremlin during a recent trip to Moscow.

Mahlobo said his starting point was that "everyone in the country agreed that, for the economy to work and in order to reduce unemployment, you need to have an energy solution".

"In our case, we say we want to ensure security of energy and it must be sustainable. That is, you do not want to have disturbances that one day you wake up you do not have sufficient energy or you cannot be able to drive investment."

He said that although the affordability of the project was a "big issue", the need for extra energy was genuine and legitimate.

South Africa uses both renewable and nonrenewable energy sources, and the sector contributes directly and indirectly more than 33% of gross domestic product. Other energy sources in the mix include coal, gas, water, solar and wind.

Mahlobo said "the principle of pace, scale and affordability applies to the entire energy mix".

"The starting point is that we do not have energy that we can guarantee for future generations because it is finite. Whatever source you choose, you must be able to say at what scale, which is the volume you want or the demand met," he said.

He said that projecting future energy demand for economic growth was "a function of saying who is going to take this energy up like industries, private sector and domestic usage".

Mahlobo said building nuclear power stations created new industries because it was capital intensive and would take more than 10 years to build.

"Yes, it is expensive when you are building, but immediately [after] a nuclear plant has been built and [has started] to operate, it produces the cheapest electricity than any source. It is actually less than 35c per kilowatt hour, which is very cheap. The renewables are on average around 80c per kilowatt hour, and some are around R1."

He said the technology in nuclear reactors had also improved and would reduce emissions. "Plus we have a good track record because we have never had reports that Koeberg [Nuclear Power Station in Cape Town] has caused problems in terms of safety and issues of environment," he said.

Mahlobo said his approach would be informed by a "build, operate, train and transfer" model whereby if government did not have the funds to build it, it would go to the market seeking an investor who would build at their own risk.

"When operations start then government comes in. The investor will want to recoup the investment and make gains. Government then operates on the principle that the cost should not be passed to the end user, and it does so by setting the tariff."

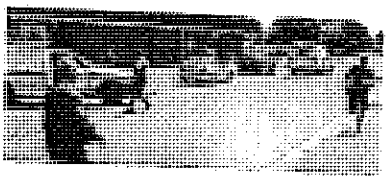
Mahlobo said it was critical to get the projection figures right to avoid costly mistakes, and the margin of error must be less than 15%.

"The growth of the economy must be our preoccupation and areas of growth must be chosen very well," he said.
"We will always work with experts because I do not possess all the wisdom. There are people who have been there and they have seen it working."

Mahlobo said he had no desire to see the country borrow money to fund the nuclear project.

"My first intention is to say who has the appetite to put the structure on the ground and they take the risk," he said.

Eskom spokesperson Khulu Phasiwe said if the integrated energy resource plan showed the nuclear programme could go ahead, they would begin the tender process immediately.



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Western Cape

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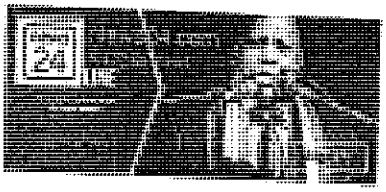

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louisa.mohlamme@energy.gov.za
maleshoane.selokoe@energy.gov.za

7 November 2017

The Honourable Minister Mohlobo

Re: Nuclear Power Programme

We act for the Southern African Faith Communities' Environment Institute (SAFCEI) and Earthlife Africa – Johannesburg (ELA-JHB).

Our clients are deeply concerned following recent press statements and reports alleging that the Honourable Minister is fast-tracking the Integrated Resource Plan (IRP) and rushing the nuclear deal (see https://www.fin24.com/Economy/mahlobo-instructs-officials-to-fast-track-sas-energy-plan-20171031#cxrecs_s), and are equally concerned that Eskom has signalled its intention to *'begin the tender process immediately'* if the IRP *'showed the nuclear programme could go ahead'* (see https://www.news24.com/SouthAfrica/News/mahlobo-rushes-nuclear-

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deal-20171105-2).

Having regard to the complexities and costs (estimated at being in excess of R1 trillion) implicit in the proposed nuclear power programme, it would be inappropriate, unlawful and unconstitutional for government or any state owned entity to proceed with nuclear determinations or procurement in the absence of clarity, transparency and consistency regarding the decision-making processes. These decision-making processes necessarily require that meaningful opportunities are provided for public participation at every stage (which also requires access to relevant information, such as on affordability).

The Honourable Minister will be aware that the High Court of South Africa (Western Cape Division) in *Earthlife Africa – Johannesburg & Another v. Minister of Energy & Others (Case No. 19529/2015)* made an order that:

- The Minister of Energy's decision on or about 10 June 2015 to table the Russian IGA [international governmental agreement] before parliament in terms of section 231(3) of the Constitution was unconstitutional and unlawful, and was reviewed and set aside;
- The Minister of Energy's decisions on or about 10 June 2015 to table agreements for cooperation between South Africa and the governments' of the United States of America and the Republic of Korea were unlawful and unconstitutional, and were reviewed and set aside;
- Determinations under section 34(1) of the Electricity Regulation Act gazetted on 11 November 2013 and 14 December 2016, made by the Minister of Energy with the concurrence of NERSA, were unlawful and unconstitutional, and were reviewed and set aside; and
- Any Request for Proposals or Request for Information issued pursuant to these determinations were set aside.

The Justices held (at paragraph 24 of the judgment) that section 34(1) of the Electricity Regulation Act *'operates as the legislative framework by which any decision that new electricity generation capacity is required'* and that *'any decision taken by the Minister in that regard, has no force and effect unless and until NERSA agrees with the Minister's decision'*. The Justices held further that *'... a rational and fair decision-making process would have made provision for public input so as to allow both interested and potentially affected parties to submit their views and present relevant facts and evidence to NERSA before it took a decision on whether or not to concur in the Minister's proposed determination'* (at paragraph 45 of the judgment).

The Justices went on to say that any section 34 determination decision would also have to *'...satisfy the test for rational decision-making, as part of the principle of* legality'. The Justices stated that applying this to the applicants' challenge on the basis of an unfair procedural process, *'the question is whether the decision by either the Minister or NERSA (or the combined decision of the Minister and NERSA) fell short of constitutional legality for want of consultation with interested parties'* (at paragraph 47 of the judgment), points out that *'[o]ur courts have recognised that there are circumstances in which rational decision-making calls for interested persons to be heard'* (at paragraph 48 to the judgment), and that it follows that the process by which the decision is made and the decision itself must be rational (at paragraph 49 of the judgment, citing *Democratic Alliance v President of the Republic of South Africa & Others* 2013 (1) SA 248 (CC) para 34). The Justices went on to recognise that there are sectors of the public with either special expertise or a special interest regarding the issue of whether it is appropriate for extra generation capacity to be set aside for procurement through nuclear power, and emphasised that NERSA is also under a statutory duty to act in the public interest

in a justifiable and transparent manner, and to utilise a procedurally fair process giving affected persons the opportunity to submit their views and present relevant facts and evidence. It held that NERSA had failed to do so, and that NERSA's decision failed to satisfy the test of rationality based on procedural grounds alone (at paragraph 50 of the judgment).

The Justices also confirmed that it would be "*unnecessary and superfluous*" to declare that prior to the commencement of any procurement process for nuclear new generation capacity, NERSA would be required to determine (as provided in section 34), in accordance with a procedurally fair public participation process, that new generation capacity is required and that the electricity must be generated from nuclear power and the percentage thereof, since "*[t]he finding that [NERSA] is under such a duty is central to this judgment and does not require restatement in a declarator*" (at paragraphs 141 and 142 of the judgment).

The Honourable Minister's reported intention to fast-track the IRP in circumstances where it is clear that there is currently an oversupply of electricity, no urgency and a lack of clarity on who will build, own and operate the power stations, is unexplained and irrational. It also undermines the constitutional imperatives of openness, reasonableness and transparency in government decision-making.

In light of the abovementioned judgment, it would also clearly be unlawful and unconstitutional for Eskom to '*begin the tender process immediately*' if the IRP '*showed the nuclear programme could go ahead*'. Prior to Eskom commencing the nuclear tender process, the Honourable Minister of Energy, with the concurrence of NERSA, would be required to make a lawful, rational, and procedurally fair section 34 determination specifying (among other things) that new electricity generation capacity is needed (and how much), and that a specified percentage of this new generation capacity should be generated from nuclear energy.

The statements to the press by the Honourable Minister of Energy and Eskom are particularly alarming in light of numerous and serious allegations that have surfaced since the judgment was handed down, including in respect of state capture and irregular procurements involving senior Eskom officials, which allegations are currently under scrutiny by Parliament's Public Enterprises Committee state capture inquiry. It has also emerged that Eskom is not in a financial position to procure new nuclear power stations https://www.fin24.com/Economy/Eskom/live-state-capture-inquiry-begins-with-focus-on-eskom-20171017). The Honourable Minister of Energy's statements contradict statements made by the Honourable Minister of Finance that '*[t]he economy can't afford the nuclear at the present moment, there are no intensive users that are taking up the generation capacity that we have*' (http://ewn.co.za/2017/10/26/gigaba-no-money-for-nuclear-programme-for-at-least-5-years). They also contradict findings made by the Minister of Energy's Ministerial Advisory Council on Energy (MACE) Working Group, which reported in its 31 October 2016 Working Group Report was that '*[a] least cost IRP model, free of any artificial constraints and before policy adjustments does not include any nuclear power generators. The optimal least cost mix is one of solar PV, wind and flexible power generators (with relatively low utilisation).*' Should a policy adjustment be made to the IRP that imposes nuclear new generation capacity into the future energy mix, the IRP itself is likely to be contested and subjected to judicial scrutiny.

In the circumstances we are instructed to call upon you, as we hereby do, to provide an

undertaking that no further steps will be taken towards procuring new electricity generation capacity derived from nuclear power until such time as:

(a) in terms of section 34, the Honourable Minister of Energy, with the concurrence of NERSA, makes a lawful, rational, and procedurally fair section 34 determination specifying (among other things) that new electricity generation capacity is needed (and how much), and that a specified percentage of this new generation capacity should be generated from nuclear energy; and

(b) there is clarity and transparency with regard to the general procurement and related processes (consistent with the order granted in the Earthlife Africa judgment) that will be followed (including, but not limited to, the public participation to be undertaken as part of the section 34 process and the processes in relation to any negotiating, renegotiating and/or tabling before Parliament under section 231 of any necessary IGAs).

Should we not receive your undertaking on or before **Monday, 13 November 2017**, it will be assumed that the Honourable Minister is not committed to ensuring clarity, transparency and consistency in the nuclear determination and procurement process, and that there is a need for an urgent application to the High Court for constructive contempt of court and such other relief as we may be advised to pursue.

Yours sincerely

Adrian Leonard Pole

Destination	Start Time	Time	Prints	Result	Note
0213235849	11-08 11:37	00:00:56	000/004	No Ans	

Note TMR: Timer TX, POL: Polling, ORG: Original Size Setting, FME: Frame Erase TX, MIX: Mixed Original TX, CALL: Manual TX, CSAC: CSAC, CSRC: CSRC, FWD: Forward, PC: PC-Fax, BND: Double-Sided Binding Direction, SP: Special Original, FCODE: F-code, RTX: Re-TX, RLY: Relay, MBX: Confidential, BUL: Bulletin, SIP: SIP Fax, IPADR: IP Address Fax, I-FAX: Internet Fax

Result OK: Communication OK, S-OK: Stop Communication, PW-OFF: Power Switch OFF, TEL: RX from TEL, NG: Other Error, Cont: Continue, No Ans: No Answer, Refuse: Receipt Refused, Busy: Busy, M-Full:Memory Full, LOVR:Receiving length Over, POVR:Receiving page Over, FIL:File Error, DC:Decode Error, MDN:MDN Response Error, DSN:DSN Response Error.

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Your Reference: The Honourable Minister of Energy

My Reference: SAFCEI ELA-JHB/ap

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VAT Registration Number: 4030234300

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TX Result Report

P 1
08/11/2017 11:33
Serial Page 1/2
TC: 957878

Destination	Start Time	Time	Prints	Result	Note
0214655980	11-08 11:32	00:00:56	000/004	No Ans	

Note TMR: Timer TX, POL: Polling, ORG: Original Size Setting, FME: Frame Erase TX, MIX: Mixed Original TX, CALL: Manual TX, CSRC: CSRC, FWD: Forward, PC: PC-Fax, BND: Double-Sided Binding Direction, SP: Special Original, FCODE: F-code, RTX: Re-TX, RLY: Relay, MBX: Confidential, BUL: Bulletin, SIP: SIP Fax, IPADR: IP Address Fax, I-FAX: Internet Fax

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Your Reference: The Honourable Minister of Energy

My Reference: SAFCEI ELA-JHB/ap

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BA,LLB,MEnvDev,LLM(environmental law)
VAT Registration Number: 4030234308

Consignor

DST HUB

CPT

PNA217650626802

PostNet Name: PostNet - Hillcrest

Tel. No.: 317651914 Acc. No.: PN176

From: (Sender) (Company Name)	loren pole	To: (Receiver) (Company Name)	The Honurable Department of Energy
Street Address	36-38 Old Main Road, Shop 5B Hillgate SC	Street Address	120 Plein Street, 7th Floor Parliament
Suburb	Hillcrest	Suburb	Cape Town
City/Town		City/Town	
Country	Durban	Country	
Code	3610	Code	8000
Contact	loren pole	Contact	The Honurable Department of E[illegible]214696425/+27214696425
Tel	+27727241549		
E-mail		E-mail	

Insurance: Yes / No — If yes, state value

Domestic: Overnight Courier ✓ | Economy (48-72hrs) | Dawn Courier | Saturday | Non Express (24-48hrs) | Same Day Courier | Other Specify | Public Holiday After Hours

International: DOCUMENTS | NON-DOCUMENTS

No. of Parcels	Description of goods	Length in cm	Breadth in cm	Height in cm	Mass in kg
1	Parcel	10	5	2	0.2

Total No. of Parcels: 1 Total Vol: 0.02 Total Mass: 0.20

WE HAVE SEEN AND AGREE TO THE STANDARD CONDITIONS OF CARRIAGE (OVERLEAF) WHICH SHALL APPLY TO THIS CONSIGNMENT AND ALL FUTURE CONSIGNMENTS ACCEPTED BY POSTNET. WE FURTHER DECLARE THAT THIS CONSIGNMENT DOES NOT CONTAIN DANGEROUS GOODS.

EXPRESS PACK SECURITY NUMBER ON LIP OF FLYER

SENDER'S DETAILS

Name: loren pole Date: 2017-11-08

Signature: [signature] Time: 11:21:00

POSTNET AND ARAMEX RESERVE THE RIGHT TO MARK THE SERVICE "OVERNIGHT EXPRESS" FOR "DOMESTIC" SHOULD NO SERVICE BE SELECTED

ACCEPTED BY POSTNET

Sinead
Name

460
Signature

2017-11-08 11:21:00
Date Time

CHARGES	RANDS	CENTS
Basic Tariff		
Surcharge		
Insurance		
Packaging Surcharge		
VAT		
TOTAL INCL. VAT		

PostNet Courier an aramex company

To track your shipment go to: www.postnet.co.za or call 0860 POSTNET (7678638)

STANDARD TRADING TERMS & CONDITIONS OF POSTNET AN ARAMEX COMPANY OF SOUTH AFRICA – ABRIDGED VERSION

The Terms and Conditions below are a condensed version of our full Terms and Conditions which you accept on signature of the waybill. A copy of the full version is available on request from any Aramex office

1. Definitions

In these Standard Trading Terms & Conditions, the following definitions apply. "The Company" shall mean Aramex South Africa. "Customer" shall mean any person on whose request or on whose behalf the Company undertakes or provides any business or service."Goods" shall mean any goods or documents handled or transported by or on behalf of the Company and includes any packaging or container covering the Goods."Consignment" shall mean goods transported from the client in one conveyance at one time.

2. Services and Delivery time

All assertions with regards to delivery times relate to working days (i.e. Monday to Friday) only, unless requested otherwise on the waybill. Same Day Express: A premium, same day collection and delivery within all Main Centre's (and outlying areas on request). Dawn Express: A premium, early morning delivery to all Main Centre's (and outlying areas on request) by 09h00 or by the time specified. Overnight Express: An economical, overnight delivery to all Main Centre's (and outlying areas on request - to be delivered within 72 hours, depending on destination) before 10h30 the next day. Express Road. An inexpensive delivery service to all Main Centre's and outlying areas within 24-48 hours (dependent on destination). Economy Freight: A highly cost-effective, deferred delivery service for large, consolidated consignments that are non-time sensitive. Delivery is effected within 48-72 hours to all Main Centres and to outlying areas. Saturday Service: A surcharge will be levied for all deliveries and/or collections that are requested on a Saturday. After Hours Service: A delivery or collection is classified as being after hours and will attract an After Hours Surcharge if it is effected between 17h30 and 07h30 on working days or over weekends between 13h00 on Saturday and 07h30 on Monday. International Documents: A time-specific delivery service for International door-to-door deliveries. This service may be utilised to send paper-based and/or general business correspondence. International Parcels: A time-specific delivery service for dutiable commodities or non-paper-based items. Different restrictions apply to each country and it is advisable to confirm customs document requirements before dispatch. Type of Export: Permanent: Items that have been sold, sent as a gift or will [illegible] return to this country must be marked under this section. Temporary: The Company must be advised about goods that are exported on a temporary basis. The Company will assist with the completion of the requisite customs [illegible]rwork. Surcharges apply to the following services:- Same Day Express; Dawn Express; Chain Store deliveries; After hours; Mines; Power Stations; Plots/Farms; Military Bases; Game Lodges; Embassies/Consulate

[illegible]xclusion of Obligations of Common or Public Carrier

[illegible]e Company is not a common carrier and any business undertaken by the Company is carried out subject to the conditions hereinafter set out. The Company shall not be bound by any agreement purporting to vary these conditions unless such agreement is in writing and signed on behalf of the Company by a competent officer thereof.

4. All Goods and documents relating to Goods, shall be subject to a lien and pledge either from monies due in respect of such Goods or for other monies due to Aramex from the Customer, for present and past debts.

5. Company Entitled to Act as Agent

5.1. The Company is authorized to appoint such third parties as the Company may consider necessary for the purpose of procuring the forwarding and/or delivery of the Customer's Goods. The Customer's Goods are accepted also subject to the conditions stipulated by all other carriers and parties into whose possession or custody they may pass as if the same had been included herein, provided that if there is any conflict between any such conditions and these conditions the latter shall prevail.

5.2. The Company is not an air transport undertaking under the Warsaw Convention, 1929 and subsequent air carriage treaties and legislation. Shipment by air to a country other than the country of origin may be subject to the terms of the Warsaw Convention and the limits of liability contained therein. The Company acts as agent for its Customer when consigning documents or Goods with a particular airline for onward carriage and without prejudice to its general right of subrogation hereunder.

6. Customer's Undertakings

6.1 The Customer warrants the accuracy of the description of the Goods on the waybill.

6.2. Adequate labelling, addressing and packaging of the Customer's Goods for transportation is the Customer's responsibility, including the placing of the Goods in any container, even if supplied to the Customer by the Company.

7. Company's Liability

7.1. The Company is only responsible for the Customer's Goods whilst they are within its custody and control and shall be liable subject to clause 7.2 hereof for loss sustained by the Customer due to damage to or loss of the Goods whilst in the Company's custody provided that such loss or damage was due to the gross negligence of the Company, its servants or agents. Save as aforesaid the Company shall be under no liability in respect of same shall arise. The parties agree that consequential loss shall be deemed to include without restriction the Goods carried by it and in particular shall NOT BE LIABLE FOR CONSEQUENTIAL LOSS however the commercial, financial or other indirect loss including loss of interest and utility.

7.2 The liability of the Company under these conditions shall be limited to the payment by the Company by way of damages of a sum not exceeding R100.00 per consignment. For the purpose of establishing the amount of liability under this clause, the value of the Goods shall be ascertained by reference to their replacement or reconstitution value at the time and place of shipment without reference to their commercial utility to the Customer and other items of consequential loss.

8. Insurance

8.1. If no insurance is requested or insurance is requested but no value is declared, the Customer's Goods will automatically be insured at no additional cost to a maximum value of R3000.00, subject to such exceptions and conditions as may be imposed by the insurer taking the risk. This automatic cover excludes cell phones and accessories and prepaid cards. A copy of the policy summary and information regarding the insurer may be inspected or obtained from any Company office.

8.2. In the event that the value of the consignment exceeds R3000.00, insurance may be provided in excess of this amount to a maximum value of R250 000.00 per consignment, provided that the Customer indicates such requirement and the declared value by completing the relevant section of the waybill. If the declared value of the consignment exceeds R250 000.00, the Customer will only be insured to a maximum value of R250 000.00 per consignment, unless separate and specific insurance arrangements are made timeously with the Company.

8.3 The Customer's attention is drawn to pertinent insurance policy exceptions, which include, but are not limited to restrictions on second hand goods which excludes cover for damages, territorial exclusions, exclusion of consequential damages and/or losses, exclusion of claims arising from insufficient packaging or loss of information, exclusion of cover for dangerous goods, samples, bottled wine, certificates, tickets, patterns, plans and designs or damaged caused by any delays in carriage or delivery of Goods. The Company shall not be obliged to arrange separate cover for any risks so excluded.... A more comprehensive list of excluded items can be viewed on the Company's website at www.aramex.com

8.4. The Customer shall be liable to pay the insurance premium and if not paid by due date, any cover shall be rendered null and void. Premium is payable at the rate from time to time provided for in the insurance tariff code, available on request at the offices of the Company and/or on the Company's website at www.aramex.co.za, to which terms the Customer agrees by signature to the waybill.

8.5. In so far as the Company arranges any insurance, the Company acts solely as an intermediary for and on behalf of the Customer. Should the insurer dispute its liability in terms of any insurance policy in respect of the Goods, the Customer shall only have recourse against the insurer and the Company shall not incur any responsibility or liability whatsoever notwithstanding that the premium paid on such policy may differ from the amount paid by the consignee or consignor to the Company in respect thereof.

8.6. If an insurance claim is rejected, the Customer has 180 days from the date of rejection to make representation to the insurer, Guardrisk Insurance Company Limited, at Alexander Forbes House, 4th floor, 90 Rivonia Road, PO Box 781692, Sandton, 2146. If the dispute is not resolved at the end of this period then the customer must within a further 180 days institute legal action by way of the service of summons against Guardrisk failing which the Customer will forfeit their claim and no liability can arise in terms of such claim.

8.7 We are an authorised Financial Service Provider and the full policy wording & disclosure documents are available on the Company's website at www.aramex.com

9. Claim Procedure and Time-Bar

9.1. Any claim brought by the Customer against the Company in respect of its duties and liabilities or any insurance claim submitted in terms of insurance arranged by the Company must be notified by the Customer to the office of the Company in writing within seven (7) days after delivery of the goods or the date when the goods should have been delivered.

9.2 Notwithstanding fulfillment of the notice requirement, the Company shall be discharged of all liability unless suit is brought and notice thereof given to the Company within nine (9) months after delivery of the goods or the date when the goods should have been delivered

10. Goods Prohibited for Carriage

10.1 The Customer warrants that the Goods comply with applicable laws, regulations or requirements of authorities or carriers, including, but not limited to requirements relating to packaging and labelling and transportation of dangerous goods. The Company does not accept for carriage any combustible or explosive materials; gold or silver bullion, coin, cyanides, precipitates or any form of gold or silver ore, bullion, platinum and other metals, precious and semi-precious stones including commercial carbons or industrial diamonds, jewelry, currency (paper or coin) of any nationality, securities, stocks, bonds, un-cancelled postage or revenue stamps, blank or endorsed bank cashier's cheques, money orders or traveller's cheques, antiques, pictures, livestock or plants, manuscripts, furs, arms and ammunition.

11. Governing law

Any dispute in terms of this Agreement shall be resolved in accordance with the laws of the Republic of South Africa.

12. Compliance with Civil Aviation Regulations

12.1 The Customer agrees that Aramex is entitled, for the purpose of complying with Part 108 of the Civil Aviation Regulations (Air Cargo Security), to screen, x-ray or hand-search the Customer's Goods before placing them on board an air carrier's aircraft.

12.2 The Customer undertakes clearly to describe the nature of the Customer's Goods in the space provided on Aramex South Africa's Waybill.

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Parcel Tracker

In the case of a continuous spinning circe the parcel is not known in the PostNet system, please contact PostNet Call Centre on 0860 767 8638 for assistance

Please note: Parcel information will appear approximately 8 hours after handed in at the PostNet store

Please enter your PN or PP tracking number into the text box and click SUBMIT to track your parcel.

(Remember to include PN or PP and do not put in any spaces)

PNA217650626802 Submit

Shipment Summary	
Shipment Number	PNA217650626802
Pickup Date	11/08/2017 4:33:00 PM
Shipper Reference	
Current Status	Delivered PRINCESS(Notify me when the shipment is delivered)
Delivered On	11/9/2017 9:52:00 AM
Delivered To	PRINCESS

For inquiries and amending delivery instructions about this shipment, click here to submit a customer care request or contact origin office at:+27 (31) 5815800 . destination office at: + 27 (21) 5268600

Time values are local to the service area in which the shipment checkpoint is recorded.

Shipment History

Location	Date	Activity
Cape Town, South Africa	11/9/2017 9:52:00 AM	Delivered
Cape Town, South Africa	11/9/2017 7:47:00 AM	Shipment Forwarded to Beyond/Remote Area Sorting Location
Durban, South Africa	11/9/2017 1:55:00 AM	Departed Operations facility – In Transit
Durban, South Africa	11/8/2017 6:49:00 PM	Received at Origin Facility
Durban, South Africa	11/8/2017 4:33:00 PM	Record created.

Shipper		Receiver	
Shipper Name:	PostNet - Hillcrest	Delivered To:	PRINCESS
Sent By:	loren pole	Destination:	Cape Town,South Africa
Shipper Address:	36-38 Old Main Road - Shop 5B Hillgate SC - Durban	Pickup Date:	11/08/2017 4:33:00 PM

Shipment Details			
Origin	South Africa/Hillcrest	Destination:	
Service:		Shipment Type:	ONP
Pieces:	1	Description:	Parcels
Weight:	0.20 KG		

Shipment Attachments

ADRIAN POLE
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Email: adrian@adrianpole.co.za Web: www.adrianpole.co.za

Your Reference: Mr Rishaban Moodley / Mr Jackwell Feris

My Reference: SAFCEI ELA-JHB/ap

Mr Rishaban Moodley
CLIFFE DEKKER HOFMEYER
1 Protea Place (C/O Fredman & Protea Place)
Sandton
Johannesburg

"URGENT"

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jackwell.feris@cdhlegal.com

Facsimile: 011 562 1466

7 November 2017

Dear Mr Moodley and Mr Feris

Re: Nuclear Power Programme

We refer to the above matter, wherein we act for the South African Faith Communities Environmental Institute (SAFCEI) and Earthlife Africa – Johannesburg (ELA-JHB).

We understand that you act for Eskom Holdings (SOC) Limited, and confirm that your Mr Jackwell Feris has confirmed that you will accept correspondence for Eskom.

Our clients are deeply concerned following recent press statements and reports alleging that the Honourable Minister of Energy is fast-tracking the Integrated Resource Plan (IRP) and rushing the nuclear deal (see https://www.fin24.com/Economy/mahlobo-instructs-officials-to-fast-track-sas-energy-plan-20171031#cxrecs_s), and are equally concerned that Eskom has signalled its intention to *'begin the tender process immediately'* if the IRP *'showed the nuclear programme could go ahead'* (see https://www.news24.com/SouthAfrica/News/mahlobo-rushes-nuclear-deal-20171105-2).

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- Determinations under section 34(1) of the Electricity Regulation Act gazetted on 11 November 2013 and 14 December 2016, made by the Minister of Energy with the concurrence of NERSA, were unlawful and unconstitutional, and were reviewed and set aside; and
- Any Request for Proposals or Request for Information issued pursuant to these determinations were set aside.

The Justices held (at paragraph 24 of the judgment) that section 34(1) of the Electricity Regulation Act *'operates as the legislative framework by which any decision that new electricity generation capacity is required'* and that *'any decision taken by the Minister in that regard, has no force and effect unless and until NERSA agrees with the Minister's decision'*. The Justices held further that *'... a rational and fair decision-making process would have made provision for public input so as to allow both interested and potentially affected parties to submit their views and present relevant facts and evidence to NERSA before it took a decision on whether or not to concur in the Minister's proposed determination'* (at paragraph 45 of the judgment).

The Justices went on to say that any section 34 determination decision would also have to *'...satisfy the test for rational decision-making, as part of the principle of* legality'. The Justices stated that applying this to the applicants' challenge on the basis of an unfair procedural process, *'the question is whether the decision by either the Minister or NERSA (or the combined decision of the Minister and NERSA) fell short of constitutional legality for want of consultation with interested parties'* (at paragraph 47 of the judgment), points out that *'[o]ur courts have recognised that there are circumstances in which rational decision-making calls for interested persons to be heard'* (at paragraph 48 to the judgment), and that it follows that the process by which the decision is made and the decision itself must be rational (at paragraph 49 of the judgment, citing *Democratic Alliance v President of the Republic of South Africa & Others* 2013 (1) SA 248 (CC) para 34). The Justices went on to recognise that there are sectors of the public with either special expertise or a special interest regarding the issue of whether it is appropriate for extra generation capacity to be set aside for procurement through nuclear power, and emphasised that NERSA is also under a statutory duty to act in the public interest in a justifiable and transparent manner, and to utilise a procedurally fair process giving affected persons the opportunity to submit their views and present relevant facts and evidence. It held that NERSA had failed to do so, and that NERSA's decision failed to satisfy the test of rationality based on procedural grounds alone (at paragraph 50 of the judgment).

The Justices also confirmed that it would be *"unnecessary and superfluous"* to declare that prior to the commencement of any procurement process for nuclear new generation capacity, NERSA would be required to determine (as provided in section 34), in accordance with a

procedurally fair public participation process, that new generation capacity is required and that the electricity must be generated from nuclear power and the percentage thereof, since *"[t]he finding that [NERSA] is under such a duty is central to this judgment and does not require restatement in a declarator"* (at paragraphs 141 and 142 of the judgment).

The Honourable Minister of Energy's reported intention to fast-track the IRP in circumstances where it is clear that there is currently an oversupply of electricity, no urgency and a lack of clarity on who will build, own and operate the power stations, is unexplained and irrational. It also undermines the constitutional imperatives of openness, reasonableness and transparency in government decision-making.

In light of the abovementioned judgment, it would clearly be unlawful and unconstitutional for Eskom to *'begin the tender process immediately'* if the IRP *'showed the nuclear programme could go ahead'*. Prior to Eskom commencing the nuclear tender process, the Honourable Minister of Energy, with the concurrence NERSA, would be required to make a lawful, rational and procedurally fair section 34 determination specifying (among other things) that new electricity generation capacity is needed (and how much), and that a specified percentage of this new generation capacity should be generated from nuclear energy.

The statements to the press by the Honourable Minister of Energy and Eskom are particularly alarming in light of numerous and serious allegations that have surfaced since the judgment was handed down, including in respect of state capture and irregular procurements involving senior Eskom officials, which allegations are currently under scrutiny by Parliament's Public Enterprises Committee state capture inquiry. It has also emerged that Eskom is not in a financial position to procure new nuclear power stations https://www.fin24.com/Economy/Eskom/live-state-capture-inquiry-begins-with-focus-on-eskom-20171017).

In the circumstances we are instructed to call upon Eskom, as we hereby do, to provide an undertaking that it will not commence any nuclear tender process until such time as:

(a) in terms of section 34, the Honourable Minister of Energy, with the concurrence of NERSA, makes a lawful, rational, and procedurally fair section 34 determination specifying (among other things) that new electricity generation capacity is needed (and how much), and that a specified percentage of this new generation capacity should be generated from nuclear energy; and

(b) there is clarity and transparency with regard to the general procurement and related processes (consistent with the order granted in the Earthlife Africa judgment) that will be followed (including, but not limited to, the public participation to be undertaken as part of the section 34 process and the processes in relation to any negotiating, renegotiating and/or tabling before Parliament under section 231 of any necessary IGAs).

Should we not receive your undertaking on or before **Monday, 13 November 2017**, it will be assumed that Eskom is determined to begin the nuclear tender process in the absence of a lawful and constitutional section 34 nuclear determination, and that there is a need for an urgent application to the High Court for constructive contempt of court and such other relief as we may be advised to pursue.

We also attach for your information a copy of a letter sent to the Minister of Energy.

Yours sincerely

Adrian Leonard Pole

ADRIAN POLE
ENVIRONMENTAL LAW
Quarry Road Chambers • 13 Quarry Road • Assagay • KwaZulu Natal • SA
P O Box 671 • Hillcrest • 3650
Cell: 082 340 8534 • Tel: 031 765 6011 • Fax: 088 031 765 6011
Email: adrian@adrianpole.co.za Web: www.adrianpole.co.za

Your Reference: The Honourable Minister of Energy

My Reference: SAFCEI ELA-JHB/ap

The Honourable Minister
Department of Energy
120 Plein Street
7th Floor
Parliament
Cape Town
8000

"URGENT"

Private Bag X 96
Pretoria
0001

Facsimiles: 021 465 5980
021 323 5849

Email: deidre.nkopane@energy.gov.za
louisa.mohlamme@energy.gov.za
maleshoane.selokoe@energy.gov.za

7 November 2017

The Honourable Minister Mohlobo

Re: Nuclear Power Programme

We act for the Southern African Faith Communities' Environment Institute (SAFCEI) and Earthlife Africa – Johannesburg (ELA-JHB).

Our clients are deeply concerned following recent press statements and reports alleging that the Honourable Minister is fast-tracking the Integrated Resource Plan (IRP) and rushing the nuclear deal (see https://www.fin24.com/Economy/mahlobo-instructs-officials-to-fast-track-sas-energy-plan-20171031#cxrecs_s), and are equally concerned that Eskom has signalled its intention to *'begin the tender process immediately'* if the IRP *'showed the nuclear programme could go ahead'* (see https://www.news24.com/SouthAfrica/News/mahlobo-rushes-nuclear-

deal-20171105-2).

Having regard to the complexities and costs (estimated at being in excess of R1 trillion) implicit in the proposed nuclear power programme, it would be inappropriate, unlawful and unconstitutional for government or any state owned entity to proceed with nuclear determinations or procurement in the absence of clarity, transparency and consistency regarding the decision-making processes. These decision-making processes necessarily require that meaningful opportunities are provided for public participation at every stage (which also requires access to relevant information, such as on affordability).

The Honourable Minister will be aware that the High Court of South Africa (Western Cape Division) in *Earthlife Africa – Johannesburg & Another v. Minister of Energy & Others (Case No. 19529/2015)* made an order that:

- The Minister of Energy's decision on or about 10 June 2015 to table the Russian IGA [international governmental agreement] before parliament in terms of section 231(3) of the Constitution was unconstitutional and unlawful, and was reviewed and set aside;
- The Minister of Energy's decisions on or about 10 June 2015 to table agreements for cooperation between South Africa and the governments' of the United States of America and the Republic of Korea were unlawful and unconstitutional, and were reviewed and set aside;
- Determinations under section 34(1) of the Electricity Regulation Act gazetted on 11 November 2013 and 14 December 2016, made by the Minister of Energy with the concurrence of NERSA, were unlawful and unconstitutional, and were reviewed and set aside; and
- Any Request for Proposals or Request for Information issued pursuant to these determinations were set aside.

The Justices held (at paragraph 24 of the judgment) that section 34(1) of the Electricity Regulation Act *'operates as the legislative framework by which any decision that new electricity generation capacity is required'* and that *'any decision taken by the Minister in that regard, has no force and effect unless and until NERSA agrees with the Minister's decision'*. The Justices held further that *'... a rational and fair decision-making process would have made provision for public input so as to allow both interested and potentially affected parties to submit their views and present relevant facts and evidence to NERSA before it took a decision on whether or not to concur in the Minister's proposed determination'* (at paragraph 45 of the judgment).

The Justices went on to say that any section 34 determination decision would also have to *'...satisfy the test for rational decision-making, as part of the principle of* legality'. The Justices stated that applying this to the applicants' challenge on the basis of an unfair procedural process, *'the question is whether the decision by either the Minister or NERSA (or the combined decision of the Minister and NERSA) fell short of constitutional legality for want of consultation with interested parties'* (at paragraph 47 of the judgment), points out that *'[o]ur courts have recognised that there are circumstances in which rational decision-making calls for interested persons to be heard'* (at paragraph 48 to the judgment), and that it follows that the process by which the decision is made and the decision itself must be rational (at paragraph 49 of the judgment, citing *Democratic Alliance v President of the Republic of South Africa & Others* 2013 (1) SA 248 (CC) para 34). The Justices went on to recognise that there are sectors of the public with either special expertise or a special interest regarding the issue of whether it is appropriate for extra generation capacity to be set aside for procurement through nuclear power, and emphasised that NERSA is also under a statutory duty to act in the public interest

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in a justifiable and transparent manner, and to utilise a procedurally fair process giving affected persons the opportunity to submit their views and present relevant facts and evidence. It held that NERSA had failed to do so, and that NERSA's decision failed to satisfy the test of rationality based on procedural grounds alone (at paragraph 50 of the judgment).

The Justices also confirmed that it would be *"unnecessary and superfluous"* to declare that prior to the commencement of any procurement process for nuclear new generation capacity, NERSA would be required to determine (as provided in section 34), in accordance with a procedurally fair public participation process, that new generation capacity is required and that the electricity must be generated from nuclear power and the percentage thereof, since *"[t]he finding that [NERSA] is under such a duty is central to this judgment and does not require restatement in a declarator"* (at paragraphs 141 and 142 of the judgment).

The Honourable Minister's reported intention to fast-track the IRP in circumstances where it is clear that there is currently an oversupply of electricity, no urgency and a lack of clarity on who will build, own and operate the power stations, is unexplained and irrational. It also undermines the constitutional imperatives of openness, reasonableness and transparency in government decision-making.

In light of the abovementioned judgment, it would also clearly be unlawful and unconstitutional for Eskom to *'begin the tender process immediately'* if the IRP *'showed the nuclear programme could go ahead'*. Prior to Eskom commencing the nuclear tender process, the Honourable Minister of Energy, with the concurrence of NERSA, would be required to make a lawful, rational, and procedurally fair section 34 determination specifying (among other things) that new electricity generation capacity is needed (and how much), and that a specified percentage of this new generation capacity should be generated from nuclear energy.

The statements to the press by the Honourable Minister of Energy and Eskom are particularly alarming in light of numerous and serious allegations that have surfaced since the judgment was handed down, including in respect of state capture and irregular procurements involving senior Eskom officials, which allegations are currently under scrutiny by Parliament's Public Enterprises Committee state capture inquiry. It has also emerged that Eskom is not in a financial position to procure new nuclear power stations https://www.fin24.com/Economy/Eskom/live-state-capture-inquiry-begins-with-focus-on-eskom-20171017). The Honourable Minister of Energy's statements contradict statements made by the Honourable Minister of Finance that *'[t]he economy can't afford the nuclear at the present moment, there are no intensive users that are taking up the generation capacity that we have'* (http://ewn.co.za/2017/10/26/gigaba-no-money-for-nuclear-programme-for-at-least-5-years). They also contradict findings made by the Minister of Energy's Ministerial Advisory Council on Energy (MACE) Working Group, which reported in its 31 October 2016 Working Group Report was that *'[a] least cost IRP model, free of any artificial constraints and before policy adjustments does not include any nuclear power generators. The optimal least cost mix is one of solar PV, wind and flexible power generators (with relotively low utilisation).'* Should a policy adjustment be made to the IRP that imposes nuclear new generation capacity into the future energy mix, the IRP itself is likely to be contested and subjected to judicial scrutiny.

In the circumstances we are instructed to call upon you, as we hereby do, to provide an

undertaking that no further steps will be taken towards procuring new electricity generation capacity derived from nuclear power until such time as:

(a) in terms of section 34, the Honourable Minister of Energy, with the concurrence of NERSA, makes a lawful, rational, and procedurally fair section 34 determination specifying (among other things) that new electricity generation capacity is needed (and how much), and that a specified percentage of this new generation capacity should be generated from nuclear energy; and

(b) there is clarity and transparency with regard to the general procurement and related processes (consistent with the order granted in the Earthlife Africa judgment) that will be followed (including, but not limited to, the public participation to be undertaken as part of the section 34 process and the processes in relation to any negotiating, renegotiating and/or tabling before Parliament under section 231 of any necessary IGAs).

Should we not receive your undertaking on or before **Monday, 13 November 2017**, it will be assumed that the Honourable Minister is not committed to ensuring clarity, transparency and consistency in the nuclear determination and procurement process, and that there is a need for an urgent application to the High Court for constructive contempt of court and such other relief as we may be advised to pursue.

Yours sincerely

Adrian Leonard Pole

Your document was successfully sent.

Pages: 8
Time: 2017-11-08 11:32:23
Number dialed: 27115621466

Kind Regards,

PostNet Name: PostNet - Hillcrest

Consignor DST HUB JNB

PNA217626017760

Tel. No.: 317651914 Acc. No.: PN176

From: (Sender) (Company Name)	Loren Pole	To: (Receiver) (Company Name)	Cliffe Dekker Hofmeyer
Street Address	36-38 Old Main Road, Shop 5B Hillgate SC	Street Address	1 Protea Place (C/O Fredman & Protea Place)
Suburb	Hillcrest City/Town	Suburb	Sandton City/Town
Country	Durban Code 3610	Country	Code 2196
Contact	Loren Pole Tel +27727241549	Contact	Mr Rishaban Moodley Tel +27115621000/+27115621000
E-mail		E-mail	

Insurance? Yes / No If yes, state value

Domestic: Overnight Courier / Economy (48-72hrs) / Down Courier / Saturday / Non Express (24-48hrs) / Same Day Courier / Other Specify / Public holiday (After Hours)

International: DOCUMENTS / NON-DOCUMENTS

No. of Parcels	Description of goods	Length in cm	Breadth in cm	Height in cm	Mass in kg
1	Parcel	15	5	2	0.2
1	Total No. of Parcels	Total Vol	0.03	Total Mass	0.20

WE HAVE SEEN AND AGREE TO THE STANDARD CONDITIONS OF CARRIAGE (OVERLEAF) WHICH SHALL APPLY TO THIS CONSIGNMENT AND ALL FUTURE CONSIGNMENTS ACCEPTED BY POSTNET. WE FURTHER DECLARE THAT THIS CONSIGNMENT DOES NOT CONTAIN DANGEROUS GOODS.

EXPRESS PACK SECURITY NUMBER ON UP OF FLYER

SENDER'S DETAILS

Name: Loren Pole Date: 2017-11-08

Signature: Time: 11:29:32

POSTNET AND ARAMEX RESERVE THE RIGHT TO MARK THE SERVICE "OVERNIGHT EXPRESS" FOR "DOMESTIC" SHOULD NO SERVICE BE SELECTED

PostNet Courier an aramex company

ACCEPTED BY POSTNET

Name: Sinead

Signature: 185

Date: 2017-11-08 Time: 11:29:32

CHARGES	RANDS	CENTS
Basic Tariff		
Surcharge		
Insurance		
Packaging Surcharge		
VAT		
TOTAL INCL. VAT		

To track your shipment go to: www.postnet.co.za or call 0860 POSTNET (7678638)

STANDARD TRADING TERMS & CONDITIONS OF POSTNET AN ARAMEX COMPANY OF SOUTH AFRICA – ABRIDGED VERSION

The Terms and Conditions below are a condensed version of our full Terms and Conditions which you accept on signature of the waybill. A copy of the full version is available on request from any Aramex office.

1. Definitions

In these Standard Trading Terms & Conditions, the following definitions apply. "The Company" shall mean Aramex South Africa. "Customer" shall mean any person on whose request or on whose behalf the Company undertakes or provides any business or service. "Goods" shall mean any goods or documents handled or transported by or on behalf of the Company and includes any packaging or container covering the Goods. "Consignment" shall mean goods transported from the client in one conveyance at one time.

2. Services and Delivery time

All assertions with regards to delivery times relate to working days (i.e. Monday to Friday) only, unless requested otherwise on the waybill. Same Day Express: A premium, same day collection and delivery within all Main Centre's (and outlying areas on request). Dawn Express: A premium, early morning delivery to all Main Centre's (and outlying areas on request) by 09h00 or by the time specified. Overnight Express: An economical, overnight delivery to all Main Centre's (and outlying areas on request - to be delivered within 72 hours, depending on destination) before 10h30 the next day. Express Road: An inexpensive delivery service to all Main Centre's and outlying areas within 24-48 hours (dependent on destination). Economy Freight: A highly cost-effective, deferred delivery service for large, consolidated consignments that are non-time sensitive. Delivery is effected within 48-72 hours to all Main Centres and to outlying areas. Saturday Service: A surcharge will be levied for all deliveries and/or collections that are requested on a Saturday. After Hours Service: A delivery or collection is classified as being after hours and will attract an After Hours Surcharge if it is effected between 17h30 and 07h30 on working days or over weekends between 13h00 on Saturday and 07h30 on Monday. International Documents: A time-specific delivery service for International door-to-door deliveries. This service may be utilised to send paper-based and/or general business correspondence. International Parcels: A time-specific delivery service (for dutiable commodities or non-paper-based items. Different restrictions apply to each country and it is advisable to confirm customs document requirements before dispatch. Type of Export: Permanent: Items that have been sold, sent as a gift or will not return to this country must be marked under this section. Temporary: The Company must be advised about goods that are exported on a temporary basis. The Company will assist with the completion of the requisite customs paperwork. Surcharges apply to the following services:- Same Day Express; Dawn Express; Chain Store deliveries; After hours; Mines; Power Stations; Plots/Farms; Military Bases; Game Lodges; Embassies/Consulate.

Exclusion of Obligations of Common or Public Carrier

The Company is not a common carrier and any business undertaken by the Company is carried out subject to the conditions hereinafter set out. The Company shall not be bound by any agreement purporting to vary these conditions unless such agreement is in writing and signed on behalf of the Company by a competent officer thereof.

4. All Goods and documents relating to Goods, shall be subject to a lien and pledge either from monies due in respect of such Goods or for other monies due to Aramex from the Customer, for present and past debts.

5. Company Entitled to Act as Agent

5.1. The Company is authorized to appoint such third parties as the Company may consider necessary for the purpose of procuring the forwarding and/or delivery of the Customer's Goods. The Customer's Goods are accepted also subject to the conditions stipulated by all other carriers and parties into whose possession or custody they may pass as if the same had been included herein, provided that if there is any conflict between any such conditions and these conditions the latter shall prevail.

5.2. The Company is not an air transport undertaking under the Warsaw Convention, 1929 and subsequent air carriage treaties and legislation. Shipment by air to a country other than the country of origin may be subject to the terms of the Warsaw Convention and the limits of liability contained therein. The Company acts as agent for its Customer when consigning documents or Goods with a particular airline for onward carriage and without prejudice to its general right of subrogation hereunder.

6. Customer's Undertakings

6.1 The Customer warrants the accuracy of the description of the Goods on the waybill.

6.2. Adequate labelling, addressing and packaging of the Customer's Goods for transportation is the Customer's responsibility, including the placing of the Goods in any container, even if supplied to the Customer by the Company.

7. Company's Liability

7.1. The Company is only responsible for the Customer's Goods whilst they are within its custody and control and shall be liable subject to clause 7.2 hereof for loss sustained by the Customer due to damage to or loss of the Goods whilst in the Company's custody provided that such loss or damage was due to the gross negligence of the Company, its servants or agents. Save as aforesaid the Company shall be under no liability in respect of same shall arise. The parties agree that consequential loss shall be deemed to include without restriction the Goods carried by it and in particular shall NOT BE LIABLE FOR CONSEQUENTIAL LOSS however the commercial, financial or other indirect loss including loss of interest and utility.

7.2 The liability of the Company under these conditions shall be limited to the payment by the Company by way of damages of a sum not exceeding R100.00 per consignment. For the purpose of establishing the amount of liability under this clause, the value of the Goods shall be ascertained by reference to their replacement or reconstitution value at the time and place of shipment without reference to their commercial utility to the Customer and other items of consequential loss.

8. Insurance

8.1. If no insurance is requested or insurance is requested but no value is declared, the Customer's Goods will automatically be insured at no additional cost to a maximum value of R3000.00, subject to such exceptions and conditions as may be imposed by the insurer taking the risk. This automatic cover excludes cell phones and accessories and prepaid cards. A copy of the policy summary and information regarding the insurer may be inspected or obtained from any Company office.

8.2. In the event that the value of the consignment exceeds R3000.00, insurance may be provided in excess of this amount to a maximum value of R250 000.00 per consignment, provided that the Customer indicates such requirement and the declared value by completing the relevant section of the waybill. If the declared value of the consignment exceeds R250 000.00, the Customer will only be insured to a maximum value of R250 000.00 per consignment, unless separate and specific insurance arrangements are made timeously with the Company.

8.3 The Customer's attention is drawn to pertinent insurance policy exceptions, which include, but are not limited to restrictions on second hand goods which excludes cover for damages, territorial exclusions, exclusion of consequential damages and/or losses, exclusion of claims arising from insufficient packaging or loss of information, exclusion of cover for dangerous goods, samples, bottled wine, certificates, tickets, patterns, plans and designs or damaged caused by any delays in carriage or delivery of Goods. The Company shall not be obliged to arrange separate cover for any risks so excluded... A more comprehensive list of excluded items can be viewed on the Company's website at www.aramex.com

8.4. The Customer shall be liable to pay the insurance premium and if not paid by due date, any cover shall be rendered null and void. Premium is payable at the rate from time to time provided for in the insurance tariff code, available on request at the offices of the Company and/or on the Company's website at www.aramex.co.za, to which terms the Customer agrees by signature to the waybill.

8.5. In so far as the Company arranges any insurance, the Company acts solely as an intermediary for and on behalf of the Customer. Should the insurer dispute its liability in terms of any insurance policy in respect of the Goods, the Customer shall only have recourse against the insurer and the Company shall not incur any responsibility or liability whatsoever notwithstanding that the premium paid on such policy may differ from the amount paid by the consignee or consignor to the Company in respect thereof.

8.6. If an insurance claim is rejected, the Customer has 180 days from the date of rejection to make representation to the insurer, Guardrisk Insurance Company Limited, at Alexander Forbes House, 4th floor, 90 Rivonia Road, PO Box 781692, Sandton, 2146. If the dispute is not resolved at the end of this period then the customer must within a further 180 days institute legal action by way of the service of summons against Guardrisk failing which the Customer will forfeit their claim and no liability can arise in terms of such claim.

8.7 We are an authorised Financial Service Provider and the full policy wording & disclosure documents are available on the Company's website at www.aramex.com

9. Claim Procedure and Time-Bar

9.1. Any claim brought by the Customer against the Company in respect of its duties and liabilities or any insurance claim submitted in terms of insurance arranged by the Company must be notified by the Customer to the office of the Company in writing within seven (7) days after delivery of the goods or the date when the goods should have been delivered.

9.2 Notwithstanding fulfillment of the notice requirement, the Company shall be discharged of all liability unless suit is brought and notice thereof given to the Company within nine (9) months after delivery of the goods or the date when the goods should have been delivered.

10. Goods Prohibited for Carriage

10.1 The Customer warrants that the Goods comply with applicable laws, regulations or requirements of authorities or carriers, including, but not limited to requirements relating to packaging and labelling and transportation of dangerous goods. The Company does not accept for carriage any combustible or explosive materials, gold or silver bullion, coin, cyanides, precipitates or any form of gold or silver ore, bullion, platinum and other metals, precious and semi-precious stones including commercial carbons or industrial diamonds, jewelry, currency (paper or coin) of any nationality, securities, stocks, bonds, un-cancelled postage or revenue stamps, blank or endorsed bank cashier's cheques, money orders or traveller's cheques, antiques, pictures, livestock or plants, manuscripts, furs, arms and ammunition.

11. Governing law

Any dispute in terms of this Agreement shall be resolved in accordance with the laws of the Republic of South Africa.

12. Compliance with Civil Aviation Regulations

12.1 The Customer agrees that Aramex is entitled, for the purpose of complying with Part 108 of the Civil Aviation Regulations (Air Cargo Security), to screen, x-ray or hand-search the Customer's Goods before placing them on board an air carrier's aircraft.

12.2 The Customer undertakes clearly to describe the nature of the Customer's Goods in the space provided on Aramex South Africa's Waybill.

Parcel Tracker

In the case of a continuous spinning cirlce the parcel is not known in the PostNet system, please contact PostNet Call Centre on 0860 767 8638 for assistance

Please note: Parcel information will appear approximately 8 hours after handed in at the PostNet store

Please enter your PN or PP tracking number into the text box and click SUBMIT to track your parcel.

(Remember to include PN or PP and do not put in any spaces)

PNA217626017760 Submit

Shipment Summary	
Shipment Number	PNA217626017760
Pickup Date	11/08/2017 4:33:00 PM
Shipper Reference	
Current Status	Delivered Norah (Notify me when the shipment is deliverd)
Delivered On	11/9/2017 4:56:00 PM
Delivered To	Norah

For inquiries and amending delivery instructions about this shipment, click here to submit a customer care request or contact origin office at:+27 (31) 5815800 , destination office at: + 27 (11) 457 3000

Time values are local to the service area in which the shipment checkpoint is recorded.

Shipment History

Location	Date	Activity
Johannesburg Express Head Office, South Africa	11/9/2017 4:56:00 PM	Delivered
Johannesburg Express Head Office, South Africa	11/9/2017 6:51:00 AM	Out for Delivery
Durban, South Africa	11/9/2017 2:34:00 AM	Departed Operations facility – In Transit
Durban, South Africa	11/8/2017 6:50:00 PM	Received at Origin Facility
Durban, South Africa	11/8/2017 4:33:00 PM	Record created.

Shipper		Receiver	
Shipper Name:	PostNet - Hillcrest	Delivered To:	Norah
Sent By:	Loren Pole	Destination:	Sandton,South Africa
Shipper Address:	36-38 Old Main Road - Shop 5B Hillgate SC - Durban	Pickup Date:	11/08/2017 4:33:00 PM

Shipment Details			
Origin	South Africa/Hillcrest	Destination:	
Service:		Shipment Type:	ONP
Pieces:	1	Description:	Parcels
Weight:	0.20 KG		

Shipment Attachments

Type	Size	Date

EJM17

ADRIAN POLE
ENVIRONMENTAL LAW
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Cell: 082 340 8534 • Tel: 031 765 6011 • Fax: 088 031 765 6011
Email: adrian@adrianpole.co.za Web: www.adrianpole.co.za

Your Reference: NERSA

My Reference: SAFCEI ELA-JHB/ap

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7 November 2017

THE NATIONAL ENERGY REGULATOR OF SOUTH AFRICA

Re: Nuclear Power Programme

We act for the Southern African Faith Communities' Environment Institute (SAFCEI) and Earthlife Africa – Johannesburg.

Our clients are deeply concerned following recent press statements and reports alleging that the Honourable Minister is fast-tracking the Integrated Resource Plan (IRP) and rushing the nuclear deal (see https://www.fin24.com/Economy/mahlobo-instructs-officials-to-fast-track-sas-energy-plan-20171031#cxrecs_s), and are equally concerned that Eskom has signalled its intention to *'begin the tender process immediately'* if the IRP *'showed the nuclear programme could go ahead'* (see https://www.news24.com/SouthAfrica/News/mahlobo-rushes-nuclear-deal-20171105-2).

Having regard to the complexities and costs (estimated at being in excess of R1 trillion) implicit

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in the proposed nuclear power programme, it would be inappropriate, unlawful and unconstitutional for government or any state owned entity to proceed with nuclear determinations or procurement in the absence of clarity, transparency and consistency regarding the decision-making processes. These decision-making processes necessarily require that meaningful opportunities are provided for public participation at every stage (which also requires access to relevant information, such as on affordability).

NERSA will be aware that the High Court of South Africa (Western Cape Division) in *Earthlife Africa – Johannesburg & Another v. Minister of Energy & Others (Case No. 19529/2015)* made an order that:

- The Minister of Energy's decision on or about 10 June 2015 to table the Russian IGA [international governmental agreement] before parliament in terms of section 231(3) of the Constitution was unconstitutional and unlawful, and was reviewed and set aside;
- The Minister of Energy's decisions on or about 10 June 2015 to table agreements for cooperation between South Africa and the governments' of the United States of America and the Republic of Korea were unlawful and unconstitutional, and were reviewed and set aside;
- Determinations under section 34(1) of the Electricity Regulation Act gazetted on 11 November 2013 and 14 December 2016, made by the Minister of Energy with the concurrence of NERSA, were unlawful and unconstitutional, and were reviewed and set aside; and
- Any Request for Proposals or Request for Information issued pursuant to these determinations were set aside.

The Justices held (at paragraph 24 of the judgment) that section 34(1) of the Electricity Regulation Act *'operates as the legislative framework by which any decision that new electricity generation capacity is required'* and that *'any decision taken by the Minister in that regard, has no force and effect unless and until NERSA agrees with the Minister's decision'*. The Justices held further that *'... a rational and fair decision-making process would have made provision for public input so as to allow both interested and potentially affected parties to submit their views and present relevant facts and evidence to NERSA before it took a decision on whether or not to concur in the Minister's proposed determination'* (at paragraph 45 of the judgment).

The Justices went on to say that any section 34 determination decision would also have to *'...satisfy the test for rationol decision-making, as part of the principle of* legality'. The Justices stated that applying this to the applicants' challenge on the basis of an unfair procedural process, *'the question is whether the decision by either the Minister or NERSA (or the combined decision of the Minister and NERSA) fell short of constitutional legality for want of consultation with interested parties'* (at paragraph 47 of the judgment), points out that *'[o]ur courts have recognised that there are circumstances in which rational decision-making calls for interested persons to be heard'* (at paragraph 48 to the judgment), and that it follows that the process by which the decision is made and the decision itself must be rational (at paragraph 49 of the judgment, citing *Democratic Alliance v President of the Republic of South Africa & Others* 2013 (1) SA 248 (CC) para 34). The Justices went on to recognise that there are sectors of the public with either special expertise or a special interest regarding the issue of whether it is appropriate for extra generation capacity to be set aside for procurement through nuclear power, and emphasised that NERSA is also under a statutory duty to act in the public interest

in a justifiable and transparent manner, and to utilise a procedurally fair process giving affected persons the opportunity to submit their views and present relevant facts and evidence. It held that NERSA had failed to do so, and that NERSA's decision failed to satisfy the test of rationality based on procedural grounds alone (at paragraph 50 of the judgment).

The Justices also confirmed that it would be *"unnecessary and superfluous"* to declare that prior to the commencement of any procurement process for nuclear new generation capacity, NERSA would be required to determine (as provided in section 34), in accordance with a procedurally fair public participation process, that new generation capacity is required and that the electricity must be generated from nuclear power and the percentage thereof, since *"[t]he finding that [NERSA] is under such a duty is central to this judgment and does not require restatement in a declarator"* (at paragraphs 141 and 142 of the judgment).

The Honourable Minister of Energy's reported intention to fast-track the IRP in circumstances where it is clear that there is currently an oversupply of electricity, no urgency and a lack of clarity on who will build, own and operate the power stations, is unexplained and irrational. It also undermines the constitutional imperatives of openness, reasonableness and transparency in government decision-making.

In light of the abovementioned judgment, it would also clearly be unlawful and unconstitutional for Eskom to *'begin the tender process immediately'* if the IRP *'showed the nuclear programme could go ahead'*. Prior to Eskom commencing the nuclear tender process, the Honourable Minister of Energy, with the concurrence of NERSA, would be required to make a lawful, rational and procedurally fair section 34 determination specifying (among other things) that new electricity generation capacity is needed (and how much), and that a specified percentage of this new generation capacity should be generated from nuclear energy.

The statements to the press by the Honourable Minister of Energy and Eskom are particularly alarming in light of numerous and serious allegations that have surfaced since the judgment was handed down, including in respect of state capture and irregular procurements involving senior Eskom officials, which allegations are currently under scrutiny by Parliament's Public Enterprises Committee state capture inquiry. It has also emerged that Eskom is not in a financial position to procure new nuclear power stations https://www.fin24.com/Economy/Eskom/live-state-capture-inquiry-begins-with-focus-on-eskom-20171017). The Honourable Minister of Energy's statements contradict statements made by the Honourable Minister of Finance that *'[t]he economy can't afford the nuclear at the present moment, there are no intensive users that are taking up the generation capacity that we have'* (http://ewn.co.za/2017/10/26/gigaba-no-money-for-nuclear-programme-for-at-least-5-years). They also contradict findings made by the Minister of Energy's Ministerial Advisory Council on Energy (MACE) Working Group, which reported in its 31 October 2016 Working Group Report was that *'[a] least cost IRP model, free of any artificial constraints and before policy adjustments does not include any nuclear power generators. The optimal least cost mix is one of solar PV, wind and flexible power generators (with relatively low utilisation).'* Should a policy adjustment be made to the IRP that imposes nuclear new generation capacity into the future energy mix, the IRP itself is likely to be contested and subjected to judicial scrutiny.

In the circumstances we are instructed to call upon NERSA, as we hereby do, to provide an

undertaking that NERSA will not concur with any section 34 determination decision made by the Honourable Minister of Energy relating to procuring new electricity generation capacity derived from nuclear power until such time as:

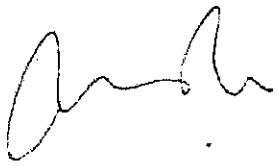
(a) in terms of section 34, the Honourable Minister of Energy, with the concurrence of NERSA, makes a lawful, rational, and procedurally fair section 34 determination specifying (among other things) that new electricity generation capacity is needed (and how much), and that a specified percentage of this new generation capacity should be generated from nuclear energy; and

(b) there is clarity and transparency with regard to the general procurement and related processes (consistent with the order granted in the Earthlife Africa judgment) that will be followed (including, but not limited to, the public participation to be undertaken as part of the section 34 process and the processes in relation to any negotiating, renegotiating and/or tabling before Parliament under section 231 of any necessary IGAs).

Should we not receive your undertaking on or before **Monday, 13 November 2017**, it will be assumed that NERSA is not committed to ensuring clarity, transparency and consistency in the nuclear determination and procurement process, and that there is a need for an urgent application to the High Court for constructive contempt of court and such other relief as we may be advised to pursue.

We also attach for your information a copy of a letter sent to the Minister of Energy.

Yours sincerely



Adrian Leonard Pole

ADRIAN POLE
ENVIRONMENTAL LAW
Quarry Road Chambers • 13 Quarry Road • Assagay • KwaZulu Natal • SA
P O Box 671 • Hillcrest • 3650
Cell: 082 340 8534 • Tel: 031 765 6011 • Fax: 086 031 765 6011
Email: adrian@adrianpole.co.za Web: www.adrianpole.co.za

Your Reference: The Honourable Minister of Energy

My Reference: SAFCEI ELA-JHB/ap

The Honourable Minister
Department of Energy
120 Plein Street
7th Floor
Parliament
Cape Town
8000

"URGENT"

Private Bag X 96
Pretoria
0001

Facsimiles: 021 465 5980
021 323 5849

Email: deidre.nkopane@energy.gov.za
louisa.mohlamme@energy.gov.za
maleshoane.selokoe@energy.gov.za

7 November 2017

The Honourable Minister Mohlobo

Re: Nuclear Power Programme

We act for the Southern African Faith Communities' Environment Institute (SAFCEI) and Earthlife Africa – Johannesburg (ELA-JHB).

Our clients are deeply concerned following recent press statements and reports alleging that the Honourable Minister is fast-tracking the Integrated Resource Plan (IRP) and rushing the nuclear deal (see https://www.fin24.com/Economy/mahlobo-instructs-officials-to-fast-track-sas-energy-plan-20171031#cxrecs_s), and are equally concerned that Eskom has signalled its intention to *'begin the tender process immediately'* if the IRP *'showed the nuclear programme could go ahead'* (see https://www.news24.com/SouthAfrica/News/mahlobo-rushes-nuclear-

deal-20171105-2).

Having regard to the complexities and costs (estimated at being in excess of R1 trillion) implicit in the proposed nuclear power programme, it would be inappropriate, unlawful and unconstitutional for government or any state owned entity to proceed with nuclear determinations or procurement in the absence of clarity, transparency and consistency regarding the decision-making processes. These decision-making processes necessarily require that meaningful opportunities are provided for public participation at every stage (which also requires access to relevant information, such as on affordability).

The Honourable Minister will be aware that the High Court of South Africa (Western Cape Division) in *Earthlife Africa – Johannesburg & Another v. Minister of Energy & Others (Case No. 19529/2015)* made an order that:

- The Minister of Energy's decision on or about 10 June 2015 to table the Russian IGA [international governmental agreement] before parliament in terms of section 231(3) of the Constitution was unconstitutional and unlawful, and was reviewed and set aside;
- The Minister of Energy's decisions on or about 10 June 2015 to table agreements for cooperation between South Africa and the governments' of the United States of America and the Republic of Korea were unlawful and unconstitutional, and were reviewed and set aside;
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The Justices went on to say that any section 34 determination decision would also have to *'...satisfy the test for rational decision-making, as part of the principle of* legality'. The Justices stated that applying this to the applicants' challenge on the basis of an unfair procedural process, *'the question is whether the decision by either the Minister or NERSA (or the combined decision of the Minister and NERSA) fell short of constitutional legality for wont of consultation with interested parties'* (at paragraph 47 of the judgment), points out that *'[o]ur courts have recognised that there are circumstances in which rational decision-making calls for interested persons to be heard'* (at paragraph 48 to the judgment), and that it follows that the process by which the decision is made and the decision itself must be rational (at paragraph 49 of the judgment, citing *Democratic Alliance v President of the Republic of South Africa & Others* 2013 (1) SA 248 (CC) para 34). The Justices went on to recognise that there are sectors of the public with either special expertise or a special interest regarding the issue of whether it is appropriate for extra generation capacity to be set aside for procurement through nuclear power, and emphasised that NERSA is also under a statutory duty to act in the public interest

in a justifiable and transparent manner, and to utilise a procedurally fair process giving affected persons the opportunity to submit their views and present relevant facts and evidence. It held that NERSA had failed to do so, and that NERSA's decision failed to satisfy the test of rationality based on procedural grounds alone (at paragraph 50 of the judgment).

The Justices also confirmed that it would be "*unnecessary and superfluous*" to declare that prior to the commencement of any procurement process for nuclear new generation capacity, NERSA would be required to determine (as provided in section 34), in accordance with a procedurally fair public participation process, that new generation capacity is required and that the electricity must be generated from nuclear power and the percentage thereof, since "*[t]he finding that [NERSA] is under such a duty is central to this judgment and does not require restatement in a declarator*" (at paragraphs 141 and 142 of the judgment).

The Honourable Minister's reported intention to fast-track the IRP in circumstances where it is clear that there is currently an oversupply of electricity, no urgency and a lack of clarity on who will build, own and operate the power stations, is unexplained and irrational. It also undermines the constitutional imperatives of openness, reasonableness and transparency in government decision-making.

In light of the abovementioned judgment, it would also clearly be unlawful and unconstitutional for Eskom to '*begin the tender process immediately*' if the IRP '*showed the nuclear programme could go ahead*'. Prior to Eskom commencing the nuclear tender process, the Honourable Minister of Energy, with the concurrence of NERSA, would be required to make a lawful, rational, and procedurally fair section 34 determination specifying (among other things) that new electricity generation capacity is needed (and how much), and that a specified percentage of this new generation capacity should be generated from nuclear energy.

The statements to the press by the Honourable Minister of Energy and Eskom are particularly alarming in light of numerous and serious allegations that have surfaced since the judgment was handed down, including in respect of state capture and irregular procurements involving senior Eskom officials, which allegations are currently under scrutiny by Parliament's Public Enterprises Committee state capture inquiry. It has also emerged that Eskom is not in a financial position to procure new nuclear power stations https://www.fin24.com/Economy/Eskom/live-state-capture-inquiry-begins-with-focus-on-eskom-20171017). The Honourable Minister of Energy's statements contradict statements made by the Honourable Minister of Finance that '*[t]he economy can't afford the nuclear at the present moment, there are no intensive users that are taking up the generation capacity that we have*' (http://ewn.co.za/2017/10/26/gigaba-no-money-for-nuclear-programme-for-at-least-5-years). They also contradict findings made by the Minister of Energy's Ministerial Advisory Council on Energy (MACE) Working Group, which reported in its 31 October 2016 Working Group Report was that '*[a] least cost IRP model, free of any artificial constraints and before policy adjustments does not include any nuclear power generators. The optimal least cost mix is one of solar PV, wind and flexible power generators (with relatively low utilisation).*' Should a policy adjustment be made to the IRP that imposes nuclear new generation capacity into the future energy mix, the IRP itself is likely to be contested and subjected to judicial scrutiny.

In the circumstances we are instructed to call upon you, as we hereby do, to provide an

undertaking that no further steps will be taken towards procuring new electricity generation capacity derived from nuclear power until such time as:

(a) in terms of section 34, the Honourable Minister of Energy, with the concurrence of NERSA, makes a lawful, rational, and procedurally fair section 34 determination specifying (among other things) that new electricity generation capacity is needed (and how much), and that a specified percentage of this new generation capacity should be generated from nuclear energy; and

(b) there is clarity and transparency with regard to the general procurement and related processes (consistent with the order granted in the Earthlife Africa judgment) that will be followed (including, but not limited to, the public participation to be undertaken as part of the section 34 process and the processes in relation to any negotiating, renegotiating and/or tabling before Parliament under section 231 of any necessary IGAs).

Should we not receive your undertaking on or before **Monday, 13 November 2017**, it will be assumed that the Honourable Minister is not committed to ensuring clarity, transparency and consistency in the nuclear determination and procurement process, and that there is a need for an urgent application to the High Court for constructive contempt of court and such other relief as we may be advised to pursue.

Yours sincerely

Adrian Leonard Pole

Your document was successfully sent.

Pages: 8
Time: 2017-11-08 11:35:19
Number dialed: 27124014700

Kind Regards,

Consignor
DST HUB
PRY

PNA217680947250

PostNet Name: PostNet - Hillcrest

Tel. No.: 317651914 Acc. No.: PN176

From: (Sender) (Company Name) Loren Pole
Street Address 36-38 Old Main Road, Shop 5B Hillgate SC
Suburb Hillcrest City/Town
Country Durban Code 3610
Contact Loren Pole Tel +27727241549
E-mail

To: (Receiver) (Company Name) The National Energy Regulator of SA
Street Address Kulawula House, 526 Madiba Street
Suburb ARCADIA City/Town
Country Code 0083
Contact The National Energy Regulator of SA 124014600/+27124014600
E-mail

Insurance Yes/No If yes, state value

Domestic: Overnight Courier ✓ | Economy (48-72hrs) | Dawn Courier | Saturday | Non Express (24-48hrs) | Same Day Courier | Other Specify | Public Holiday After Hours

International: DOCUMENTS | NON-DOCUMENTS

No. of Parcels	Description of goods	Length in cm	Breadth in cm	Height in cm	Mass in kg
1	Parcel	12	10	2	0.2
1	Total No. of Parcels	Total Vol	0.05	Total Mass	0.20

WE HAVE SEEN AND AGREE TO THE STANDARD CONDITIONS OF CARRIAGE (OVERLEAF) WHICH SHALL APPLY TO THIS CONSIGNMENT AND ALL FUTURE CONSIGNMENTS ACCEPTED BY POSTNET. WE FURTHER DECLARE THAT THIS CONSIGNMENT DOES NOT CONTAIN DANGEROUS GOODS.

EXPRESS PACK SECURITY NUMBER ON LIP OF FLYER

SENDER'S DETAILS

Name: Loren Pole Date: 2017-11-08
Signature: [signature] Time: 11:26:14

POSTNET AND ARAMEX RESERVE THE RIGHT TO MARK THE SERVICE "OVERNIGHT EXPRESS" FOR "DOMESTIC" SHOULD NO SERVICE BE SELECTED

ACCEPTED BY POSTNET

Sinead
Name
Signature 450
2017-11-08 11:26:14
Date Time

CHARGES	RANDS	CENTS
Basic Tariff		
Surcharge		
Insurance		
Packaging Surcharge		
VAT		
TOTAL INCL. VAT		

POSTNET Courier
an aramex company

To track your shipment go to: www.postnet.co.za or call 0860 POSTNET (7678638)

STANDARD TRADING TERMS & CONDITIONS OF POSTNET AN ARAMEX COMPANY OF SOUTH AFRICA – ABRIDGED VERSION

The Terms and Conditions below are a condensed version of our full Terms and Conditions which you accept on signature of the waybill. A copy of the full version is available on request from any Aramex office.

1. Definitions

In these Standard Trading Terms & Conditions, the following definitions apply "The Company" shall mean Aramex South Africa. "Customer" shall mean any person on whose request or on whose behalf the Company undertakes or provides any business or service."Goods" shall mean any goods or documents handled or transported by or on behalf of the Company and includes any packaging or container covering the Goods."Consignment" shall mean goods transported from the client in one conveyance at one time.

2. Services and Delivery time

All assertions with regards to delivery times relate to working days (i.e. Monday to Friday) only, unless requested otherwise on the waybill. Same Day Express: A premium, same day collection and delivery within all Main Centre's (and outlying areas on request). Dawn Express: A premium, early morning delivery to all Main Centre's (and outlying areas on request) by 09h00 or by the time specified. Overnight Express: An economical, overnight delivery to all Main Centre's (and outlying areas on request - to be delivered within 72 hours, depending on destination) before 10h30 the next day. Express Road: An inexpensive delivery service to all Main Centre's and outlying areas within 24-48 hours (dependent on destination). Economy Freight: A highly cost-effective, deferred delivery service for large, consolidated consignments that are non-time sensitive. Delivery is effected within 48-72 hours to all Main Centres and to outlying areas. Saturday Service: A surcharge will be levied for all deliveries and/or collections that are requested on a Saturday. After Hours Service: A delivery or collection is classified as being after hours and will attract an After Hours Surcharge if it is effected between 17h30 and 07h30 on working days or over weekends between 13h00 on Saturday and 07h30 on Monday. International Documents: A time-specific delivery service for International door-to-door deliveries. This service may be utilised to send paper-based and/or general business correspondence. International Parcels: A time-specific delivery service for dutiable commodities or non-paper-based items. Different restrictions apply to each country and it is advisable to confirm customs document requirements before dispatch. Type of Export: Permanent: Items that have been sold, sent as a gift or will return to this country must be marked under this section. Temporary: The Company must be advised about goods that are exported on a temporary basis. The Company will assist with the completion of the requisite customs paperwork. Surcharges apply to the following services - Same Day Express; Dawn Express; Chain Store deliveries; After hours; Mines; Power Stations; Plots/Farms; Military Bases, Game Lodges; Embassies/Consulate

Exclusion of Obligations of Common or Public Carrier

The Company is not a common carrier and any business undertaken by the Company is carried out subject to the conditions hereinafter set out. The Company shall not be bound by any agreement purporting to vary these conditions unless such agreement is in writing and signed on behalf of the Company by a competent officer thereof.

4. All Goods and documents relating to Goods, shall be subject to a lien and pledge either from monies due in respect of such Goods or for other monies due to Aramex from the Customer, for present and past debts.

5. Company Entitled to Act as Agent

5.1. The Company is authorized to appoint such third parties as the Company may consider necessary for the purpose of procuring the forwarding and/or delivery of the Customer's Goods. The Customer's Goods are accepted also subject to the conditions stipulated by all other carriers and parties into whose possession or custody they may pass as if the same had been included herein, provided that if there is any conflict between any such conditions and these conditions the latter shall prevail.

5.2. The Company is not an air transport undertaking under the Warsaw Convention, 1929 and subsequent air carriage treaties and legislation. Shipment by air to a country other than the country of origin may be subject to the terms of the Warsaw Convention and the limits of liability contained therein. The Company acts as agent for its Customer when consigning documents or Goods with a particular airline for onward carriage and without prejudice to its general right of subrogation hereunder.

6. Customer's Undertakings

6.1 The Customer warrants the accuracy of the description of the Goods on the waybill.

6.2. Adequate labelling, addressing and packaging of the Customer's Goods for transportation is the Customer's responsibility, including the placing of the Goods in any container, even if supplied to the Customer by the Company.

7. Company's Liability

7.1. The Company is only responsible for the Customer's Goods whilst they are within its custody and control and shall be liable subject to clause 7.2 hereof for loss sustained by the Customer due to damage to or loss of the Goods whilst in the Company's custody provided that such loss or damage was due to the gross negligence of the Company, its servants or agents. Save as aforesaid the Company shall be under no liability in respect of same shall arise. The parties agree that consequential loss shall be deemed to include without restriction the Goods carried by it and in particular shall NOT BE LIABLE FOR CONSEQUENTIAL LOSS however the commercial, financial or other indirect loss including loss of interest and utility.

7.2 The liability of the Company under these conditions shall be limited to the payment by the Company by way of damages of a sum not exceeding R100.00 per consignment. For the purpose of establishing the amount of liability under this clause, the value of the Goods shall be ascertained by reference to their replacement or reconstitution value at the time and place of shipment without reference to their commercial utility to the Customer and other items of consequential loss.

8. Insurance

8.1. If no insurance is requested or insurance is requested but no value is declared, the Customer's Goods will automatically be insured at no additional cost to a maximum value of R3000.00, subject to such exceptions and conditions as may be imposed by the insurer taking the risk. This automatic cover excludes cell phones and accessories and prepaid cards. A copy of the policy summary and information regarding the insurer may be inspected or obtained from any Company office.

8.2. In the event that the value of the consignment exceeds R3000.00, insurance may be provided in excess of this amount to a maximum value of R250 000.00 per consignment, provided that the Customer indicates such requirement and the declared value by completing the relevant section of the waybill. If the declared value of the consignment exceeds R250 000.00, the Customer will only be insured to a maximum value of R250 000.00 per consignment, unless separate and specific insurance arrangements are made timeously with the Company

8.3 The Customer's attention is drawn to pertinent insurance policy exceptions, which include, but are not limited to restrictions on second hand goods which excludes cover for damages, territorial exclusions, exclusion of consequential damages and/or losses, exclusion of claims arising from insufficient packaging or loss of information, exclusion of cover for dangerous goods, samples, bottled wine, certificates, tickets, patterns, plans and designs or damaged caused by any delays in carriage or delivery of Goods. The Company shall not be obliged to arrange separate cover for any risks so excluded.... A more comprehensive list of excluded items can be viewed on the Company's website at www.aramex.com

8.4. The Customer shall be liable to pay the insurance premium and if not paid by due date, any cover shall be rendered null and void. Premium is payable at the rate from time to time provided for in the insurance tariff code, available on request at the offices of the Company and/or on the Company's website at www.aramex.co.za, to which terms the Customer agrees by signature to the waybill.

8.5. In so far as the Company arranges any insurance, the Company acts solely as an intermediary for and on behalf of the Customer. Should the insurer dispute its liability in terms of any insurance policy in respect of the Goods, the Customer shall only have recourse against the insurer and the Company shall not incur any responsibility or liability whatsoever notwithstanding that the premium paid on such policy may differ from the amount paid by the consignee or consignor to the Company in respect thereof.

8.6. If an insurance claim is rejected, the Customer has 180 days from the date of rejection to make representation to the insurer, Guardrisk Insurance Company Limited, at Alexander Forbes House, 4th floor, 90 Rivonia Road, PO Box 781692, Sandton, 2146. If the dispute is not resolved at the end of this period then the customer must within a further 180 days institute legal action by way of the service of summons against Guardrisk failing which the Customer will forfeit their claim and no liability can arise in terms of such claim.

8.7 We are an authorised Financial Service Provider and the full policy wording & disclosure documents are available on the Company's website at www.aramex.com

9. Claim Procedure and Time-Bar

9.1. Any claim brought by the Customer against the Company in respect of its duties and liabilities or any insurance claim submitted in terms of insurance arranged by the Company must be notified by the Customer to the office of the Company in writing within seven (7) days after delivery of the goods or the date when the goods should have been delivered

9.2 Notwithstanding fulfilment of the notice requirement, the Company shall be discharged of all liability unless suit is brought and notice thereof given to the Company within nine (9) months after delivery of the goods or the date when the goods should have been delivered.

10. Goods Prohibited for Carriage

10.1 The Customer warrants that the Goods comply with applicable laws, regulations or requirements of authorities or carriers, including, but not limited to requirements relating to packaging and labelling and transportation of dangerous goods. The Company does not accept for carriage any combustible or explosive materials, gold or silver bullion, coin, cyanides, precipitates or any form of gold or silver ore, bullion, platinum and other metals, precious and semi-precious stones including commercial carbons or industrial diamonds, jewelry, currency (paper or coin) of any nationality, securities, stocks, bonds, un-cancelled postage or revenue stamps, blank or endorsed bank cashier's cheques, money orders or traveller's cheques, antiques, pictures, livestock or plants, manuscripts, furs, arms and ammunition.

11. Governing law

Any dispute in terms of this Agreement shall be resolved in accordance with the laws of the Republic of South Africa.

12. Compliance with Civil Aviation Regulations

12.1 The Customer agrees that Aramex is entitled, for the purpose of complying with Part 108 of the Civil Aviation Regulations (Air Cargo Security), to screen, x-ray or hand-search the Customer's Goods before placing them on board an air carrier's aircraft.

12.2 The Customer undertakes clearly to describe the nature of the Customer's Goods in the space provided on Aramex South Africa's Waybill.

PostNet

Parcel Tracker

In the case of a continuous spinning cirlce the parcel is not known in the PostNet system, please contact PostNet Call Centre on 0860 767 8638 for assistance

Please note: Parcel information will appear approximately 8 hours after handed in at the PostNet store

Please enter your PN or PP tracking number into the text box and click SUBMIT to track your parcel.

(Remember to include PN or PP and do not put in any spaces)

PNA217680947250 Submit

Shipment Summary	
Shipment Number	PNA217680947250
Pickup Date	11/08/2017 4:33:00 PM
Shipper Reference	
Current Status	Delivered MPUMI(Notify me when the shipment is delivered)
Delivered On	11/9/2017 12:12:00 PM
Delivered To	MPUMI

For inquiries and amending delivery instructions about this shipment, click here to submit a customer care request or contact origin office at:+27 (31) 5815800 , destination office at: + 27 (12) 7420300

Time values are local to the service area in which the shipment checkpoint is recorded.

Shipment History

Location	Date	Activity
Pretoria, South Africa	11/9/2017 12:12:00 PM	Delivered
Pretoria, South Africa	11/9/2017 6:26:00 AM	Out for Delivery
Pretoria, South Africa	11/9/2017 5:30:00 AM	Received at operations Facility.
Durban, South Africa	11/9/2017 2:34:00 AM	Departed Operations facility – In Transit
Durban, South Africa	11/8/2017 6:46:00 PM	Received at Origin Facility
Durban, South Africa	11/8/2017 4:33:00 PM	Record created.

Shipper		Receiver	
Shipper Name:	PostNet - Hillcrest	Delivered To:	MPUMI
Sent By:	Loren Pole	Destination:	ARCADIA,South Africa
Shipper Address:	36-38 Old Main Road - Shop 5B Hillgate SC - Durban	Pickup Date:	11/08/2017 4:33:00 PM

Shipment Details			
Origin	South Africa/Hillcrest	Destination:	
Service:		Shipment Type:	ONP
Pieces:	1	Description:	Parcels
Weight:	0.20 KG		

Shipment Attachments

Type	Size	Date

1
2

196

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

In re: **Case No: 19529/15**

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

And

THE MINISTER OF ENERGY	First Respondent
THE NATIONAL ENERGY REGULATOR OF SOUTH AFRICA	Second Respondent
ESKOM HOLDINGS (SOC) LTD	Third Respondent
DEMOCRATIC ALLIANCE	Fourth Respondent

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
ESKOM HOLDINGS (SOC) LTD	Sixth Respondent

NPM

CONFIRMATORY AFFIDAVIT

I, the undersigned

ADRIAN LEONARD POLE

do hereby make oath and state:

1. I am an adult male attorney practicing as Adrian Pole Attorney at 13 Quarry Road, Assagay, Kwa-Zulu Natal.

2. I am the applicants' attorney in this matter and I have handled the matter on behalf of the applicants from inception.

3. I have read the founding affidavit of Elizabeth Jane McDaid and I confirm that it is true and correct insofar as it relates to me and the things done by me or by a staff member under my supervision and control.

ADRIAN LEONARD POLE

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 Hillcrest on this 15th day of November 2017. NPM

COMMUNITY SERVICE CENTRE
2017 -11- 15
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KWAZULU-NATAL

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COMMISSIONER OF OATHS
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