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

Case No: 19529/15

In the matter between:

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

and

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

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APPLICANTS' HEADS OF ARGUMENT

Table of Contents

Glossary of terms

Parties

The **DOE** – the Department of Energy.

The **Government respondents** – a collective reference to **the Minister of Energy** and **the President**, who are the only respondents opposing this application.

NERSA - the National Energy Regulator of South Africa.

The **Minister** – the Minister of Energy, the first respondent – unless otherwise indicated no distinction is drawn between the different holders of the office in the periods discussed in this matter (the current incumbent took office in May 2014).

The **President** – the President of the Republic of South Africa, the second respondent, who is the head of the National Executive (Cabinet).

Terms

IGA(s) – intergovernmental agreement(s).

The **IRP2010** – the Integrated Resource Plan (**IRP**) for Electricity 2010-2030. Although years out of date, no more recent final IRP has been gazetted.

The **2013 s 34 Determination** or the **Determination** – the determination in terms of section 34 of the ERA by the Minister with the concurrence of NERSA (signed on November and December 2013 respectively), in relation to the requirement for and procurement of 9600 MW of electricity from nuclear energy, which was only made public by the Minister by publication in the gazette on 21 December 2015.

Legislation

PAJA – the Promotion of Administrative Justice Act 3 of 2000.

The **NERA** – the National Energy Regulator Act 40 of 2004.

The **ERA** – the Electricity Regulation Act 4 of 2006 (all references to "section 34", are references to section 34 of the ERA.

I. INTRODUCTION AND SUMMARY OF CASE

1. This matter involves the unlawful and secretive pursuit of what will be the largest public procurement ever entered into in South Africa: the procuring of multiple nuclear power plants in order to generate 9.6 gigawatts (**GW**) of electricity, at a cost that could well exceed R1 trillion (that is a thousand billion rand).

2. In pursuing this nuclear procurement, statutory and constitutional prescripts have been ignored, parliament has been unlawfully circumvented, public participation unlawfully dispensed with, and the exercise of public power has been kept secret – even in, and tellingly so, the face of this litigation.

3. Thus, this case is not about whether nuclear power or the procurement of a certain quantity of nuclear power is affordable or otherwise advisable. It is a case about the rule of law, separation of powers, and the constitutional principle of open, transparent, and accountable government.

4. The central issues to be determined by this Court are straight forward:

    4.1 Did the Minister of Energy and NERSA (the statutory energy regulator)[1] violate statutory and constitutional prescripts in making a determination that a certain quantity of new nuclear capacity was required and should be procured?

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[1] NERSA does not oppose this application.

4.2 Did the President and the Minister (**the Government respondents**) violate the Constitution when entering into and tabling an intergovernmental agreement (**IGA**) with Russia in relation to nuclear procurement?

4.3 Did the Minister violate the Constitution when tabling two other IGAs in relation to nuclear cooperation many years after they had been signed?

5. As the facts reveal, notwithstanding the vast sums of money to be committed, and the potential long-term effect on the economy and for consumers of electricity and generations of South Africans, the decisions to proceed with procuring nuclear power plants violate the very statutory and constitutional constraints meant to ensure open, accountable, and transparent decision making. In brief summary:[2]

5.1 In late 2013, the Minister and NERSA, exercising their powers under section 34 of the ERA, determined that South Africa required 9.6GW of nuclear power, and that this should be procured by the DOE.

5.2 Notwithstanding the extraordinary power given to the Minister and NERSA by section 34 to determine the quantity of new generation capacity required and to be procured by South Africa, they took this decision without any form of public participation, or other consultative process.

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[2] The full facts, with relevant references to the record, will be set out in the factual and thematic sections below.

5.3 Moreover, NERSA – despite its recorded and material concerns that the determination was based on incorrect information – irrationally gave its concurrence because it mistakenly believed it was required to simply approve the Minister's determination.

5.4 Worse, in breach of the Minister's own approval decision, the 2013 s 34 Determination was actively kept secret. It was only in December 2015, some two years after the Determination was signed, that the Determination was gazetted. Despite the passage of time and the change in circumstances, the Minister, without consulting NERSA or obtaining its concurrence, belatedly elected to make the Determination (unchanged) public and final. This was an obvious construct, designed after the fact to provide a purportedly legal basis for the nuclear procurement process that the Minister had already begun (in an express attempt to rectify the unlawfulness that the applicants had identified in this matter, having launched this application in October 2015).

5.5 Notwithstanding that there was no public (and thus final) s 34 Determination, in late 2014 and early 2015 the DOE and the Minister entered into international agreements (leading to separate constitutional unlawfulness, to which we return below), purportedly as a necessary precursor to an undisclosed procurement process, conducted vendor parades with the countries that had entered into such international agreements, and announced that the necessary request for proposals in

relation to the procurement of nuclear power plants to generate 9.6GW had already begun to be prepared and would shortly be released.

5.6 In relation to the IGAs that were entered into:

5.6.1 In September 2014, the Minister, with the President's approval, signed an IGA with the Russian government (the Russian IGA) in relation to procuring 9.6GW of Russian made nuclear power plants. The IGA made binding commitments in relation to nuclear procurement – including providing Russia with an indemnification – when no similar commitments were made to the other foreign governments whom the Government purportedly also wished to have tender for construction of nuclear power plants. This was done without following any lawful procurement process, let alone attempting to engage upon such a process.

5.6.2 The efforts at avoiding public scrutiny did not end there. In June 2015, despite the binding commitments made in the Russian IGA, including an indemnification of the Russian government, the Minister – contrary to the advice of the senior State Law Adviser – tabled the Russian IGA, under section 231(3) of the Constitution, rather than section 231(2), thus bypassing the requirement for parliamentary approval prior to an international agreement becoming binding.

5.6.3 Moreover, at the same time as tabling the Russian IGA, whether as window-dressing or otherwise, the Minister tabled a number of IGAs, including an IGA with the US government signed in **1995**, and an IGA signed with the South Korean government, signed in **2010**. This clearly violated the requirement in section 231(3) that if the executive is going to seek to make an international agreement binding by mere tabling before parliament (absent parliamentary approval), by making use of section 231(3), the international agreement must be tabled in a reasonable time.

6. These facts, viewed through the prism of fundamental constitutional principles (legality, the rule of law, open and accountable government, and the separation of powers) and the terms of the relevant legislation, demonstrate that:

6.1 The s 34 Determination is unconstitutional and unlawful;

6.2 The decisions to approve, sign, and table the Russian IGA were unconstitutional and unlawful;

6.3 The tabling of the US and South Korean IGAs was unconstitutional and unlawful.

7. Section 172(1) of the Constitution therefore requires this Court to declare those decisions invalid to the extent of their unconstitutionality, and grant any necessary, consequential just and equitable relief.

8. Furthermore, given that the Government respondents have, as discussed below, repeatedly in their actions and affidavits made clear that they fundamentally misunderstand, or have intentionally chosen to ignore, the binding terms of section 34, it will also be appropriate for this Court to grant declaratory relief which makes clear the strictures that section 34 places on any government nuclear procurement process.

9. Having set out an overview of the applicants' case, the remainder of these heads deal with the following:

9.1 A summary of the key facts;

9.2 The statutory and constitutional law relevant to this Court's determination of the matter;

9.3 That the 2013 s 34 Determination, signed in 2013 by the Minister and NERSA, and then gazetted in December 2015 by the Minister, was unlawful.

9.4 That the Minister's signature and the President's authorisation of that signature of the Russian IGA was unconstitutional, given the content of that IGA;

9.5 That the Russian IGA was also impermissibly tabled under section 231(3), rather than section 231(2), thus unconstitutionally bypassing the requirement for parliamentary approval;

9.6 That the tabling of the US and South Korean IGAs, twenty years, and five years respectively, after they were signed, was an unconstitutional violation of the requirement under section 231(3) that they be tabled within a reasonable time.

9.7 The constitutionally required relief consequent upon finding the above conduct unlawful;

9.8 The Government respondents' *in limine* point.

II. SUMMARY OF THE KEY FACTS

10. In order to provide a general overview of this matter we set out the key facts that are common cause, or are otherwise undisputed. However, we will set out more detail of certain of facts that are relevant to the specific challenges in the thematic sections which follow thereafter.

11. On 6 May 2011, the Minister gazetted the Integrated Resource Plan for Electricity 2010-2030 (**IRP2010**).[3]

12. The IRP2010, begins by contextualizing its own purpose, in the following terms "**The Integrated Resource Plan (IRP) is a living plan that is expected to be continuously revised and updated as necessitated by changing circumstances**. **At the very least, it is expected that the IRP should be**

[3] Government Gazette GNR.400, it is also available at http://www.doe-irp.co.za/content/IRP2010_promulgated.pdf.

revised by the Department of Energy (DoE) every two years, resulting in a revision in 2012."[4]

13. During the course of 2013, the DOE commenced a process (which included a public participation process in which the applicants participated by submitting detailed technical submissions) aimed at updating the IRP2010 and which culminated in a draft Integrated Resource Plan for Electricity (IRP) 2010-2030 – Update Report 2013 (**the IRP2010 Update**).[5] However, despite the fact that the IRP2010 stated that is should be updated, **at the very least, every two years**, the IRP2010 update process never saw the light of day.[6]

14. During the same time period and unbeknown to the applicants or the public, the Minister had on 11 November 2013 secretly signed a determination under section 34(1) of the ERA in relation to the requirement for and procurement of 9600 MW of electricity from nuclear energy (**2013 s 34 Determination**).[7] The Minister wrote to NERSA on 11 November 2013 seeking its concurrence in the determination.[8]

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[4] IRP2010 para 1.1.

[5] Founding Affidavit: Vol 1: p 27: paras 45. The IRP2010 Update is available at http://www.doe-irp.co.za/content/IRP2010_updatea.pdf.

[6] The March 2014 deadline for submission of the final draft IRP2010 update to Cabinet was not met. According to a media report published on 30 October 2014, the Parliamentary Committee of Energy chairperson, Mr Fikile Majola, stated during the course of a debate on the future of nuclear energy in South Africa, that the IRP2010 Update would "not see the light of day": Supplementary Affidavit: annexure PL43.7: p 504.

[7] Supplementary Affidavit: Vol 2: p 479 – 480.

[8] Supplementary Affidavit: Vol 2: p 491.

15. In a letter received by the DOE on 6 January 2014 and signed by the Chairperson of NERSA on 20 December 2013, NERSA advised the Minister that it concurred in the determination, in terms of a meeting held on 26 November 2013. [9] The letter attached the Determination which the Chairperson had signed, to indicate NERSA's concurrence on 17 December 2013, and the extracts from NERSA's meeting.[10]

16. On 20 September 2014 the President signed President's Minute No. 289 approving the Russian IGA in relation to a strategic nuclear partnership and authorising the Minister to sign the agreement.[11]

17. On 21 September 2014, the Minister signed the agreement on behalf of the Government.

18. On 22 September 2014, the DOE and Russia's atomic energy agency (**Rosatom**) released identical press statements (effectively a joint statement) confirming their joint understanding of what the two governments had agreed and advising that on 21 September 2014 the Russian Federation and the Republic of South Africa signed an Intergovernmental Agreement on Strategic Partnership and Cooperation in Nuclear Energy and Industry.[12]

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[9] Supplementary Affidavit: Vol 2: annexure PL45.4, p 493.
[10] Supplementary Affidavit: Vol 2: annexure PL45.4, p 499-500.
[11] Supplementary Affidavit: annexure PL43.7: p 504.
[12] Founding Affidavit: Vol 1: p 33: para 65: Joint-Press Statement, 22 Sept 2014, Vol 1, p 131-2.

19. The press release records 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."[13]

20. However, in subsequent press releases the DOE sought to distance itself from the initial press release and sought to suggest it would enter into similar agreements with other countries.[14] The DOE also sought to indicate that the concluding of the Russian IGA "initiates the preparatory phase for the procurement of the nuclear build programme."[15]

21. In a series of further press releases, the DOE made clear that in late 2014 and early 2015 it conducted Vendor Parades in relation to nuclear procurement.[16]

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[13] Founding Affidavit: Vol 1: annexure PL6: p 131.

[14] See e.g. Founding Affidavit: Vol 1: p 35: para 68: annexure PL8: p 135; Answering Affidavit: Vol 4: annexure ZM23: p 1297.

[15] Answering Affidavit: Vol 4: annexure ZM22: p 1294.

[16] Answering Affidavit: annexure ZM25: Vol 4, p 1299; Answering Affidavit: annexure ZM24: Vol 4, p 1298; Answering Affidavit: Vol 4: annexure ZM28: p 1304.

These parades occurred first with Russia, and then with China, France, South Korea and the United States.[17]

22. The Government also entered into IGAs with China[18] and France[19] in late 2014, after entering into the Russian IGA. As will be discussed below, the Russian IGA was in distinctly different terms to the China and France IGAs.

23. On 10 June 2015, the Minister signed a letter authorising the Parliamentary Liaison Officer to submit the IGAs signed with various nuclear vendor countries for tabling in Parliament in accordance with section 231(3) of the Constitution. [20] In particular, the follow IGAs were tabled (even though some had been signed years, and decades ago):

23.1 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**;[21]

23.2 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**

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[17] Answering Affidavit: annexure ZM25: Vol 4, p 1299; Answering Affidavit: annexure ZM24: Vol 4, p 1298; Answering Affidavit: Vol 4: annexure ZM28: p 1304.

[18] Answering Affidavit: Vol 4: annexure ZN27L p 1302.

[19] Answering Affidavit: annexure ZM25: p 1299.

[20] Founding Affidavit: annexure PL24, Vol 1, p 216 – 218.

[21] US IGA, Vol 1, p 270 – 285.

October 2010;[22]

23.3 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;[23]

23.4 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 (**the French IGA**), dated 14 October 2014;[24]

23.5 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 (**the Chinese IGA**), signed on 7 November 2014.[25]

24. On 14 July 2015 the DOE issued a media statement entitled "Nuclear Procurement Process Update".[26] In its statement, the DOE recorded, *inter alia*, that:

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[22] South Korean IGA, Vol 1, p 251- 260.
[23] Russian IGA, Vol 1, p 286 – 299.
[24] French IGA, Vol 1, p 218-233.
[25] Chinese IGA, Vol 1, p 307 – 312.
[26] Founding Affidavit: annexure PL27: p 317 – 323; see also the advertorial published by DOE in July 2015, Founding Affidavit: annexure PL28: p 324 - 325.

24.1 a Bid Invitation Specifications (BIS) and related evaluation criteria which would be a prerequisite for the tendering and procurement process, would **be finalised** by the end of July 2015;

24.2 the DOE was designated as the "Procuring Agency";

24.3 Government has signed IGAs with several vendor countries, including China, France, Russia, USA and South Korea, and that negotiations are underway to conclude IGAs with Canada and Japan. These IGAs "lay the foundation for cooperation, trade and exchange of nuclear technology as well as procurement". The IGAs were presented to Cabinet for discussion and approval, and have "recently been tabled in Parliament and are now ready for further debate and Parliamentary endorsement"; and

24.4 vendor parade workshops focussing on (among other things) nuclear plant technology and construction, and financing and commercial matters, were completed in March 2015.

25. On 4 August 2015 the DOE made a presentation to the Portfolio Committee on Energy in respect of its Performance Reports.[27] Importantly, the presentation indicated that "Procurement process for new nuclear build

[27] Founding Affidavit: Vol 1: annexure PL29: p 326 - 329.

programme in progress".[28]

26. On 21 December 2015, the s 34 Determination was for the first time made public, and, quite clearly in response to this application,[29] by publication in the Gazette.[30]

27. The s 34 Determination was gazetted in accordance with a Decision Memorandum from the Director-General of the DOE, which was approved on 2 December 2015, and which also authorised the sending of letters to the Minister of Public Enterprises and the Chair of Eskom about the development.[31] The letters provided copies of the 2013 s 34 Determination, and indicated that, inter alia, "[i]n order to proceed with the procurement, the Electricity Regulation Act, No.4 of 2006 requires that new generation capacity be determined in consultation with the National Energy Regulator of South Africa (NERSA)."[32]

28. There are estimates that the procuring of 9.6GW of power could cost approximately R1 trillion (but at least hundreds of billions). [33]

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[28] Founding Affidavit, annexure PL29, slide 12, Vol 1, p 327.
[29] 2015 Decision Memorandum in relation to the gazetting of Determination, paras 3.5 - 3.6, Vol 2, p 524.
[30] GN1268, *GG3954J* of 21 December 2015, Vol 2, p 479-480.
[31] 2015 Decision Memorandum, Vol 2, p 522-528.
[32] Vol 2, p 527-8.
[33] See e.g. PL19, p 205, PL29, p 23; and Replying Affidavit, para 132, Vol 5, p 1407.

III. THE RELEVANT CONSTITUTIONAL AND STATUTORY FRAMEWORK

29. Below we set out the constitutional and statutory framework that governs the lawful procurement of nuclear new generation capacity, the entering into of international agreements, and the requirements for the constitutional exercise of public power. This will inform this Court's consideration of the decisions by the Minister, NERSA, and the President.

A. Electricity Regulation Act - the framework for the procurement of all new electrical generation capacity

30. The Electricity Regulation Act 4 of 2006 (**ERA**) was promulgated, *inter alia*, to establish a national regulatory framework for the electricity supply industry.

31. Section 1 defines "generation" as meaning "the production of electricity by any means."[34]

32. With regard to establishing of new *generation* capacity, section 34(1) of the ERA provides that the Minister in consultation with NERSA may (among other things):

32.1 determine that new generation capacity is required to ensure the continued uninterrupted supply of electricity (section 34(1)(a));

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[34] Emphasis added.

32.2 determine the types of energy sources from which electricity must be generated, and the percentage thereof (section 34(1)(b));

32.3 determine that the electricity produced may only be sold to the persons or in the manner set out in such notice (section 34(1)(c));

32.4 determine that electricity thus produced must be purchased by the persons set out in such notice (section 34(1)(d)); and

32.5 require that new generation capacity must be established through a tendering procedure which is fair, equitable, transparent and cost effective (section 34(1)(e)(i)).

33. Section 34(1) therefore operates as the specific legislative framework by which any decision that new electricity generation capacity is required and that this must be procured, is taken.

34. Section 34(2) of the ERA gives the Minister such powers as may be necessary or incidental to any purpose set out in section 34(1). In other words, the Minister is empowered to exercise section 34(2) powers after having taken the relevant decision in consultation with NERSA under section 34(1). Those powers include:

34.1 undertaking such **management and development activities**, including **entering into contracts**, as may be **necessary to organise tenders and to facilitate the tendering process for the development, construction,**

commissioning and operation of <u>such new electricity generation capacity</u> (that is new generation capacity specifically determined to be required under section 34(1)(a) read with (b)) (section 34(2)(a)); and

34.2 subject to the Public Finance Management Act 1 of 1999 (PFMA), issue any guarantee, indemnity or security or enter into any other transaction that binds the State to any future financial commitment that is necessary or expedient for the development, construction, commissioning or effective operation of a public or privately owned electricity generation business (section 34(2)(e)).

35. Importantly, section 4(1)(a)(iv) of the ERA provides for NERSA to issue rules, *inter alia*, designed to implement the integrated resource plan (IRP), which is defined as "a resource plan established by the national sphere of government to give effect to national policy". However, the ERA, signally, **does not provide for the IRP to be considered, let alone considered binding, when making section 34 determinations**.

B. National Energy Regulator Act

36. The National Energy Regulator Act 40 of 2004 (NERA), created NERSA.

37. Section 4 of NERA makes clear that the functions of NERSA include that it "**must…undertake the functions set out in section 4 of the Electricity Regulation Act, 2006**." (emphasis added)

38. Section 10 provides that:

> "(1) Every decision of [NERSA] must be in writing and be-
>
> *(a)* consistent with the Constitution and all applicable laws;
>
> *(b)* in the public interest;
>
> *(c)* within the powers of [NERSA], as set out in this Act, the Electricity Act, the Gas Act and the Petroleum Pipelines Act
>
> *(d)* taken within a procedurally fair process in which affected persons have the opportunity to submit their views and present relevant facts and evidence to [NERSA];
>
> *(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 [NERSA] 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 2 of 2000).
>
> (3) Any person may institute proceedings in the High Court for the judicial review of an administrative action by [NERSA] in accordance with the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000)." (emphasis added)

39. This section applies to decisions taken by NERSA under section 34(1) of the ERA.

C. The Constitution's general requirements for lawful procurement

40. Section 217(1) provides that "[w]hen an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective."

41. The SCA has held that "[w]hen the Constitution, in section 217, requires that the procurement of goods and services by organs of State shall be transparent, its purpose is to ensure that the tender process is not abused to favour those who have influence within the institutions of the State or those whose interests the relevant officials and office bearers in organs of State wish to advance. It requires that public procurement take place in public view and not by way of back door deals, the peddling of influence or other forms of corruption."[35]

D. The Constitution's requirements for the executive and parliament to jointly enter into international agreements

42. Section 231 governs the entering into of international agreements by the executive and parliament.

43. It provides, in relevant part, that:

> "(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**." (emphasis added)

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

44. As Ngcobo CJ opined in *Glenister II*, "**[t]he 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."[36]

45. In the thematic sections we discuss, in more detail, section 231 in the context of the Russian, US and South Korean IGAs.

E. The general principles applicable to all exercises of public power

46. Before setting out the specific grounds of challenge in this matter, we situate those grounds of challenge within the proper constitutional framework regarding the exercise of public power by organs of state and the review powers of this Court.

47. **First**, in terms of the principle of legality that flows from section 1(c) of the

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[36] *Glenister v the President of the Republic of South Africa* 2011 (3) SA 347 (CC) (*Glenister II*) para 89 (emphasis added) (although Ngcobo CJ, was writing for the minority, the majority did not take issue with his setting out of the law in this respect); and see paras 179 – 181 (per Moseneke DCJ and Cameron J)).

Constitution and the rule of law, all exercises of public power, including executive action, are subject to the Constitution and review by our courts.[37] The principle of legality and the rule of law therefore require that:

47.1 organs of state can exercise only those powers and perform those functions conferred upon them by the Constitution, or by law that is consistent with the Constitution; [38]

47.2 all exercises of public power must be rational;[39]

47.3 not only the substance of the decision, but also the procedure leading to the decision, must be rational;[40] and

47.4 there are many circumstances in which procedurally rational decision-making requires interested persons to be afforded with an opportunity to

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[37] *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) (*Pharmaceutical Manufacturers*) at para 40.

[38] *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) (*Fedsure*) at paras 56-59; *President of the Republic of South Africa v SARFU* 2000 (1) SA 1 (CC) (*SARFU*) at para 148; *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) paras 49; *Mansingh v General Council of the Bar and Others* 2014 (2) SA 26 (CC) para 25.

[39] *New National Party v Government of the Republic of South Africa* 1999 (3) SA 191 (CC) at para 24*; Pharmaceutical Manufacturers* at para 85.

[40] *Minister of Home Affairs and Others v Scalabrini Centre, Cape Town and Others* 2013 (6) SA 421 (SCA) para 68; *Democratic Alliance v President of South Africa and Others* 2013 (1) SA 248 (CC) para 34; *Democratic Alliance v President of the Republic of South Africa* 2012 (1) SA 417 (SCA) para 66; *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) ("Albutt") paras 50-1; and *Minister of Justice and Constitutional Development v Chonco* 2010 (4) SA 82 (CC) ("Chonco") paras 12 and 36.

be heard.[41]

48. **Second**, in terms of the Promotion of Administrative Justice Act (PAJA), which gives effect to section 33 of the Constitution:

48.1 Administrative action, is action which is administrative in nature (the focus being the nature of the action not the identity of the functionary),[42] that has the *capacity* to affect rights;[43]

48.2 All administrative action must be lawful, reasonable and procedurally fair.

48.3 These obligations of lawfulness, reasonableness and procedural fairness are further delineated in section 6 of PAJA.

48.4 Administrative action that fails to meet the requirements of section 6 is

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[41] Ibid.

[42] See *Permanent Secretary of the Department of Education and Welfare, Eastern Cape, & another v Ed-U-College (PE) (Section 21) Inc* 2001 (2) SA (1) (CC) at para 18, where O'Regan J set out the trite position developed by the Constitutional Court:

> "In *President of the Republic of South Africa and Others v South African Rugby Football Union and* Others[42] this Court held that, in order to determine whether a particular act constitutes administrative action, the focus of the enquiry should be the nature of the power exercised, not the identity of the actor. The Court noted that senior elected members of the Executive (such as the President, Cabinet Ministers in the national sphere and members of executive councils in the provincial sphere) exercise different functions according to the Constitution. For example, they implement legislation, they develop and implement policy and they prepare and initiate legislation. At times the exercise of their functions will involve administrative action and at other times it will not. In particular, the Court held that when such a senior member of the Executive is engaged upon the implementation of legislation, that will ordinarily constitute administrative action."

[43] See *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others 2005 (6) SA 313 (SCA) ("Grey's Marine")* at paras 23-24 (relied upon and approved in *Joseph and Others v City of Johannesburg and Others* 2010 (4) SA 55 (CC), para 27, and *AllPay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer of the South African Social Security Agency and others* 2014 (1) SA 604 (CC) (*AllPay I*) para 60.

reviewable in terms of section 7.

49. **Third**, the principle of openness and accountability:

49.1 Section 1 of the Constitution sets out its founding values. These include, at section 1(d): "accountability, responsiveness and openness".

49.2 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".

49.3 Section 195 of the Constitution provides:

> **"(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:**
>
> a) A high standard of professional ethics must be promoted and maintained.
> **b) Efficient, economic and effective use of resources must be promoted.**
> c) . . .
> d) …..
> e) People's needs must be responded to, and the public must be encouraged to participate in policy-making;
> f) **Public administration must be accountable**;
> g) **Transparency must be fostered by providing the public with timely, accessible and accurate information.**" (Emphasis added.)

49.4 The sum of these provisions, among others, is to confirm what the

Constitutional Court has called "a culture of openness and democracy".[44]

49.5 As the Constitutional Court has held, "one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency must be fostered by providing the public with timely, accessible and accurate information."[45]

49.6 Moreover, this obligation requires organs of state when taking statutory decision to consider "all relevant factors".[46]

49.7 Lastly, our courts have confirmed that ours is not merely a representative democracy, but also a participatory democracy.[47]

50. It is within this constitutionally-mandated understanding of open, responsive and accountable government that the Government respondents' and NERSA's conduct must be evaluated. The applicants submit that the Government respondents and NERSA have acted in a manner which is secretive, obstructive and prejudicial to the rights of the applicants and the public, and their decision-making is replete with failures to consider relevant factors.

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[44] *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* H 2001 (4) SA 501 (SCA) para 7; *Minister of Education v Harris* 2001 (4) SA 1297 (CC) paras 9 – 11.

[45] *Brümmer v Minister for Social Development and Others* 2009 (6) SA 323 (CC) para 63.

[46] *SANRAL v City of Cape Town* (66/2016) [2016] ZASCA 122 (22 September 2016) para 101.

[47] See *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) at paras 111 and 227 (Sachs J). See also Chaskalson CJ's account of the principle of open, transparent and responsive government in response to a challenge to the dispensing fee by pharmacies at paras 110ff in *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* 2006 (2) SA 311 (CC), and Sachs J at paras 625 and 626.

51. **Fourth**, as a function of the separation of powers, government policy, not being a legislative instrument, cannot override, amend or be in conflict with laws, and policy determinations do not create binding obligations of law.[48]

52. Yet, in the Government respondents' answering affidavit they either erroneously misunderstand, or sought to avoid, a number of key principles in relation to the role of policy, and have made largely irrelevant references to various and diverse government policy documents over more than 20 years without ever explaining how those documents are a justification for their impugned decisions or an excuse for flouting binding constitutional prescripts of procurement law, of administrative justice, of openness and transparency, and of the rule of law and the principle of legality.

53. Therefore, it is necessary to set out the following key principles established by the case law:

53.1 Policy determinations cannot override, amend or be in conflict with laws (including subordinate legislation), and they must be consistent with the operative legislative framework;[49]

53.2 Policies cannot supplant the statutory provisions which are the sole source

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[48] *MEC for Education, Gauteng Province, and Others v Governing Body, Rivonia Primary School and Others 2013 (6) SA 582 (CC)* in paras 54 – 56.

[49] *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* 2001 (4) SA 501 (SCA) para 7; *Minister of Education v Harris* 2001 (4) SA 1297 (CC) in paras 9 – 11.

of the ambit of the power or any procedure related to it;[50]

53.3 Policies cannot constrain the exercise of a discretion or detract from a duty conferred by a statutory provision.[51]

53.4 Decision makers may adopt their own policies or guidelines that are compatible with the enabling legislation that serve as a guide to decision-making, but these policies may not bind the decision maker thus fettering its discretion, nor may the decision maker apply them rigidly or inflexibly.[52]

F. Constitutionally compliant interpretation of the relevant legislation

54. As an incidence of the supremacy of the Constitution, it is trite that when there are two conflicting but reasonable interpretations of a particular provision of a statute[53] or of the Constitution,[54] the interpretation which best gives effect to the

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[50] *Computer Investors Group Inc and Another v Minister of Finance* C 1979 (1) SA 879 (T) at 898C – E; *Foodcorp (Pty) Ltd v Deputy Director-General, Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management, and Others* 2006 (2) SA 191 (SCA)) para 10.

[51] *Comair Ltd v Minister for Public Enterprises & others* 2016 (1) SA 1 (GP) para 44.3.

[52] *MEC for Education, Gauteng Province, and Others v Governing Body, Rivonia Primary School and Others* 2013 (6) SA 582 (CC) in paras 54 – 56; *National Lotteries Board v SA Education* 2012 (4) SA 504 (SCA), para 9; *Kemp No v Van Wyk* 2005 (6) SA 519 (SCA) para 1.

[53] In the context of statutory interpretation, see, as examples, *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) at para 91; *CUSA v Tao Ying Metal Industries and Others* 2009 (2) SA 204 (CC) at para 103; *True Motives 84 (Pty) Ltd v Mahdi and Another* 2009 (4) SA 153 (SCA) at para 65; *Bertie van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others* 2010 (2) SA 181 (CC) at paras 20-23.

[54] *Minister of Defence v Potsane; Legal Soldier (Pty) Ltd* 2002 (1) SA 1 (CC) at paras 26-42; *Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional*

values under the Constitution must be preferred. As stated by Ngcobo J in *Matatiele Municipality & Others v President of the Republic of South Africa & Others*:[55]

> "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**.
> The process of constitutional interpretation must therefore be context-sensitive. In construing the provisions of the Constitution it is not sufficient to focus only on the ordinary or textual meaning of the phrase. The proper approach to constitutional interpretation involves a combination of textual approach and structural approach. **Any construction of a provision in a constitution must be consistent with the structure or scheme of the Constitution**."[56]

55. The Constitutional Court has held, that, "[t]he Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values."[57]

56. Therefore, it is important, when interpreting the ERA and NERA to read them in such a way, as best to give effect, *inter alia*, to the principle of open and accountable government, which includes the requirement in section 217, for procurement to occur in terms of a system, that is not only fair and equitable, but

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Development and Another; Executive Council, KwaZulu-Natal v President of the Republic of South Africa and Others 2000 (1) SA 661 (CC) at paras 44-45 and 48.

[55] 2007 (6) SA 477 (CC).

[56] At paras 36-37 (internal citations omitted), emphasis added.

[57] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) ("*Hyundai*") at para 22.

is also competitive and cost effective, and – fundamentally – transparent.

IV. THE UNLAWFUL S 34 DETERMINATION

57. The relevant facts in relation to the s 34 Determination are not disputed, and can be summarised as follows:

57.1 The Minister signed the Determination on 11 November 2013;[58]

57.2 NERSA, after its board meeting to consider the Determination, signed in concurrence on 17 December 2013;[59]

57.3 The Determination expressly determined, *inter alia*, that:

57.3.1 "energy generation capacity needs to be procured…. accordingly, **9 600 megawatts (MW) should be procured to be generated from nuclear energy ('nuclear programme')**";

57.3.2 "**the procurement agency in respect of the nuclear programme will be the Department of Energy**";

57.3.3 "the role of the procurement agency **will be to conduct the procurement process**, **including preparing any requests for qualification, requests for proposals** and/or all related and associated documentation, negotiating the power purchase agreements, facilitating the conclusion of the other project agreements, and facilitating the satisfaction of any conditions precedent to financial close which are within its control";

57.3.4 "electricity produced from the new generation capacity ("the

[58] Supplementary Affidavit, annexure PL45.4, Vol 2, p 499-500.

[59] Supplementary Affidavit, annexure PL45.4, Vol 2, p 499-500.

electricity"), shall be procured through tendering procedures which are fair, equitable, transparent, competitive and cost-effective";

57.3.5 "**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)";

57.3.6 "the electricity must be purchased from the special purpose vehicle(s) set up for the purpose of developing the nuclear programme".[60]

57.4 It is to be stressed that these facts – which are now common cause – would apparently not have come to light had it not been for this application, it being recalled that the Minister had kept these developments from the public (and has never explained why the facts were so hidden). In the absence of any attempted explanation from the Minister, the only reasonable conclusion to draw is that the secrecy was to avoid public scrutiny. Tellingly, neither NERSA nor the Minister sought to consult with, or otherwise invite comment from, any interested and effected parties, nor the public, prior to signing the s 34 Determination in 2013 - the s 34 Determination was made away from the light without any public participation of any kind.[61]

57.5 The Determination (unchanged) was published by Notice in the Gazette on 21 December 2015, which the Minister decided to Gazette but only after this application had been launched and on the advice of the DG of the

[60] 2013 s 34 Determination, Vol 2, p 499-500.

[61] Supplementary Affidavit para 65, Vol 2, p 398-9.

DOE that this was necessary.[62]

57.6 It is clear from the Decision Memorandum, wherein the Minister approved the publication in the Gazette, that at least part of the reason for finally publishing the Determination in the Gazette and simultaneously including it in the record, was on the advice of the Government respondents' counsel, in direct response to this litigation and in an attempt to weaken the applicants' case.[63]

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

59. We will demonstrate why this is so, thematically below.

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[62] 2015 Decision Memorandum, Vol 2, p 522-528.

[63] 2015 Decision Memorandum, provides at paras 3.5 - 3.6 (Vol 2, p 524): "**The publishing of the determination has become urgent as the Department is facing litigation by Earthlife Africa Johannesburg and the Southern African Faith Communities Environment Institute.** In the Notice of Motion... the applicants claim that the Minister has not published a Section 34 determination nor conducted a public participation process and therefore any decisions to facilitate, organize, commence or proceed with the procurement of nuclear new generation capacity is unlawful. During the meeting of 27 November 2015 to brief the legal counsel defending the Department... [t]he legal counsel requested to include the determination when filing the record for the court papers. The legal councel (sic) advised that the inclusion of the determination in the answering affidavit will weaken the case for the applicant as it will show that their application is based on false assumption (sic)."

A. Procedural unfairness and irrationality – No public participation or consultation of any kind

60. A determination that South Africa requires significant new nuclear energy generation and to procure that capacity, and empowering the DOE as the procuring agency, is a decision which materially and adversely affects the rights of the public, and is administrative in nature.

61. The decision to procure 9.6GW of nuclear new generation capacity has profound consequences for the South African public. The decision that 9.6GW of nuclear new generation capacity is required and should be procured, effectively locks the country into a very substantial spending on a particular type and quantity of new infrastructure.

62. The determination raises issues in relation to:

62.1 costs (the burden of paying for a procurement that could cost approximately R1 trillion will fall to the public, through taxes and increased electric charges);

62.2 allocation of resources, since so significant an infrastructure commitment may lead to a reduction of spending on other social goods (education, social assistance, health services, and housing) that may necessarily be crowded out if government is forced to use the National Revenue Fund to pay for nuclear power);

62.3 the environment, thus directly implicating *inter alia* section 24 of the Constitution (the right to a healthy environment).[64]

63. These are issues that the applicants, together with the public, would have been well placed to address, and had a right to give their input on.

64. Given the exceptional nature of the power conferred on the Minister and NERSA by section 34, it is clear that when that power is used to determine that substantial new nuclear energy generation capacity must be procured, such determination may only be made after a full public participation process.

65. Therefore, in taking such administrative decision, a procedurally fair process had to be complied with.

66. Section 3 of PAJA provides that administrative action which materially and adversely affects the rights or legitimate expectation of any person must be procedurally fair. Section 4 of PAJA provides more particularly that in cases where administrative action materially and adversely affects the rights of the public, an administrator, in order to give effect to the right to procedurally fair administrative action, must decide whether:

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[64] Section 24 of the Constitution provides that "Everyone has the right-

(a) to an environment that is not harmful to their health or well-being; and

(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that- (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."

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

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

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

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

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

67. Moreover,

67.1 in terms of section 10(1)(d) of the National Energy Regulator Act ("NERA"), NERSA's decision to concur in the s 34 Determination had to "be taken with a procedurally fair process in which affected persons have the opportunity to submit their views and present relevant facts and evidence to [NERSA]".

67.2 This is in addition to the obligation under sections 3 and 4 of PAJA.

67.3 Given the nature of the decision (as described above), a rational decision making process,[65] would have required public input prior to determining that a certain amount of nuclear new generation capacity was required and should be procured.

68. Yet, in violation of sections 3 and 4 of PAJA, section 10(1)(d) of NERA, and, in

[65] *Minister of Home Affairs and Others v Scalabrini Centre, Cape Town and Others* 2013 (6) SA 421 (SCA) para 68.

any event, the requirements for a rational decision making process (in terms of the principle of legality), neither the Minister nor NERSA engaged in any public participation process, or otherwise sought to solicit and consider the views of anyone.

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

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

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

B. The unlawfulness arising from the two-year delay in gazetting the 2013 s 34 Determine decision

70. The 2013 s 34 Determination was not communicated to the public for a period of two years. In may never have been so communicated had the applicants' case not been launched and the record not been extracted from the government, as it had to be in this case.

71. It should also be emphasised that, prior to instituting this application, the Minister and NERSA were directly and pertinently asked by the applicants whether there had been any section 34 determination in relation to nuclear power, yet no response was given.[66]

72. This flagrant failure to make the Determination public leads to various issues.

73. **First**, the gazetting in 2015, violated the terms of the Minister's own decision.

74. The Director-General: Energy prepared and submitted a decision memorandum to the Minister on 8 November 2013 ("the Decision Memorandum") in relation to the 2013 s 34 Determination. This was approved by the Minister and was the basis for the Minister's signature of the Determination.[67] The Decision Memorandum makes clear that what was being approved was the Determination to be promulgated in the gazette.

75. In particular, the following recommendation was made by the Minister:

> "7.1 **approves the s34 determination in Annexure A**[68] for promulgation in the government gazette, ***so that*** **the Nuclear Procurement process can be launched**."[69]

76. Recommendation 7.1 forms part of recommendation 7 (para 7.2, went on to seek

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[66] Founding Affidavit paras 120.4, Vol 1, p 60-2, and paras 126-128, Vol 1, p 65-66, and paras 130-135, Vol 1, p 66-8.

[67] Decision Memorandum (8 November 2013), Vol 2, p 483-488.

[68] Annexure A to the recommendation is the nuclear s 34 determination substantially in the format belatedly published by notice in the *Gazette* by the Minister in December 2015.

[69] Decision Memorandum, Vol 2: pg 487, para 7.1, emphasis added.

approval to seek the consent of NERSA for the Determination). On 11 November 2013 the Minister signed off below this recommendation, indicating:

"Recommendation 7 Approved"[70]

77. The recommendation as approved by the Minister clearly and explicitly required that the 2013 34 Determination be published in the *Gazette* and the purpose was so that the nuclear procurement process could publicly commence. There was no suggestion in the Decision Memorandum that the Determination could be approved, and then not gazetted. This is of course not surprising, given the constitutional requirement for open and accountable government.

78. It follows that for this decision to be reasonable, rational and lawful, the 2013 s 34 Determination should have been published in the *Gazette* within a reasonable period of time, after NERSA had given its concurrence, and, given the legal purpose for the s 34 Determination, prior to the commencement of any procurement process.

79. **Second**, decisions require public notification in order for them to have final legal effect (for instance, in this case, so as to provide a basis for nuclear procurement). [71] This is in accordance with the fundamental constitutional principle of open, accountable, and transparent government. While the ERA

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[70] Decision Memorandum, Vol 2: p 487.

[71] See *President of the Republic of South Africa v SARFU* 2000 (1) SA 1 (CC) ("*SARFU"*) para 44.

does not expressly require that section 34 determinations be gazetted, this is one of the recognised means for giving public notice of a decision.

80. As the Constitutional Court held in relation to the President's appointment of a commission of inquiry, "[i]n 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**."[72]

81. This is consistent with the fact, as discussed above, that the Minister took the view that the 2013 s 34 Determination, which had not been made public, should be gazetted prior to the procurement RFP being released (although, as submitted below, no procurement steps, including those taken prior to the issuing of an RFP, should have commenced until there had been a proper and public gazetting of the determination).

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[72] *SARFU*) para 44, emphasis added.

82. Moreover, it is clear that the Minister elected to using gazetting, to make the 2013 s 34 Determination public and final. Yet this was only done in December 2015.

83. The Director-General's Decision Memorandum to the Minister dated 1 December 2015, seeking approval for the belated gazetting, also acknowledges that the nuclear s 34 determination needed to be published in the *Gazette:*

> Although the determination process was completed in 2014 [*this date may be a reference to the fact that NERSA's letter to the Minister confirming its December 2013 concurrence was only received on 6 January 2014*] with NERSA and signed by the previous Minister of Energy, Ben Martins, the determination was not gazetted due to [a] change in the leadership in the Ministry and to further conduct some work prior to gazetting. As a result, there has been progress in the nuclear build work done by the Department and relevant stakeholders, it is therefore deemed appropriate to publish it. The determination needs to be gazetted…".[73]

84. There is no indication what this work to be conducted prior to gazetting was – and no evidence thereof in the record. However, this at least indicates that the Minister took the view that the s 34 Determination would not have legal effect (and thus provide the basis for the nuclear procurement), until promulgated in the gazette (otherwise, it would make no sense to suggest that gazetting was intentionally delayed so further work could be undertaken). Moreover, this is also emphasised by the fact that that Memorandum went on to note that "[t]he publishing of the determination has become urgent" (para 3.5).[74]

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[73] Decision Memorandum 1 December 2015, Vol 2, p 528, para 3.4.

[74] 2015 Decision Memorandum, para 3.5, Vol 2, p 524.

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

86. The 2015 Decision Memorandum makes clear that the Minister and the DOE accepted that for the s 34 Determination to have legal effect, and so that it could be relied upon, it needed to be gazetted.[75]

87. **Third**, there was a failure to consult with, and obtain the concurrence of NERSA prior to belatedly deciding to only make the Determination public and final, two years later.

88. Given the passage of time, and the change in circumstances (for instance, even the IRP indicated that it should be updated every two years), NERSA's concurrence in 2013 could obviously not constitute a valid concurrence for the

[75] This is also made clear from the 26 December 2015 Media Statement issued by DOE, titled 'Progress with the New Nuclear Build Programme'. Vol 2, p 560-1. In particular, in the Media Statements the following, *inter alia*, is said "In order to proceed with the Request for Proposals as agreed by Cabinet on 9 December 2015 it was necessary to ensure that the National Electricity Regulator of South Africa (NERSA) has been consulted on the appropriate energy mix and particularly the intention to procure additional nuclear capacity. This was done in 2013 and agreed by NERSA and the Minister at the time, Minister Ben Martins, MP, and a determination to this effect in terms of the Electricity Regulation Act of 2006 was signed. However the actual gazetting of this determination was withheld until such *stage* that government had agreed to proceed with the Request for Proposals. Once this agreement was reached, on 9 December 2015, the present Minister of Energy, Ms Tina Joemat-Pettersson, consented that the determination signed in 2013 could be released, particularly as nothing had changed in the Integrated Resource Plan for Energy in the intervening period.

The Department accepts that this should have been made clear when the determination was gazetted on 21 December 2015."

gazetting in 2015.[76]

89. Although NERSA had been willing to concur in the decision two years earlier, the Minister could not rationally or reasonably take such concurrence as an ongoing concurrence given the significant delay. Certainly, the Minister had clear reason to believe from NERSA's original concurrence (which expressly states that the IRP was even then out of date) that it would not have necessarily concurred in the s 34 Determination in its unaltered form in 2015. In those two years, there may well have been material reasons for NERSA to question the amount of nuclear new generation capacity required (indeed, even in 2013, it had substantial concerns in this regard, as discussed below).

90. In any event, whether NERSA would or would not have concurred is legally irrelevant. The issue is simply that the Minister neither sought nor received NERSA's concurrence for the gazetting of the Determination, unchanged, two years later.

91. **Fourth**, even though the Minister purported to consider the issue of whether to gazette the 2013 s 34 Determination, she failed to take into account that relevant and material changes had taken place in the energy sector and economy during the intervening period. That such changes had occurred was recognised by the DOE in its draft IRP2010 update document published on its website on 21

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[76] See by analogy Fourie J's decision in *Sea Front For All and Another v The MEC: Environmental and Development Planning, Western Cape Provincial Government and Others* 2011 (3) SA 55 (WCC).

November 2013, ten days after the then-Minister had signed the nuclear s 34 Determination, and inviting public comment by 7 February 2014.[77] These changed circumstances and uncertainties were relevant considerations that should have served as clear warning bells to the Minister, and she should have applied her mind to these changed circumstances before putting the 2013 s 34 Determination into effect by publishing it in the *Gazette.* This should have been considered in determining whether 9.6GW of nuclear power was still required.

92. In the circumstances, the Minister failed to take into consideration relevant and material changes in the energy sector and economy since the nuclear s34 determination was signed in 2013.[78]

93. In conclusion and summary, the failure to gazette (or otherwise make public) the s34 Determination for two years, and its final gazetting in December 2015, is unconstitutional for the following reasons:

93.1 The belated gazetting violated the terms of the Minister's decision as record in the 2013 Decision Memorandum, and therefore was irrational and unlawful;

93.2 The failure to make the determination public by publication in the *Gazette* for two years was in violation of the requirements of open, transparent and

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[77] Founding Affidavit, paras 45-47, Vol 1, p 26-28; Supplementary Founding Affidavit para 125, Vol 2, pg 426.

[78] *Sea Front For All and Another v MEC, Environmental and Development Planning, Western Cape and Others* 2011 (3) SA 55 (WCC) para 73.

accountable government (in terms of section 1 and 41 of the Constitution), and the need for a transparent procurement system (as required by section 217 of the Constitution), and the requirement in section 10(2) of NERA that all decisions of NERSA (which would include its concurrence) be made available to the public;

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

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

94. Furthermore, as indicated above, since until the s 34 Determination was gazetted, it was not final, any procurement steps taken by the DOE, including the holding of vendor parades and the appointing of anybody to prepare an RFP, was unlawful.

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

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

96. We demonstrate why this is so by looking first at the Minister's decision, and then at NERSA's concurrence.

1. The Minister's unlawful decision

97. In the Decision Memorandum from the Director-General to the Minister dated 8 November 2013 in relation to the taking of the 2013 s 34 Determination, the "Background and Motivation" section states that:

> "The Department of Energy ("DoE") intends to prepare documentation for the procurement of approximately 9600MW of power from nuclear energy, which is in accordance with the capacity allocated under the Integrated Resource Plan for Electricity 2010-2030 (published as GN 400 of 06 May 2011 in Government Gazette no 34263) ("IRP 2010-2030")."[79]

98. The document does not set out any other relevant considerations relating to the procurement of nuclear energy, including (but not limited to) issues such as affordability of nuclear power, potential negative impacts on electricity prices

[79] Decision Memorandum, Vol 2, p 485, para 3.1, emphasis added.

and potential socio-economic and environmental impacts.

99. The Decision Memorandum, and the Minister's subsequent decision to sign the nuclear s 34 determination three days later, shows that there was a failure to appreciate that the IRP2010 was not binding but was merely one of the considerations that could have been taken into account.

100. The IRP2010 is a policy document that is not legislation and cannot bind the discretionary power vested in the Minister by statute and the Constitution.[80]

101. Indeed, nothing in the ERA requires a section 34 determination to follow the IRP.

102. The blind, unconsidered, reliance on the IRP2010 was also irrational since:

102.1 When the Minister signed off on the s 34 Determination in November 2013, the Minister's own department had already embarked on a process to update the IRP2010, with a IRP2010 update document published on the DOE's website on 21 November 2013, ten days after the Minister had signed the nuclear s 34 Determination[81] (inviting public comment by 7 February 2014, an invitation that turns out to have been cynical in the extreme in light of the Minister's secret determination ten days earlier).

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[80] See the authorities considered above in para 53.

[81] Supplementary Affidavit para 105, Vol 1, p 418.

102.2 The draft IRP2010 update document also records that there had been a number of developments in the energy sector in South and Southern Africa since the IRP2010 was promulgated, that the electricity demand outlook has changed markedly from that expected in 2010, and that "all these uncertainties suggest that an alternative to a fixed capacity plan as espoused in the IRP 2010 is a more flexible approach taking into account the different outcomes based on changing assumptions and scenarios and looking at the determinants required in making key investment decisions."[82]

102.3 It is acknowledged in the IRP2010 itself that it was a serious error not to conclude or release a socio-economic impact study, that further research was required on the full costs relating to specific technologies (including nuclear) around the costs of decommissioning and managing spent nuclear fuel, and that if the costs of the nuclear build turn out to be higher than assumed, this could increase the expected price of electricity.[83]

102.4 Despite the requirement set out in the IRP2010 that further research as to the full cost of nuclear power was required,[84] the IRP2010 Update records that this has been difficult to achieve, and yet this costing was highly relevant, since if the nuclear capital costs was to be over a certain level this

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[82] Founding Affidavit para 45, Vol 1, p 27.
[83] IRP2010 paragraph 7.11 and paragraph 6.9.2.
[84] IRP2010 para 7.11.

would militate in favour of the adoption of an alternative energy generation source. In particular the IRP2010 Update records that "[a] persistent and unresolved uncertainty surrounds nuclear capital costs"[85] and goes on to state that "[i]f it is clear that there is no commitment to nuclear capital cost below $6500/KW **then procurement should be abandoned as the additional cost would suggest an alternative technology instead**."[86]

102.5 What is clear is that none of these material changes and considerations, so clearly reflected in the draft IRP2010 update document, were taken into account by the Minister, even though she was aware of them,[87] when making the Determination. The Minister irrationally ignored them.

103. It is clear that the Minister unlawfully, unreasonably and irrationally placed unqualified reliance on the IRP2010 (a policy), and to make matters worse the Minister did so when the Minister knew that the IRP2010 update process was underway (with public comment still awaited on the draft prepared by the DOE), which already indicated that different conclusions had been reach in the

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[85]IRP2010 Update para 3.3 (available at http://www.doe-irp.co.za/content/IRP2010_updatea.pdf); Supplementary Affidavit para 127, Vol 2, p 427-8.

[86] IRP2010 Update para 12.5.2 (emphasis added); Supplementary Affidavit para 127, Vol 2, p 428.

[87] At the time of signing the 2013 s 34 Determination, the Minister of course knew of the draft IRP2010 update, it being an update process initiated by the Minister. Lest there be any doubt, the NERSA's 'Extract of the Minutes of the Energy Regulator Meeting No. 96 of 26 November 2013' in which it decided to concur in the Determination indicates at paragraph 5.2(b) that '[t]he Minister has however since informed NERSA in a letter dated 22 November 2013 that an updated IRP has been published on the Department of Energy's website for comment'. See Extracts of the Minutes (Annexure to NERSA's letter to the Minister (PL49)) Vol 2, p 557, para 5.2(b).

subsequent two years (since IRP2010 was finalised) and in particular which had indicated a change in approach to nuclear procurement. As a result, the Minister failed to take relevant considerations recorded in the draft IRP2010 update into account, and the Minister's decision was unreasonable and irrational.

104. In a decision of this Court, in an analogous challenge to a Record of Decision granting environmental authorisation for the proposed redevelopment of a site, the Court held that the decision maker's reliance on outdated information, and failing to seek more current information, was a ground to set aside the Record of Decision.[88] In particular, the Court held that:

> "[73] The material change of circumstances in the period 2002 – 2007, referred to by the experts of the parties, ought, in my view, to have been taken into account by the MEC in her decision-making process. The fact of the matter is that, to the extent that the MEC purported to consider socioeconomic changes after September 2004, this was on the basis of outdated and erroneous information. It did not reflect the socio-economic changes which, it is common cause, had taken place. The integrity of the environmental impact assessment process will be seriously undermined if decision-makers are to base their decisions on substantially outdated information. In fact, I find it inexplicable that the MEC decided to grant the application, while information on which she J had to base her decision was some four and a half years out of date. **In my view, this is a case where the information in the final scoping report ought to have been augmented by a comprehensive current environmental impact assessment. In failing to call for such an updated assessment, the MEC took her decision on the basis of irrelevant considerations (information which was out of date and no longer correct), and failed to have regard to relevant considerations (the current situation in Sea Point)**."[89]

105. In conclusion, the Minister's ERA nuclear requirement decision in the 2013 s 34 Determination violated the requirements of PAJA and the principle of legality

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[88] *Sea Front For All and Another v MEC, Environmental and Development Planning, Western Cape and Others* 2011 (3) SA 55 (WCC).

[89] *Sea Front For All* para 73, emphasis added.

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

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

2. NERSA's unlawful decision

106. NERSA took the decision to concur at its meeting of 26 November 2013.[90] Yet the minutes of that meeting reveal that NERSA had a number of material concerns, which should have, but did not prevent it from giving its concurrence. The minutes appear to indicate that it erroneously viewed its role as purely a rubber stamp for the decision made by the Minister.

107. The Minutes reveal the following material irregularities in the concurrence decision:

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

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[90] Extracts of the Minutes (Annexure to NERSA's letter to the Minister (PL49)) Vol 2, p 557, para 5.2(b).

"a. Overstated forecasts
In October 2012, the Energy Regulator approved a determination from the Minister for renewable energy. Stated in the document was the fact that all the forecasts were overstated. The Energy Regulator approved despite having noted this because the relevant section requiring concurrence is section 34 which has specific regard to such matters as the new generation capacity, who the suppliers will be and the types of energy sources etc."[91]

107.2 The NERSA Report (which served before NERSA at its meeting of 26 November 2013)[92] elaborates on the overstated forecasts, indicating that:

"(c) However, the forecasts of the IRP 2010 – 2030 appear to be overstated when compared with peak demand. For example, the peak demand in 2013 is about 36 000 MW as opposed to the peak demand of IRP2010 of 42 416 MW in 2013, which is more than 6000 MW below the IRP2010 forecast. Currently the IRP2010 is being revised with the main focus being the reduction of demand forecast

(d) the significant reduction in the revised demand forecast of the CSIR will require the deferment of the commissioning dates of the New build options of the IRP2010 by about at least 5 years given the coal and renewable energy programs currently under construction".[93]

107.3 It is clear from the above that the NERSA's Report on concurrence in relation to the 2013 s 34 Determination raised the significant problem of overstated electricity demand forecasts in the IRP2010 (which had formed the basis for the Minister's determination).[94]

107.4 NERSA gave its approval despite having noted that the electricity demand

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[91] Extract of Minutes, Vol 2, p 496.

[92] Report of the Chairperson of the Electricity Subcommittee - New Generation Capacity: Determination on Nuclear Programme by Minister of Energy, Vol 2, p 548-550.

[93] Vol 2, p 549.

[94] The Report also underscores that there was no pressing need for NERSA to make a decision on concurrence on the 2013 s 34 Determination at the time (the NERSA Report indicates that the commissioning dates of new build options could be deferred by at least five years).

forecasts in the IRP2010 were overstated by as much as 6000 MW (i.e. 6 GW) in 2013.

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

107.6 This appears to suggest (and NERSA has not sought to further explain its minutes, or dispute that it acted irrationally) that NERSA thought it was required to give its approval by section 34, notwithstanding its serious concerns. Yet, this certainly is incorrect. Overstated electricity demand forecasts are clearly a critical consideration when deciding whether or not to concur with a s 34 Determination for 9600MW of new electricity generation capacity deriving from nuclear energy. Therefore, by simply making reference to the empowering statutory provisions demonstrates that NERSA failed to apply its mind properly to this highly relevant consideration, or worse, as appears clear from its own minutes, simply viewed its concurrence as a statutorily-required rubber stamp (i.e. that it was required to give its concurrence to the Minister's determination, regardless of its concerns).

107.7 **Second**, in relation to the issue of an outdated IRP, the Minutes indicate the following:

> "b. Outdated Integrated resource plan (IRP)
> The matter of the IRP being outdated stood true when the previous decision was taken (27 September 2012). NERSA amongst other things needs to be consistent as the Regulator.
> The Minister has however since informed NERSA in a letter dated 22 November 2013 that an updated IRP has been published on the Department of Energy's website for comment. NERSA will be commenting on the updated IRP."[95]

107.8 This paragraph shows that NERSA was aware that the IRP2010 was out of date at the time when it made its decision on concurrence. However, NERSA side-stepped this highly relevant consideration by stating that this "stood true" when NERSA took its 27 September 2012 decision (this decision was its concurrence on the renewable energy determination),[96] and that it needed to be 'consistent'. But then, incredibly, it chose deliberately to act inconsistently. It did so by fettering its own discretion regarding the 2013 s 34 Determination concurrence. If in 2012 NERSA was of the view (correctly) that the IRP2010 was outdated, it would of course have been even more outdated a year later in 2013, which would only have heightened the irregularity in failing to take this into account.

107.9 NERSA also apparently seeks to justify its decision by referring to the IRP update process that the Minister had informed it about, and states that it

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[95] Extract of Minutes, para 5.2, Vol 2, p 496.

[96] Supplementary Founding Affidavit, para 137.4.9, Vol 2, p 431.

would comment on the updated IRP. This attempted rationalisation of the decision is itself irrational and unreasonable, since any concerns NERSA may have expressed in the IRP update process, would be legally irrelevant, at least in relation to nuclear procurement. That is because its concurrence would effectively give the necessary consent for the statutory s 34 Determination (which, as indeed occurred, would be used by the Minister to commence procurement of the 9600 MW of nuclear new generation capacity).

107.10 Thus, **NERSA knowingly provided its consent prematurely**.

107.11 By pre-empting the draft update process (which in any event never saw the light of day) notwithstanding its acknowledgment that the IRP2010 was out of date, NERSA took irrelevant considerations into account (the outdated IRP2010) and failed to take highly relevant considerations into account (as documented in the draft IRP2010 update). NERSA's decision was also unreasonable and irrational in the circumstances.

107.12 **Third**, in relation to the issue of levelised costs of electricity, the Minutes indicate the following:

"d. Levelised costs of electricity

With regard to the costs on the nuclear programme being double, the Energy Regulator noted the same issue in the previous determination on

renewable energy. However, it should be noted that these issues have been raised with the Minister.[97]

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

> "(e) The overnight capital cost for the nuclear power plant are estimated at R26575 in the IRP 2010 – 2030. The current estimates of overnight capital costs based on the Areva/Mitsubishi nuclear plant construction in Turkey are about $4600/kW (R45 830/kW).
>
> (f) The Levelised Cost of Electricity (LCOE) projected from overnight costs of R45 830/kW is R0.95/KWh (in 2013 ZAR).
>
> (g) The procurement programme for nuclear energy may have no impact on MYPD3[98] but will affect the MYPD4.[99]

107.14 The above information read together shows that NERSA had information before it indicating that the overnight capital costs of a nuclear power plant [100] were already almost 'double' the overnight capital costs as estimated in the original IRP2010, and that this would have a knock-on effect on the levelised cost of electricity[101] and, inevitably, on the price of electricity as determined by NERSA.

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[97] Extract of Minutes, para 5.2, Vol 2, p 496-7.

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

[99] NERSA Report, Vol 2, p 549.

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

[101] The IRP2010 states that the "levelised cost of energy" refers to "the discounted total cost of a technology option or project over its economic life, divided by the total discounted output from the technology or project over the same period, i.e. the levelised cost of energy provides an indication of the discounted average cost relating to a technology option or project". See Glossary of terms on pg 5 of the gazetted IRP2010.

107.15 NERSA seeks to justify its decision by again referring to a prior determination it made relating to renewable energy, while also attempting to rationalize the decision by stating that "these issues have been raised with the Minister". NERSA never suggests (in any of the documents in the record) that the Minister gave any explanation, or if such explanation was given, how it was regarded as acceptable by NERSA. The only reasonable inference (as suggested in the applicants' supplementary founding affidavit), that NERSA acted supinely by abdicating its responsibility to the Minister, is overwhelming.[102]

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

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

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

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[102] Supplementary Founding Affidavit para 137.4.15, Vol 2, p 440.

108. In conclusion, for the reasons set out above, NERSA's decision to concur in the ERA nuclear requirement decision in the 2013 s 34 Determination violated the requirements of PAJA and the principle of legality (which requires decisions to be substantively and procedurally rational and taken in good faith), on one, more or all of these grounds:

108.1 NERSA's decision was materially influenced by an error of law – it is therefore reviewable in terms of section 6(2)(d) of PAJA and/or the principle of legality;

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

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

108.4 NERSA's decision was unreasonable (and therefore reviewable in terms of section 6(2)(f)(h) of PAJA) and irrational, and therefore reviewable in terms of section 6(2)(f)(ii) of PAJA and the principle of legality on the basis of irrationality.

D. No specific procedure for the procurement of nuclear new build capacity in violation of s 34 of the ERA, read with s 217 of the Constitution

109. Section 34(1)(e) of the ERA provides as follows:

> "(1) The Minister may, in consultation with [NERSA]-
> …..
> (e) require that new generation capacity must-
> (i) be established through a tendering procedure which is fair, equitable, transparent, competitive and cost-effective;" (emphasis added)

110. This section, must be interpreted, in such a way as to give best effect to the Constitution's fundamental values, which include open and accountable government. Open and accountable government when it comes to procurement requires, as provided for in section 217 of the Constitution, that all goods and services must be procured in terms of a system that is fair, equitable, **transparent**, competitive and cost-effective.

111. The term "system" within section 217 and "procedure" in section 34(1)(e) clearly have, given the almost identical context, the same or similar meaning, and nothing seems to turn on the different words used. Indeed, the Shorter Oxford English Dictionary defines "procedure" inter alia, to be "a system for proceeding", and "system" as "an orderly or regular procedure or method". And the Chambers Thesaurus (5th ed), lists "procedure" as a synonym for "system".

112. It is submitted that properly interpreted section 34(1)(e) requires that if there has been a determination that new generation capacity is required under sections

34(1)(a) and (b) and the source and amount thereof determined, then under section 34(1)(e) the Minister and NERSA must determine the fair, equitable, transparent, competitive and cost-effective procedure that must be used to procure that new generation capacity.

113. Since all procurement must be in terms of a procedure that is fair, equitable, transparent, competitive and cost-effective (otherwise it would violate section 217), for section 34(1)(e) not to be rendered superfluous or its wording meaningless, it is clear that what is required is for the Minister and NERSA to make a determination of the procedure to be used for the procurement of the new generation capacity.

114. This requires that such a procedure be specifically determined by the Minister and NERSA and also serves the important purpose of ensuring that the procedure (or system) be made public in order that the procurement can transparently occur in accordance with the procedure that has been made public.

115. The terms of section 34(1)(e) make clear that it is the Minister and NERSA that must determine the procurement procedure, and not Cabinet. This confirms that any proposed "approval" of a procurement system by Cabinet, as suggested in DOE press statements, referred to by the Government respondents, [103] is manifestly insufficient for the purposes of compliance with the ERA.

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[103] Answering Affidavit para 63.4, Vol 3, p 761, and ZM31, Vol 4, p 1312.

116. Importantly, it is not enough (either in terms of section 34(1)(e) or section 217) that the procurement can be claimed retrospectively to have been fair, equitable, transparent, competitive and cost-effective, not least of all since transparency clearly requires a system or procedure to be put in place proactively in advance of the processes that are engaged in in terms of that system, both for the participants therein and for the decision-makers concerned. What section 34, read with section 217, requires, is the putting in place of a process which is fair, equitable, transparent, competitive and cost-effective, and then once that system is in place and public, the relevant procurement must be commenced in accordance with that system. This is important, since it ensures that at every stage of the procurement, and prior to the commencement of the procurement, the public, the state's officials, and the participants within the process can meaningfully assess the procurement and decisions taken thereunder against the predetermined system.

117. Furthermore, in terms of section 34(1)(e) of the ERA, the procedure may not be determined by the Minister alone; rather it must also be determined in consultation with NERSA. Moreover, prior to determining the system, there must be a procedurally fair process followed (as discussed above in relation to decisions in terms of sections 34(1)(a) and (b)), which includes that the decision must be "taken within a procedurally fair process in which affected persons have the opportunity to submit their views and present relevant facts and evidence to

[NERSA]".[104]

118. Yet, the 2013 s 34 Determination (which, as noted above, was also not taken after any form of public participation, or other opportunity for input) did not include any specified procedure to be followed for the procurement of the new nuclear power capacity.

119. The 2013 s 34 Determination provides only as follows:

> 2. electricity produced from the new generation capacity ("the electricity"), shall be procured through tendering procedures which are fair, equitable, transparent, competitive and cost effective
> …..
> 5. the procurement agency in respect of the nuclear programme will be the Department of Energy;
>
> 6. the role of the procurement agency will be to conduct the procurement process, including preparing any requests for qualification, requests for proposals and/or all related and associated documentation, negotiating the power purchase agreements, facilitating the conclusion of the other project agreements, and facilitating the satisfaction of any conditions precedent to financial close which are within its control;"

120. **First**, the wording of paragraph 2 is tautological – it simply repeats the wording used in section 34(1)(e)(i) of the ERA, namely that the Minister may, in consultation with NERSA, require that new generation capacity must be established through a tendering procedure which is fair, equitable, transparent, competitive and cost-effective. In so doing the 2013 nuclear s 34 determination wording is identical to the wording used in section 217 of the Constitution (save

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[104] Section 10(1)(d) of the National Energy Regulator Act.

that the word section 217 refers to a "system" rather than a "procedure").

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

122. Therefore, on a proper, constitutionally compliant interpretation of this section, once a determination was made that new generation capacity deriving from nuclear energy was required, the Minister, with the concurrence of NERSA, was required to specify a system or process for the procurement of nuclear power to meet the requirements of section 34(1)(e) of the ERA (read with section 217 of the Constitution).

123. **Second**, the wording of paragraphs 5 and 6 of the 2013 s 34 Determination purported to grant the DOE a free hand to conduct procurement on an ad hoc basis in any manner that the DOE sees fit. But that is not permissible: it plainly does not provide for a fair, transparent, competitive and cost effect procedure.

124. That is because a lawful section 34(1)(e) decision is required to specify in

advance the procurement procedure to be followed. For instance this would include specifying certain issues: such as the nature of the tendering process, whether a Request For Qualifications (RFQ) would be required (which would request an expression of interest on the part of potential contractors), and when and by whom it would be developed and published, when and by whom the Requests for Proposals (RFP) would be developed and published (including the specification of criteria that would be applied), and the process of adjudication (including who the adjudicators would be and how they would be selected).

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

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

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

126.2 The decision was materially influenced by an error of law (the Government respondents' answering affidavit on behalf of the President and the Minister, would appear to indicate that at least the then Minister

(who did not file an affidavit) did not appreciate that a procedure had to be specified – indeed the current Minister denies this was required) – in terms of section 6(2)(d) of PAJA and/or the principle of legality;

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

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

E. Rebuttal of the Minister and the President's argument

127. In the Government respondents' answering affidavit a number of arguments are raised in relation to the applicants' challenge to the Determination. None of them are availing.

128. **First**, the Government respondents' claim that the s 34 Determination is not administrative action, but is simply an "encased policy directive which binds NERSA" or an "encased executive policy choice for the electricity industry, made binding upon… NERSA".

129. This is not consistent with the Constitutional Court's jurisprudence, referred to above, for the following reasons:

129.1 The Government respondents' argument is primarily based on an incorrect and misleading characterization of the nature of a section 34 determination. Section 34, *inter alia*, empowers the Minister in agreement with NERSA

to determine that the country requires a certain amount of energy, from a certain source, and then to require that it be procured. That is precisely what was expressly determined by the Minister in the 2013 s 34 Determination.

129.2 The 2013 s 34 Determination (at least once gazetted) represents the point at which a binding decision was made that (in this case) 9.6GW of nuclear new generation capacity is needed by the country and should be procured (in other words it is a binding decision to commence a procurement process for 9.6GW of nuclear power, as distinct from the decision to award the tender and appoint bidders to the construction of the nuclear reactors, after the procurement process has been concluded).

129.3 This decision has direct external effect as it locks South Africa into (a) the use of a particular energy mix (i.e. a certain quantity of nuclear power (9.6GW), over other options), and (b) the procurement of that energy.

129.4 Furthermore, the Determination also has a number of other binding, external legal effects: 1) it requires Eskom to procure the electricity produced;[105] 2) it requires a special purpose vehicle to be set up to sell the electricity;[106] 3) it designates the DOE as the procuring agency;[107] and 4)

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[105] Determination para 7, Vol 2, pg 480.
[106] Determination para 8, Vol 2, pg 480.
[107] Determination para 5, Vol 2, pg 479.

the DOE was empowered to conduct the procurement process.[108]

129.5 The Determination, therefore not only had the capacity to affect rights, but did in fact affect legal rights: most obviously, the legal right of the DOE to act as the procuring agency, and its right to begin the procurement process.

129.6 Importantly, the Government respondents also mischaracterise the respective roles of the Minister and NERSA. Section 34 is clear. The Minister makes the relevant determination "in consultation with" NERSA. This means that NERSA's concurrence (agreement) must be sought and received, and therefore NERSA has to make its own independent decision on whether or not to concur with the determination. As a consequence, the determination is not simply an "encased" (whatever that may mean) executive policy directive or ministerial choice which binds NERSA.[109] The determination can only be made with NERSA's agreement (which can be withheld). If it does not agree, then there can be no section 34 Determination. In other words, for a section 34 determination to be made the Minister must reach agreement with NERSA.

129.7 The fact that NERSA (which is a regulating body that fulfils administrative functions in relation to the regulating of energy in South Africa, not a policy function) is required to concur in the determination,

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[108] Determination para 6, Vol 2, pg 480.

[109] Answering Affidavit para 84, Vol 3, p 782.

further demonstrates the administrative nature of the determination.

129.8 Given that a determination has been made by the Minister and in consultation with NERSA, NERSA is expressly then bound (in terms of section 34(3)) when issuing a generation licence by such a determination. As a consequence, NERSA is not required during a generation licence application process (which would any event be project specific in respect of one installation at a time), to address issues and concerns relating to whether South Africa requires and should procure an entire fleet of nuclear reactors to produce 9.6GW (which is precisely why section 34 determinations should include public participation). This further emphasises that, notwithstanding the Government respondents' contention to the contrary, the 2013 s 34 Determination has direct external legal effect.

129.9 Even if the 2013 s 34 Determination is found to constitute executive action, such action must nevertheless be lawful, and rational in process and substance – and is therefore still unlawful, on the grounds set out above.

130. **Second**, the Government respondents contend that while no public participation process was conducted in respect of the 2013 s 34 Determination, no such process was required.[110] The Government respondents also point to certain public participation conducted during the various policy formulation processes

[110] Answering Affidavit para 14.2, Vol 3, p 644-5.

(culminating in the publication of the IRP2010), and to further public participation opportunities in project specific authorisation processes. In this respect, we make the following points:

130.1 The requirement for public participation in respect of the 2013 s 34 Determination has been fully canvassed above.

130.2 None of the opportunities described by the Government respondents have afforded or will afford the applicants, or the general public, an opportunity to make representations on the critical issue of whether there should have been a determination that South Africa should procure 9.6GW of nuclear new generation capacity, and in particular whether having regard to all relevant factors (including but not limited to affordability and potential inter-generational socio-economic impacts) such new generation capacity is (or is still) needed. Yet, a final decision was made by the Minister with the concurrence of NERSA by way of the 2013 s 34 Determination, that 9.6GW was required and should be procured. Prior to that final and binding determination in terms of section 34 the applicants (and the general public) should have been afforded an opportunity to make representations to the decision makers.

130.3 The public participation (which was in any event flawed) carried out in respect of earlier policy-making processes cannot stand as a substitute for, nor does it negate the right to, an opportunity to make informed representations to statutorily empowered decision makers when a statutory

decision of massive public import is being made with the capacity to so obviously adversely impact upon rights.[111]

130.4 The applicants, stakeholders, and the public have a right to make informed representations and be heard. This is so, *inter alia*, for the fundamental reason that our courts have held that public involvement must be an opportunity capable of influencing the decision to be taken.[112] This can only occur if the public participation is involved as part of the statutory decision making process, not in general policy formulation years or decades earlier. In fact, if public participation was thought important at a mere policy stage, *a fortiori* such public participation would be

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[111] For instance, in the analogous context of public participation in the legislative process, the Constitutional Court held, in *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) para 171, that "**Legislatures must facilitate participation at a point in the legislative process where involvement by interested members of the public would be meaningful. It is not reasonable to offer participation at a time or place that is tangential to the moments when significant legislative decisions are in fact about to be made. Interested parties are entitled to a reasonable opportunity to participate in a manner which may influence legislative decisions**. The requirement that participation must be facilitated where it is most meaningful has both symbolic and practical objectives: the persons concerned must be manifestly shown the respect due to them as concerned citizens, and the legislators must have the benefit of all inputs that will enable them to produce the best possible laws."

[112] See *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* 2008 (10) BCLR 969 (CC) para 54*; Maqoma v Sebe NO and Another* 1987 (1) SA 483 (Ck), *Robertson & Another v City of Cape Town; Truman-Baker v City of Cape Town* 2004 (5) SA 412 (C). As Pickard J eloquently summarised the position in *Maqoma* at 491,

"**However convinced the empowered authority may be at the outset, of the wisdom or advisability of the intended course of action, he is obliged to constrain his enthusiasm and to extend a genuine invitation to those to be consulted and to inform them adequately of his intention and to keep an open and receptive mind to the extent that he is able to appreciate and understand views expressed by them; to assess the views so expressed and the validity of objections to the proposals and to generally conduct meaningful and free discussion and debate regarding the merits or demerits of the relevant issues. So receptive must his mind be that, if sound arguments are raised or other relevant matters should emerge during consultation, he would be receptive to suggestions to amend or vary the intended course to the extent that at least a possibility exists for those with whom he consults to persuade him to alter his intentions if not to abandon them**."

procedurally fair and be necessary for rational decision making, at the statutory decision making stage.

130.5 This is particularly true in the current context: Once a decision has been taken that 9.6GW of nuclear new generation capacity needs to be procured (as indeed has occurred by way of the 2013 s 34 nuclear determination), no further opportunity is provided in the legislative framework for the applicants to persuade the decision-maker through the making of informed representations. Such limited opportunities to participate in the environmental authorisation, nuclear installation licensing and electricity generation licensing processes, that may exist, are all project-specific and with specific focusses that preclude a consideration of macro-economic considerations relevant to the procurement of a fleet of nuclear reactors. It is precisely because the legislatively binding decision is the 2013 s 34 Determination, which the Executive and the DOE must act in accordance with, until and unless it is set aside, that it is that decision making process that required public participation.

130.6 That participation was not only required to give effect to the procedural rights of the public and interested parties, including the applicants. As our courts have repeatedly made clear a fair procedure is also necessary to secure a second aim: to enhance and improve the government's own

decision-making process.[113] In such a materially important decision, it is inexplicable that the government would not have wished to maximise its potential for arriving at the best possible decision – unless one concludes that the Government acted with the design of short-circuiting the public participation process.

131. **Third,** the Government respondents contend that as a matter of law a section 34 determination is not required for nuclear procurement.[114] This is not only incorrect, but reinforces the submission made above that the s 34 Determination was predicated on a material error of law.

132. The Government's contention is simply wrong as a matter of law:

132.1 Section 34 of the ERA is specific legislation dealing with the determination of the requirement for, and the procurement of, new generation capacity from any source of electricity, including nuclear power. It specifically empowers the Minister and NERSA to make these determinations. It would violate the rule of law, the principles of statutory interpretation, and the separation of powers, if notwithstanding the clear statutory framework created by the legislature when enacting section 34, this section could simply be bypassed, when procuring nuclear new generation capacity.

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[113] See e.g. *AllPay I* para 27.

[114] See e.g. Answering Affidavit, para 125.10, Vol 3, 854; para 125.115, Vol 3, p 895; para 121, Vol 3, p 817; para 119, Vol 3, p 816-7.

132.2 The joint powers of the Minister and NERSA and the purpose-specific strictures of the ERA cannot simply be ignored by relying on general procurement legislation and policies. It is accepted by our courts that where there is general legislation and specific legislation that overlap, the general legislation's reach is limited by the specific legislation – in other words, the strictures of the subject specific legislation (in this case, section 34's regulation of the procuring of nuclear new generation capacity) cannot be avoided by recourse to the general legislation (in this case, general procurement legislation that is not subject specific). In particular, the SCA has recently held that, "[w]here there is legislation dealing generally with a topic and, either before or after the enactment of that legislation, the legislature enacts other legislation dealing with a specific area otherwise covered by the general legislation, the two statutes co-exist alongside one another, each dealing with its own subject matter and without conflict. In both instances the general statute's reach is limited by the existence of the specific legislation."[115]

132.3 Moreover, no procurement legislation in fact provides for the National Executive (as opposed to departments and public entities and their relevant accounting authorities (such as individual Ministers)) to institute

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[115] *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* 2016 (3) SA 317 (SCA) para 102, see also the general principle *generalia specialibus non derogant* (general words and rules do not derogate from special ones) as discussed in *Minister of Defence and Military Veterans v Motau & others* [2014] ZACC 18; 2014 (5) SA 69 (CC) para 78; *Sasol Synthetic Fuels (Pty) Ltd & others v Lambert & others* [2001] ZASCA 133; 2002 (2) SA 21 (SCA).

procurement processes or take procurement decisions.[116]

133. Moreover, it is also inconsistent with the firm position adopted by the Minister and the DOE when the section 34 Determination was initially taken in 2013, and made public in 2015. In this regard, we highlight the following:

133.1 The 2013 s 34 Determination was expressly taken based on the acceptance that it was required in order to procure 9.6GW of nuclear power (as discussed in the supplementary founding affidavit):

133.1.1 The 2013 Departmental Decision Memorandum (or ministerial submission) prepared by the Director General of the DOE, for the Minister to approve, makes clear that the 2013 s 34 Determination was a necessary prerequisite for the commencement of procurement of 9.6GW of nuclear power.[117] The Minister was asked to approve the Determination and did so "**so that the Nuclear Procurement process can be launched**."[118]

133.1.2 Therefore, the Minister in deciding to sign the Determination did so precisely on the basis that it was necessary for the procurement process in relation to 9,6GW to proceed (and the Minister believed this to be the case).

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[116] See in particular the Preferential Procurement Policy Framework Act and the Public Finance Management Act.

[117] Decision Memorandum, Vol 2 p 487, para 7.

[118] Decision Memorandum, Vol 2 pg 487, para 7.1.

133.1.3 This is also clear from the letters that the Minister sent to ESKOM and the MPE in 2013[119] and in 2015[120] (in other words the view was consistently held by the DOE and the Minister, despite changes in personnel).

133.1.4 The same position was confirmed a few days after the 2013 s 34 Determination was gazetted, in the DOE media statement titled *'Progress with the Nuclear New Build Programme'*.

133.2 The Government respondents' suggestion that the 2013 s 34 Determination was not required can therefore be rightly dismissed by this Court as post-facto reasoning by legal representatives to avoid the gravamen of the applicants' case.

134. In any event, in the current matter a section 34 determination was made (although initially kept secret), and therefore, even if procurement of nuclear new generation capacity could have been pursued absent a section 34 Determination (which is certainly not the case), the fact remains that the Minister and NERSA have in terms of section 34, made a binding, gazetted, determination as to the amount of nuclear energy required (9.6GW) and that it must be procured, and have, *inter alia*, designated the DOE as the procuring

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[119] Letter to Eskom dated 23 Jan 2014, Vol 2, p 501; Letter to MPE dated 23 Jan 2014, Vol 2, p 502.

[120] Letter to Eskom dated 23 Jan 2014, Vol 2, p 527; Letter to MPE dated 23 Jan 2014, Vol 2, p 528.

agency. The Minister and NERSA have thereby locked (or "encased", to use the Government respondents' word) South Africa into initiating a procurement process for 9.6GW of nuclear new generation capacity by doing so. Therefore, such nuclear procurement is required and empowered by and must be in accordance with the 2013 s 34 Determination.

135. Of course, the Determination was unlawful for the reasons set out above, and it is precisely because it has legal effect that it must be set aside.

136. **Fourth**, as discussed above, the applicants submit that the 2013 s 34 Determination should have but did not establish a separate and dedicated procedure for the procurement of nuclear new build capacity, in violation of s 34 of ERA read with s 217 of the Constitution. The Government respondents argue that a "generic procurement system" not specified in the Determination would suffice. The Government respondents contend that there is no reason why existing procurement in terms of the PFMA, Treasury Regulations and the PPPFA could not be used and state that it is in fact doing so and that it would be "ludicrous, counter-productive and not cost-effective" for the Minister to require, before investigations have been conducted, that a specific delimited tender system would be required.[121]

137. The ad hoc procurement process that has and apparently will be followed has been outlined by the Government respondents in their answering affidavit. And,

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[121] Answering Affidavit paragraph 123.4.4, Vol 3, p 830-31.

as vague as it is, it makes clear that a procurement process for nuclear power is being rolled out, that various critical studies (including in respect of affordability) will not be released to the public, and that the National Executive will make the final decision (notwithstanding that under section 34 this statutory power is given to the Minister and NERSA – and that the Section 34 Determination expressly designated the DOE as the procuring agency), again clearly with no public participation. While reference is made to using existing procurement processes established under the PFMA, the Treasury Regulations and the PPPFA, the Government respondents have failed to clearly identify the parts of this legislation and on what basis they are invoked. Furthermore, the Government respondents have failed to put up a copy of any relevant SCM policy that they claim is to be applied. In any event, it is evident that any generic procurement process or supply chain management policy, will be inadequate. That much is clear on the Government respondents' version alone: the Government respondents evidently accept the unique nature of nuclear procurement (for instance, the Government respondents insist that Canada's and Japan's failure to sign IGAs would preclude them participating in the nuclear procurement process).[122]

138. Importantly, the Government respondents appear to believe that National Executive has the power to make a final decision on nuclear procurement once

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

the procurement process has run its course.[123] This is clearly incorrect. No statute gives the National Executive this power. As noted above, the ERA provides the statutory framework for making a decision on whether a specific amount of nuclear new generation capacity is needed, should be procured, and for determining the procurement process. In any event, as discussed above, the 2013 s 34 Determination in the current matter has specifically designated the DOE as the procuring agency (and not the National Executive) for the 9.6GW nuclear programme, and no power is given to the National Executive to make any procurement decisions in Determination.

139. Thus one of the key points of departure between the applicants and the Government respondents, is that:

139.1 the Government respondents seem to take the view that the decision-making process in relation to the procurement of nuclear new generation capacity entails an unbounded policy decision by the National Executive, followed by a procurement decision where the National Executive – without any specific statutory authority to do so – can again decide whether or not to proceed should the actual procurement of nuclear plants not be viable for whatever reason.[124]

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[123] See Answering Affidavit, para 38, p 694, para 68.4, p 765; para 127.67, p 919; para 63.4, p 761-2.

[124] See Answering Affidavit, para 38, Vol 3, p 694.

139.2 The applicants on the other hand, submit that the process is disciplined by the law, and the rule of law. We submit that a decision-making process for new nuclear procurement must be in accordance with relevant statutory requirements. In the absence of any other specific statutory requirements relating to a decision that new nuclear generation capacity is required and should be procured, it follows that such a decision can only be taken in terms of and subject to the empowering provisions of section 34 of the ERA (as discussed above).

139.3 Moreover, as already noted no legislation gives the National Executive procurement powers.

140. In addition to what has been set out above in relation to the proper interpretation of section 34(1)(e)(i), we note the following:

140.1 All tender procedures and systems, must be adopted ahead of time (and not during the procurement itself), otherwise they could hardly meet the requirement of being transparent.

140.2 In order to comply with the imperatives of section 217 of the Constitution, the procurement system must be transparent, and in order to be so, it must be specific and clearly stated. Section 34(1)(e) requires that such a procedure be specifically determined by the Minister and NERSA (and not by Cabinet) after properly conducting a procedurally fair process, and that this system be made public in order to comply with the requirement of

transparency.

140.3 Instead of transparency, clarity and consistency, the Minister and the DOE, or the Government more generally, have sidestepped section 34 in favour of an entirely *ad hoc* procurement process, notwithstanding that this has not been specified in the section 34 Determination. In the Government respondents' answering affidavit procurement vendor parades were conducted with only those countries specifically invited to participate,[125] and there is an assertion that the participation in the procurement process requires countries to first enter into IGAs.[126]

140.4 In the circumstances, the facts reveal that the Government has in fact adopted an ad hoc procurement process, that is not in terms of an agreed procurement procedure set out in the Determination. In other words, Government's actions demonstrate the need for a specific procurement procedure or system in relation to nuclear procurement, yet what has occurred is ad hoc and not transparent, and has not been agreed with NERSA, nor has there been any public participation prior to its adoption, nor has the process been made public.

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[125] Answering Affidavit para 107.4, p 802-3.

[126] The Government respondents insist that Canada's and Japan's failure to sign IGAs would preclude them participating in the nuclear procurement process. Answering Affidavit para 125.73, p 882-3.

140.5 This violates the requirement of transparency. It creates the very real danger that officials will simply change or adopt an approach as they see fit, without any set procedure in place, to which they can be held to account. This is anathema to the rule of law and section 217, and the clear purpose of section 34(1)(e)(i).

140.6 The existing or generic procurement systems the Government respondents appear to rely on would in any event have to consist of a Supply Chain Management (SCM) policy for a Department or state-owned enterprise, but even in this regard they fail to put up this (or any) SCM policy to shed light on the process being followed or to be followed. Their conduct in this regard simply confirms the wholly inadequate ad hoc process that is apparently being followed.

140.7 In addition, any SCM policy would deal with procurement at a Department or state-owned enterprise level. And, not surprisingly, any such SCM policy would not cover and does not make provision for procurement decisions by Cabinet, since that would be inconsistent with the relevant regulations under the PFMA and the PPPFA. This alone is fatal to the lawfulness of the procurement, given that the Government respondents appear to allege that it is Cabinet that will make the final decision to award the tender.

141. **Fifth**, the Government respondents erroneously contend that considerations such as affordability of nuclear power, potential negative impacts on electricity prices,

potential socio-economic and environmental impacts, further studies or research on the full costs of certain technologies (and particularly in relation to the costs of decommissioning nuclear power plants and the costs of managing nuclear fuel) and changes in electricity forecasts are not relevant considerations for a section 34 nuclear determination, but may be relevant for an actual procurement decision or a decision to grant either a generation licence or an environmental authorisation for a particular project. [127] This shows a fundamental misunderstanding both of the law and the facts.

141.1 As we have explained above, the s 34 Determination is the only statutory decision-making point where such issues could be raised by interested and affected parties with the decision-makers (the Minister and NERSA). The s 34 Determination is not simply a precursor for potential procurement; it is *the* decision as to *how much is required* and *that it should be procured in the first place*.

141.2 The 2013 s 34 Determination, on its own terms, is *inter alia* a decision that a specific quantity of nuclear new generation capacity must be procured (9 600 MW), and that the procuring agency is the DOE, which is given power to proceed with such procurement. Therefore, it is certainly relevant, before a binding decision of this nature and magnitude is taken, that a certain amount of nuclear power is (a) required (b) should be procured, and (c) that a certain department is to proceed with such procurement. All

[127] Answering Affidavit, paragraph 123.5.1, Vol 3, p 834.

such relevant considerations discussed above, should have been, but evidently were not, taken into account.

141.3 Furthermore, the Government respondents pointedly fail to make any clear commitment to a point in the decision-making where such considerations would be relevant.

142. **Seventh**, the Government respondents do not contest the applicants' assertions regarding the content of the draft IRP2010 update, discussed above, but seek to side-step the relevance of this draft Update by claiming that when the then Minister made his decision on the 2013 s 34 Determination there was no way that he could have or would have known what the content or information contained therein was, that at best the Minister would have known that an update process was underway, and that the proposed update remained a draft without legal effect and has not been approved by Cabinet.[128]

143. These contentions too are both legally and factually incorrect:

143.1 As made clear above, the draft 2013 IRP2010 update contained information that was relevant to both the Minister and NERSA in making their s 34 determination, and it is clear from the Government respondents' version that these factors were not taken into account (if indeed the Minister did not know of the contents thereof, the Minister should have

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[128] Answering Affidavit para 123.5.3, Vol 3, p 836.

known).

143.2 As noted above, the Minister certainly must have known of the draft IRP2010 update, it being an update process initiated by the Minister. But, lest there be any doubt, the NERSA's 'Extract of the Minutes of the Energy Regulator Meeting No. 96 of 26 November 2013' in which NERSA decided to concur in the Determination, indicates at paragraph 5.2(b) that **'[t]he Minister has however since informed NERSA in a letter dated 22 November 2013 that an updated IRP has been published on the Department of Energy's website for comment'**.[129] Not only did the Minister know of the update, but was in fact advising NERSA of this fact at the time in November 2013 that the Minister was seeking NERSA's concurrence in the section 34 Determination.

143.3 We also point out above, the statements as to what the then Minister knew or considered at the time of signing the 2013 s 34 Determination, made now by the Government respondents in this application, are clearly unsupported hearsay in the mouth of the deponent to the Government respondents' answer, since no confirmatory affidavit has been provided by the then Minister (only the current Minister, who took office in May 2014, provided a confirmatory affidavit), and therefore must be ignored by this

[129] See Extracts of the Minutes (Annexure to NERSA's letter to the Minister (PL49)) Vol 2, p 557, para 5.2(b).

Court. [130]

143.4 The fact that the draft 2013 IRP2010 update had not been approved by Cabinet is irrelevant, and does not void the relevant information contained therein.

143.5 Finally, at least in 2015, prior to gazetting the 2013 s 34 Determination, the Minister evidently would have been aware of the contents of the update. Yet as discussed above, the Minister (without consulting with, or obtaining the agreement of, NERSA), gazetted the 2013 s 34 Determination, without any changes (and without any consultation or consideration of whether any change was required).

144. **Seventh**, the Government respondents[131] contend that the applicants are wrong in their claim that NERSA's decision to concur in the 2013 s 34 determination violated the requirements of PAJA and the principle of legality as the decision took irrelevant considerations into account and failed to consider relevant considerations, was taken because of the unauthorised or unwarranted dictates of another person or body, and was unreasonable and irrational.

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[130] In *Gerhardt v State President and Others* 1989 (2) SA 499 (T) the following is said at 504F - H: "Clearly one person cannot make an affidavit on behalf of another and Mr *Hattingh*, who appears on behalf of the three Government respondents, concedes correctly that I can only take into account those portions of the second respondent's affidavit in which he refers to matters within his knowledge. Insofar as he imputes intentions or anything else to the State President, it is clearly hearsay and inadmissible." See also *Tantoush v Refugee Appeal Board and Others* 2008 (1) SA 232 (T) para 70; *Von Abo v Government of the Republic of South Africa and Others* 2009 (2) SA 526 (T) paras 46 – 48; *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) para 105.

[131] Answering Affidavit para 123.6, Vol 3, p 840ff.

145. In this regard we refer to what has been set out above, furthermore, we note that:

145.1 NERSA does not oppose this application, and has not taken the opportunity to dispute any of the averments made by the applicants. The Government respondents' submissions relating to NERSA's conduct in giving its concurrence are accordingly hearsay, and the averments made by the applicants as to why NERSA's concurrence was irrational and/or unreasonable, remain unchallenged by NERSA. The applicants' version thus prevails.

145.2 The Government respondents take note of the applicants' factual averments regarding the overnight capital costs of a nuclear plant having almost doubled from what was estimated originally, which NERSA specifically mentioned in its Report and minutes in support of its concurrence, but then ignored.[132] The Government respondents go on to argue that the financial implications can only be determined once the phase for making an actual procurement decision on a specific bid or tender is reached, and that financial considerations are broader than the potential impact on electricity prices. However, this is certainly incorrect, and once again indicates a clear misunderstanding or misstatement of the nature of section 34 determinations. The financial implications of the procurement of 9.6GW of nuclear new generation capacity on future electricity prices are clearly a relevant consideration for NERSA, which

[132] As discussed above, paras 107.13 to 107.18.

inter alia has a statutory obligation to safeguard electricity users and consumers, when deciding whether to concur in a proposed s 34 determination that new generation capacity needs to be procured and that 9.6GW should be procured to be generated from nuclear energy.

145.3 We note that the Government respondents[133] contend that any concerns that NERSA had regarding the IRP2010 update process would continue to be relevant to NERSA's future decision-making as the final authority on licensing new generation capacity. Given that NERSA is bound by the 2013 s 34 Determination when issuing a generation license (s 34(3)(a) of NERA), this contention is wrong in law and fact. This demonstrates why NERSA should have taken these considerations into account in reach agreement as to the s 34 Determination.

V. THE APPROVAL, SIGNATURE AND TABLING OF THE RUSSIAN IGA IS UNLAWFUL AND UNCONSTITUTIONAL

146. The terms of the Russian IGA are more extensive and include far greater commitments, than any of the comparative IGAs in relation to nuclear co-operation that were tabled before Parliament at the same time. The comparison is instructive, because it makes clear that the entering into of the Russian IGA was not merely a precursor to any engagement with Russia in relation to nuclear procurement. Indeed, as we discuss below, South Africa already had entered into

[133] Answering Affidavit, para 123.6.9, Vol 3, p 846.

a generic IGA in relation to nuclear cooperation with the Russian Government (which was comparable to the cooperation agreements with the other countries).

147. This leads to two conclusions:

147.1 At the very least, the Russian IGA should have been tabled under the under section 231(2) of the Constitution, which would have required parliamentary approval;

147.2 It was irrational for the Minister to sign and for the President to approve the signature of the Russian IGA.

A. The key provisions of the Russian IGA

148. The true nature and extent of the Russian IGA are revealed by a number of provisions of the IGA, which require some discussion in detail.

149. The **Preamble** states that the agreement provides for "the legal fixation of the **strategic partnership** in the fields of nuclear power and industry" (emphasis added).[134]

150. **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 development

[134] Russian IGA, Vol 1, p 288.

of the Republic of South Africa" (emphasis added).[135]

151. It should be recalled that the term "strategic partner" has been used by government to refer to the party that will ultimately construct the new nuclear power plants: as noted above, this is not only apparent from the DOE's joint press release issued with Rosatom (the Russian agency designated by IGA)[136] on 22 September 2014,[137] but also by the fact that the Minister and the President have both referred to a fair process that will be followed to select a "strategic partner",[138] and the DOE also stated that government is planning to have its "strategic partner" for the nuclear build by the end of the year (2015).[139] It is therefore of significance that the Russian IGA specifically refers to the creation of a strategic partnership; particularly in view of the contents of the IGA which will be discussed below. None of the other IGAs make reference to the agreement creating a "strategic partnership".

152. **Article 3**, 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 in accordance with IAEA recommendations;

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[135] Russian IGA Article 1, Vol 1, p 288.

[136] Russian IGA Article 5, Vol 1, p 291.

[137] Joint-Press Statement, 22 Sept 2014, Vol 1, p 131-2.

[138] New report, reporting on state of nation address by the President, p 205; the Minister's 19 May 2015, the Minister announced in her 2015/16 budget speech, Vol 2, p 213.

[139] DOE press statement, 14 July 2015, Vol 1, p 323.

(ii) design, construction, operation and decommissioning of NPP [new nuclear power plant] 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;" (emphasis added)[140]

153. It is important to note the peremptory language used ("shall create") and the reference to a "strategic partnership" and that the VVER reactor technology is unique to Russia.[141]

154. Indeed, as the DOE and Rosatom's Joint-Press statement indicated when this agreement was reached, it laid the foundation for "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)**."[142] ("NPP" units, was defined in the preamble, as the "new nuclear power plant" units to be constructed in South Africa).

155. **Article 4** provides as follows:

"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 center located at Pelindaba, Republic of South Africa. **The**

[140] Russian IGA Article 3, Vol 1, p 288-9.
[141] Founding Affidavit, para 152.4.1, p 78.
[142] Founding Affidavit: Vol 1: annexure PL6: p 131.

> **mechanism of implementation of these priority projects will be governed by separate intergovernmental agreements, in which the Parties shall agree on the sites, parameters and installed capacity of NPP units planned to be constructed in the Republic of South Africa**." (emphasis added)[143]

156. We note that none of the other IGAs include this type of specificity and firm commitments. The Russian IGA makes clear that there is an agreement to construct particular types of reactors (only manufactured by Russia), particular numbers, and provides an initial indication of the location thereof; and the agreement indicates that South Africa and Russia "shall agree on the sites, parameters and installed capacity of NPP units planned to be constructed in the Republic of South Africa" (emphasis added).

157. To make matters worse **Article 7** effectively precludes the involvement of other countries in the construction of new nuclear power plants without Russia's consent. The article provides as follows:

> "Cooperation in areas as outlined in Article 3 of this Agreement, will be governed by separate agreements between the Parties, the Competent Authorities, as well as by agreements (contracts) between Russian and (or) South African authorized organizations, which are involved by the Competent Authorities of the Parties for the implementation of cooperation in the framework of this Agreement. The Competent Authorities of the Parties can, by mutual consent, involve third countries' organizations for the implementation of particular cooperation areas in the framework of this Agreement."[144]

158. Recall that one of the areas of cooperation listed in Article 3, which would

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[143] Russian IGA Article 4, Vol 1, p 290.

[144] Russian IGA Article 7, Vol 1, p 292.

require Russian consent if any other countries' organisations are to be involved, is the "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".

159. While, the VVER reactor technology is proprietary to Russia, article 7 read with article 3, may be interpreted to mean to a) reinforce that South Africa must procure the 9.6Gw capacity from Russia (absent consent from Russia); and/or b) that if Russia withholds consent, South Africa is obligated in terms of this IGA, *inter alia*, when contracting for the design, construction, operation and decommissioning of nuclear power plants, to contract exclusively with Russia. In other words, this clause apparently precludes (absent Russia's consent) a situation where some of the nuclear power plants are constructed (or operated) by other countries in addition to Russia.

160. **Article 9** provides as follows:

> "For the purpose of implementation of this Agreement the South African Party will facilitate the provision of a special favorable 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."[145]

[145] Russian IGA Article 9, Vol 1, p 292.

161. In terms of this Article the South African government agrees that it will afford Russia a favourable tax and financial regime, inter alia, in relation to the construction by Russia of new nuclear power plants. Not surprisingly, no other country obtained such an agreement from the Government.

162. **Article 15** provides as follows:

> "1. **The authorized organization of the South African Party** at any time and 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 occurring at NPP or Multi-purpose Research Reactor and also in relation with a nuclear incident during the transportation, handling or storage outside the NPP or Multi-purpose Research Reactor of nuclear fuel and any contaminated materials or any part of NPP or Multi-purpose Research Reactor equipment 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**.
> 2. Nuclear liability due to nuclear incident occurring when handling and transporting the nuclear fuel shall be transferred from the authorized Russian organization to the authorized South African organization after the physical handing over of the nuclear fuel at a place determined in separate agreements (contracts) as concluded in accordance with Article 7 of this Agreement.
> 3. Should the Vienna Convention on Civil Liability for Nuclear Damage enter into force for the Republic of South Africa, the issues of civil liability for nuclear damage under this Agreement for the South African Party shall be regulated by this Vienna Convention."[146]

[146] Russian IGA Article 15, Vol 1, p 296-7.

163. In terms of this Article, the Government agreed to incur liability, and provides that the authorised South African organisation, as opposed to any Russian organisation, is deemed to be the operator of the nuclear power plants, at all stages of construction and operation. Given the subject matter (nuclear incidents) and the geographic scope (within or outside South Africa), this liability could be enormous. Moreover, and importantly, in terms of Article 15, the Government **is also providing an indemnification to Russia and its entities from any liability** ("[t]he 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").**

164. It is signal that this commitment is made in an agreement, which, has been tabled under section 231(3) as opposed to 231(2). Thus parliament is not given an opportunity to consider whether to approve the agreement and this clause in particular, and the concomitant constitutionally required public participation inherent in seeking parliamentary approval, is circumvented.

165. That this commitment has been made is yet a further indication that the IGA is intended to constitute a firm commitment to using Russia to construct the required nuclear power plants. **If this were not the case, there would be no need for such an indemnification to have been sought by Russia or given by South Africa, or for the incidence of liability during all stages of**

construction and operation of the new nuclear power plants to be agreed.

166. Once again, none of the other IGAs placed before Parliament has any similar clause.

167. **Article 16** provides that: "In case of any discrepancy between this Agreement and agreements (contracts), concluded under this Agreement, the provisions of this Agreement shall prevail." [147]

168. This again makes clear that the undertaking provided under the Russian agreement is intended to take precedence over any subsequent agreements. This is significant. It underscores that the agreement is intending to bind the South African government, regardless of any subsequent agreements. In other words, even if the Minister or the government enters into a more specific contract with Russia and/or Rosatom for the construction of the nuclear power plants, at a set price, for instance after any purportedly fair tender process, the government will already have fettered its discretion, since it is bound by the terms of the IGA. This would at least be relevant in the context of the indemnity already provided (which would then no longer be an issue for further discussion or parliamentary input), and the fact that third country involvement can be vetoed by Russia, and the favourable tax regime that is promised.

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[147] Russian IGA Article 16, Vol 1, p 297.

169. In terms of **article 17**, the agreement is a 20-year agreement, which "enters 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", with an automatic renewal for 10 years, although it can be cancelled on a year's notice.[148] However, it has a savings clause:

> "4. The 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.
> 5. This Agreement may be amended by mutual consent of the Parties through an Exchange of Notes between the Parties through diplomatic channels. Such amendments shall form an integral part of this Agreement.
> 6. The termination of this Agreement 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."[149]

170. From these articles it is clear that the Russian IGA records a binding agreement in relation to the procurement of new nuclear reactor plants (including in respect of South Africa's liability consequent on such procurement) from a particular country.

171. It is therefore not surprising that the DOE and Rosatom, the Russian designated competent authority under the agreement, went public on 22 September 2014 (as discussed above) the day after the agreement was entered into to both claim that

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[148] Russian IGA Article 17.1 and 17.2, Vol 1, p 297-8.
[149] Russian IGA Article 17, Vol 1, p 298.

they signed a deal for the construction of nuclear power plants in South Africa.[150] That understanding was clearly warranted, on a plain reading of the agreement. It is telling that the government then immediately sought to downplay the significance of the agreement, and sought at first to keep the agreement secret given that it would evidently be unlawful to enter into such an agreement absent the conclusion of a lawful procurement process as required by section 217.

172. The explicit terms of the Russian IGA, in contradistinction to the other IGAs, speak to the true position – it is even termed a "strategic partnership" agreement, unlike any of the other IGAs: the Russian IGA is obviously not a mere "framework" or non-binding agreement.

B. A comparison with the terms of 2004 Russian IGA

173. In 2004 the South African and Russian governments had already entered into an agreement providing for co-operation in relation to nuclear energy ("**the 2004 Russian IGA**"),[151] and a comparison of the 2004 Russian IGA's terms as opposed to the terms of the Russian IGA (of 2014), is signal.

174. The 2004 Russian IGA is evidently a broad and non-specific nuclear energy cooperation agreement, which contains no specific commitments in relation to the procurement of new nuclear power plants. In particular, unlike the 2014

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[150] Joint-Press Statement, 22 Sept 2014, Vol 1, p 131-2.
[151] 2004 Russian IGA, Vol 5, p 1470-5.

Russian IGA, in the 2004 IGA, *inter alia*:

174.1 there is no liability or indemnification clause in relation to the construction and operation of the nuclear power plants, which indemnifies the Russian government from any damages, and places responsibility on the South African government for damage both within and outside South Africa;

174.2 there is no reference to or firm commitments in relation to the construction of new nuclear power plants, based on the Russian VVER reactor technology, in South Africa with a total installed capacity of 9.6GW;

174.3 there is no prohibition, absent consent by Russia, on involving third countries' organisations, *inter alia*, in the construction, operating and decommissioning of nuclear power plants;

174.4 there is no undertaking by the South African government to facilitate a special and favourable tax regime to apply, *inter alia*, to the construction and operation of the new nuclear power plants in South Africa; and

174.5 there is no provision that envisaged the entering into of "agreements **(contracts)**" (emphasis added) under the IGA, and that the IGA's provisions would prevail over the terms of such contracts.

175. Even to the extent that the Government respondents claim that there was a need to enter into broad nuclear cooperation agreements prior to inviting vendor countries to participate in the nuclear procurement programme, the fact is that

South Africa already had such an agreement with Russian since 2004 (although, we note that even though the Government respondents indicate that South Africa had entered into this agreement, as discussed below, the Government respondents have not responded to the request to clarify if, when and under what section of the Constitution this agreement was tabled before Parliament).

176. The comparison between the 2004 Russian IGA and the 2014 Russian IGA, much like the comparison between the other IGAs tabled together with the Russian IGA in June 2015, confirms that Russia was being treated preferentially to the other prospective bidders. No other country had received the firm commitments contained in the 2014 Russian IGA, and given that the 2004 Russian IGA had already been entered into, the only purpose for the 2014 Russian IGA was precisely to make the firm commitments in relation to procuring the nuclear power plants from Russia (which were absent from the 2004 IGA).

177. Indeed, in the DOE's 2013 press statement when referring to the 2004 Russian IGA, the DOE indicated that South Africa has "similar bilateral Agreements", *inter alia*, with America and South Korea.[152] These are evidently references to the US IGA and South Korean IGA entered into in 1995 and 2010 respectively and only tabled in Parliament in June 2015. Since the Minister was willing to rely on the US IGA and South Korean IGA, which were "*similar*" to the 2004 Russian IGA, as the basis for the US's and South Korea's involvement in the

[152] DOE Media Statement, 31 July 2013, Vol 4, p 1286.

proposed nuclear procurement process, this again reinforces that there could have been no lawful and legitimate purpose for entering into the 2014 Russian IGA. Rather, the purpose was to make firm and favourable commitments to Russia in relation to nuclear procurement. The special treatment accorded to Russia in this manner is as obvious as it is unlawful, not least of all because of the very real apprehension of bias.

C. The decision to table the Russian IGA under section 231(3) was unconstitutional

178. The Minister's decision to table the Russian IGA under section 231(3) of the Constitution, in order that such an agreement could become binding without Parliamentary approval, was unlawful, since the Russian IGA should have been tabled under section 231(2).

179. Section 231(3) allows an "international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession" to simply be tabled in Parliament in order for it to become binding. All other international agreements must, in terms of section 231(2), be approved by Parliament, in order to become binding.

180. Section 231(3) must be interpreted in order to give best effect to fundamental constitutional values and so as to be consistent with the Constitution's scheme

and structure.[153]

181. Tabling under section 231(3), allows the executive to bind South Africa to an agreement absent parliamentary approval and the public participation that accompanies any such parliamentary approval process.[154]

182. Therefore, it is evident that in order to best give effect to the fundamental constitutional principles of separation of powers, open and accountable government, and participatory democracy, it will only be a limited subset of international agreements that could be considered to fall into section 231(3) (thus bypassing parliamentary approval and public participation).

183. Ultimately, the question of whether an agreement falls within section 231(3) must be determined by the content of the international agreement.

184. International agreements that make substantive commitments and create obligations for South Africa and the government into the future, and those agreements that by their nature ought to require parliamentary and public scrutiny, would certainly not fall into section 231(3).

185. Professor Dugard has pointed out, in relation to the interpretation of section 231(3), in his seminal work on International Law from a South African perspective, that "[t]he practice of the government law advisors is to treat

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[153] See authorities referred to at paragraph 54 above.
[154] See sections 59 and 72 of the Constitution.

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."[155]

186. Given the Russian IGA's content and extent, as discussed above, it was clearly the type of agreement which required approval by Parliament by resolution in terms of section 231(2). It certainly is not an agreement of a routine nature.

187. This is clearly so, given, *inter alia*, the financial commitments being made to Russia, that are necessarily entailed in the indemnity provisions. Given that this agreement has significant financial implications, it is evidently not an "international agreement of a technical, administrative or executive nature".

188. That the incidence of financial commitments in an agreement, is determinative of the fact that it is an agreement that falls within the ambit of section 231(2) and not section 231(3), is confirmed by the Government's own internal handbook in relation to entering into and tabling of international agreements. The Handbook indicates that an international agreement which has "extra-budgetary financial implications" must be tabled before Parliament under section 231(2) in order to obtain parliamentary approval.[156]

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[155] Dugard, *International Law: a South African Perspective*, 4th ed (2011) p 417.
[156] See Extracts from DIRCO Handbook (PL40), Vol 1, p 352.

189. Moreover, that the Russian IGA is, due to its contents, the type of agreement that needs parliamentary approval, is also clear from the fact that:

189.1 The IGA is intended to take precedence over any subsequent agreements or contracts, as discussed above;

189.2 The IGA includes a prohibition, absent consent by Russia, on involving third countries' organisations, *inter alia*, in the construction, operating and decommissioning of nuclear power plants;

189.3 The IGA includes an undertaking by the South African government to facilitate a special and favourable tax regime to apply, *inter alia*, to the construction and operation of the new nuclear power plants in South Africa; and

189.4 The IGA, makes firm commitments to Russia that pre-empts the procurement process, and at least creates the perception (and indeed reality) of favouring one potential bidder (given the far more extensive and favourable content of the agreement as opposed to the other IGAs, as discussed above).

190. We are fortified in our conclusion that the Russian IGA had to be tabled under section 231(2) by the Explanatory Memorandum prepared by the State Law Advisor (International Law), and which served before the Minister and the President. In discussing the nature of the Russian IGA, the senior state law

advisor concluded as follows:

"**The Agreement falls within the scope of section 231(2) of the Constitution and Parliamentary Approval is required**".[157]

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

192. Therefore, the memorandum that was before the Minister prepared by the State Law Advisor, supports the applicants' contention that the Russian IGA, given its content and extent (including that it included indemnifications), was clearly the type of agreement which required approval by Parliament in terms of section 231(2) of the Constitution.

193. It was necessary to table the Russian IGA under section 231(2) of the Constitution in order to ensure that a number of important constitutional requirements were met and objectives achieved. It would firstly have allowed both houses of parliament (the NA and the NCOP) – the legislative branch of government – to consider whether to approve the agreement. Given the contents, they may well have refused such approval (as envisaged in the Explanatory Memorandum). It is precisely for this reason that the Constitution creates a check and balance on executive power in relation to the entering into of

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[157] Explanatory Memorandum, Vol 2, p 509, see also draft Russian IGA that accompanied the memorandum, Vol 2, p 510ff.

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

194. The parliamentary approval process required by section 231(2) also serves another vital democratic end. As mentioned above, it allows for a public participation process as required by sections 59 and 72 of the Constitution, which would have afforded the applicants (and other members of the public) an opportunity to make important representations regarding the content of the Russian IGA, and regarding other important related issues (including *inter alia* environmental issues, socio-economic issues, and in relation to constitutionally and statutorily compliant procurement).

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

196. In light of these constitutional prescripts, and the State Law Advisor (International Law)'s advice in this regard, it is remarkable that the Minister would have chosen to bypass section 231(2) of the Constitution. Certainly such

a bypassing would have had to be explained. Yet, the Minister's decision to act contrary to the view expressed by the State Law Advisor (International Law) in the Explanatory Memorandum, the view of the principle drafter of the agreement, by tabling the Russian IGA under section 231(3) of the Constitution, rather than section 231(2), is not explained in any documents that form part of the record (there is no evidence that she sought or received any alternative legal opinion on the issue). The Minister appears at best to have failed to apply her mind to the requirements of section 231(2), and at worst to have deliberately bypassed its provisions for an ulterior purpose.

197. Accordingly, the Minister's decision was also irrational, she failed to have regard to relevant considerations, and the fact that the State Law Advisor's assessment was ignored and that Parliament was bypassed (and participatory democracy frustrated) indicates that the decisions were unlawful and taken for an ulterior purpose.

198. In the premises, the tabling of the Russian IGA under section 231(3) was unlawful and unconstitutional and the Court must declare this decision unconstitutional and set it aside.

D. Unlawful authorisation and signature of the Russian IGA

199. The power to sign international agreements is sourced in the Constitution. Section 231(1) of the Constitution states that "[t]he negotiating and signing of all international agreements is the responsibility of the national executive."

200. The Constitutional Court has held that section 231(1) is a collective responsibility of the Cabinet.[158]

201. As noted above the President expressly authorised the Minister to sign the Russian IGA.

202. While in terms of section 231(1) the national executive is empowered to negotiate and sign international agreements, this exercise of power must accord with the rule of law and the principle of legality, discussed above.

203. The Minister's signature of the Russian IGA and the President's authorisation of the signature as head of the national executive were unlawful and unconstitutional on the following grounds.

204. **First**, the agreement violates section 217 of the Constitution. Section 217 requires that the national sphere of government when it "contract[s] for goods or services" "must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective."

205. The Russian IGA:

205.1 makes binding undertakings as a matter of international law with Russia and its agency in relation to construction and operation of nuclear power plants; and/or

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[158] See *President of the Republic of South Africa and Others v Quagliani* 2009 (2) SA 466 (CC).

205.2 contains a specific clause that ensures that it take precedence over any subsequent agreements in relation to the construction and operation of nuclear power plants; and/or

205.3 indicates that Russia has been given a veto over the inclusion of a third party country in any part of the design, construction, and operation of the required nuclear power plants; and

205.4 contains a specific provision that grants indemnity to Russia for damages arising from the construction and operation of nuclear power plants.

206. Therefore, the Russian IGA contains sufficient particularity and firm commitments so as to fall within the remit of contracting for "goods and services" under section 217 of the Constitution (which the courts have given a broad interpretation), since section 217 requires that "the tender process, **preceding the conclusion of contracts for the supply of goods and services**, must be 'fair, equitable, transparent, competitive and cost-effective'."

207. Yet, at the time the Minister signed, and the President authorised her signature of, the IGA, there was no procurement system in place that complied with section 217 in relation to the procurement of nuclear new generation capacity (indeed such a system should have been, but was not, determined by the Minister and NERSA, in terms of section 34(1)(e)) – moreover the section 34 Determination had not been made final by being gazetted. Nor was there any process followed in reaching the agreement that could remotely be argued to

have been fair, or competitive, or equitable, or transparent, or cost-effective. This therefore means that decisions by the President to authorise the signature of, and the Minister's decision to sign, the agreement were in violation of section 217.

208. **Second**, alternatively, and in any event, even if the Russian IGA could be argued not to fall within the meaning of a contract under section 217, at the very least it expressly formed part of the first steps of procurement process to be conducted.

209. The Government respondents make clear that the Russian IGA and the other IGA were entered into and then table precisely as a preliminary step in ensuring that certain nations would tender as part of the procurement process.[159] In other words, on the Government respondents' own express averment, the entering into of some form of IGA was a necessary first step before a foreign government could participate in the nuclear procurement process.

210. Yet, precisely because the Russian IGA made firm commitments to Russia, that were not made to any other potential bidding country that entered into IGAs too (the US, China, France, and South Korea), means that to enter into the Russian IGA was to violate the requirements for a fair and equitable procurement process. That is so because it created a reasonable apprehension of bias towards Russia.

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

211. **Third**, and in any event, the Minister's decision to sign and the President's decision to authorise the signature of the agreement are nevertheless irrational and in violation of the principle of legality, since:

211.1 There is no discernible (nor publicly expressed) legitimate government objective that required the government to pre-empt the procurement process by signing this type of agreement (including indemnifying Russia in respect of any future nuclear accident), which has significant financial implications – especially given, as discussed below, there was already had an existing IGA in relation to nuclear cooperation.

211.2 Indeed, by way of comparison, the other IGAs with other states in relation to nuclear cooperation are nowhere near as comprehensive nor do they express agreement by South Africa to any of the key undertakings provided to Russia.

211.3 Entering into a comparatively comprehensive agreement entailing onerous obligations against South Africa and in favour of Russia, leads to reasonable apprehension of bias in any future procurement process. Therefore, it is irrational to taint the fairness of the proposed procurement process by entering into such an agreement.

211.4 The terms of the Russian IGA, as set out above, furthermore give rise to a fettering of government's discretion in relation to the proposed procurement process and subsequent contracting phase, including but not

limited to an irrevocable indemnity for Russia.

E. Rebuttal of the Government respondents' argument in relation to the Russian IGA

212. The Government respondents have denied that the President's and the Minister's conduct in relation to the Russian IGA is unconstitutional, and have also denied that these decisions are justiciable, or that they are justiciable at the instance of the applicants. Again, these arguments are unavailing, for the reasons that follow:

213. **First**, the negotiation and signature and the tabling of an international agreement before Parliament either in terms of section 231(3) or (2) of the Constitution, are the exercises of public power, in terms of section 231 of the Constitution. As noted above, the Constitutional Court has made clear that all exercises of public power, whatever their subject matter, including those that relate to foreign affairs,[160] are justiciable: those exercises of power must be lawful and rational, and the Constitution requires the courts on application to inquire into whether they are.

214. **Second,** this Court certainly has jurisdiction to review any unlawful tabling of any international agreement. Indeed, to review such a decision is not inconsistent with the separation of powers, but rather upholds it. That is so since the Minister has sought to make a binding international agreement, in terms of

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

section 231, by tabling the Russian IGA under the wrong section, therefore intentionally dispensing with the need for Parliamentary approval – thus violating the principle of separation of powers (in this case between the executive and the legislature) by bypassing parliamentary approval – expressly recognised in section 231. As Ngcobo CJ held in *Glenister II* "**[u]nder 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.**"[161]

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[161] *Glenister v the President of the Republic of South Africa* 2011 (3) SA 347 (CC) para 95 (emphasis added) (although Ngcobo CJ, was writing for the minority, the majority did not take issue with his setting out of the law in this respect); and see paras 179 – 181 (per Moseneke DCJ and Cameron J)) see also paras 89 and 91:
"[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.…
[91] The approval of an international agreement, under s 231(2) of the Constitution, conveys South Africa's intention, in its capacity as a sovereign State, to be bound at the international level by the provisions of the agreement. As the Vienna Convention on the Law of Treaties provides, the act of approving a convention is an 'international act . . . whereby a State establishes on the international plane its consent to be bound by a treaty'. The approval of an international agreement under s 231(2), therefore, constitutes an undertaking at the international level, as between South Africa and other States, to take steps to comply with the substance of the agreement. This undertaking will, generally speaking, be given effect by either incorporating the agreement into South African law, or taking other steps to bring our laws in line with the agreement, to the extent they do not already comply….
[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**

215. **Third,** the Government respondents' allegation [162] that the applicants lack standing to challenge the President's and Minister's actions in relation to section 231 is misguided. The Constitutional Court has confirmed that broad grounds of standing exist in relation to constitutional challenges including in relation to executive action.[163] This certainly includes a right to challenge unconstitutional exercise of constitutional and statutory powers.[164] The applicants have standing in their own interest and in the public interest,[165] to challenge unconstitutional actions by the executive, in relation to entering into and tabling of IGAs on nuclear procurement.

216. The mere fact that the executive is accountable to Parliament in relation to the exercise of their powers does not change the fact that the exercise of all public powers must be constitutional and comply with the principle of legality, and that those powers are therefore subject to judicial review at the instance of the public. [166] Actions by the President and the Minister in violation of the

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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." (emphasis added)

[162] Answering Affidavit *inter alia*, paras 12 and 13, Vol 3, p 638-43.

[163] See *Kruger v President of the Republic of South Africa and Others* 2009 (1) SA 417 (CC) ("Kruger") at paras 21-23, and the application of that principle by the High Court in relation to a decision by the Minister in relation to financial guarantees to SAA, *Comair Ltd v Minister of Public Enterprises and Others* 2016 (1) SA 1 (GP) para 62; *Albutt* at para 33. See also more generally *Rail Commuter Action Group v Transnet Ltd t/a Metrorail (No 1)* 2005 (2) SA 518 (C*)* at 556F-H; *Highveldridge Residents Concerned Party v Highveldridge Transitional Local Council* 2002 (6) SA 66 (T); *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape* 2001 (2) SA 609 (E) at 625E; *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) at para 16.

[164] Ibid.

[165] Founding Affidavit para 18, Vol 1, p 17-18.

[166] See e.g. *Economic Freedom Fighters v Speaker, National Assembly and Others* 2016 (3) SA

Constitution, are not merely a matter of interest to Parliament, but are a matter of legal interest to the public, and the applicants represent that interest.

217. **Fourth,** the Government respondents' suggestion that this Court may not even interpret an international agreement which the executive has entered into, is simply untenable in light of express provisions of the Constitution (which require courts to have regard to international law (both customary and treaty based)),[167] and the jurisprudence of the Constitutional Court and Supreme Court of Appeal, wherein they regularly interpret international agreements and other international instruments.[168] Moreover, the lawfulness and constitutionality of the President's and the Minister's exercise of powers granted to them under section 231 of the Constitution, in relation to international agreements, is certainly justiciable. Therefore, a review of the lawfulness and rationality of the exercise of those powers, requires the Court to have regard to and consider the obligations flowing from the agreements negotiated, signed, and sought to be made binding, pursuant to the exercise of those powers. For instance, it is obviously necessary for the Court to interpret an international agreement in order to inquire into the obligations created by it and nature of that agreement, in order to determine whether or not it should have been tabled under section

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580 (CC); see also *Comair supra* para 62.

[167] See section 39(2) and section 233 of the Constitution.

[168] See e.g. *Government of the Republic of Zimbabwe v Fick and Others* 2013 (5) SA 325 (CC); *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC); *National Commission of the South African Police Service v Southern African Human Rights Litigation Centre* 2015 (1) SA 315 (CC) ("SALC"); and *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* 2016 (3) SA 317 (SCA).

231(2) (requiring parliamentary approval), or (3) (and thus not requiring such approval) of the Constitution.

218. **Fifth,** in relation to the proper *interpretation* of the terms of the Russian IGA, we refer to what has been stated above, and further note that:

218.1 While the Government respondents have sought, unconvincingly, to explain away certain of the clear provisions of the Russian IGA and the binding commitments made therein, they have not explained why none of the other IGAs tabled as part of the nuclear procurement process, have the same detailed substantive and binding provisions highlighted above.

218.2 In particular, none of the other IGAs that were tabled, includes an indemnity provision, as contained in Article 15 of the Russian IGA. The suggestion by the Government respondents to the effect that Article 15 is really little more than a recordal of the existing civil liability regime in relation to nuclear power, is a makeweight argument conjured ex post facto by its legal team. It is nowhere borne out by any statement or document in the record, and is in any event wrong in fact and law. We point out:

218.2.1 South Africa is not a party to the 1963 Vienna Convention on Civil Liability for Nuclear Damage,[169] and is therefore not

[169] See https://www.iaea.org/Publications/Documents/Conventions/liability_status.pdf.

bound by its provisions (acceding to the Convention would necessarily require parliamentary approval under section 231(2) of the Constitution). In fact, Article 15 specifically takes account of this since it provides that "***[s]hould*** the Vienna Convention on Civil Liability for Nuclear Damage enter into force for the Republic of South Africa, the issues of ***civil liability*** for nuclear damage under this Agreement ***for the South African Party*** shall be regulated by this Vienna Convention."[170]

218.2.2 In any event, we note that, in terms of the 1963 Vienna Convention, which Russia is a party to,[171] the "operator" of a nuclear installation, who bears liability under that regime,[172] is defined as "the person designated or recognized by the Installation State[173] as the operator of that installation."[174]

218.2.3 Importantly, the effect of Article 15 is to designate the South African organisation as the Operator of the nuclear power plants, and not any Russian organisation, regardless of the fact

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[170] Russian IGA Article 15, Vol 1, p 296-7, emphasis added.

[171] See https://www.iaea.org/Publications/Documents/Conventions/liability_status.pdf.

[172] See Article II.

[173] Article I(d) provides that, "Installation State", in relation to a nuclear installation, means the Contracting Party within whose territory that installation is situated or, if it is not situated within the territory of any State, the Contracting Party by which or under the authority of which the nuclear installation is operated.

[174] Article I(c).

that it is the Russian organisation that will certainly construct and may operate the Russian nuclear power plants (Article 15 provides that "**[t]he authorized organization of the South African Party at any time and 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").

218.2.4 The applicable domestic liability regime is contained in the National Nuclear Regulator Act 47 of 1999 ("**NNR Act**"). It is certainly not correct that the liability and indemnification agreement included in the Russian IGA (Article 15) was simply a repetition of the domestic civil liability regime, since Article 15 goes far beyond that regime.

218.2.5 For instance:

218.2.5.1 The NNR Act creates a liability regime (in section 30) for holders of "a nuclear installation licence".

218.2.5.2 A nuclear installation licence is required by any person who wishes "to site, construct, operate, decontaminate or decommission a nuclear installation" (sections 20(1) and 21).

218.2.5.3 Save in the event of some artificial construct used to avoid the effects of the NNR Act, it is clear that the relevant Russian organisation or entity would require a nuclear installation licence, at the very least, to construct the nuclear power plants in South Africa.

218.2.5.4 Therefore, that Russian entity would incur liability under section 30 for nuclear damages.

218.2.5.5 This is completely at odds with Article 15 which provides that "**[t]he authorized organization of the South African Party** at any time and **at all stages of the construction** and operation of the NPP units and Multi-purpose Research Reactor shall …**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 occurring at NPP or Multi-purpose Research Reactor and also in relation with a nuclear incident during the transportation, handling or storage outside the NPP or Multi-purpose Research Reactor of nuclear fuel and any contaminated materials or any part of NPP or Multi-purpose Research Reactor equipment both within and**

outside the territory of the Republic of South Africa."

218.2.6 Moreover, Article 15 provides a complete indemnification from liability to the Russian government and its organisations whatever the circumstances. The NNR Act has no indemnification provisions.

218.2.7 In fact, there seems little doubt that it is precisely because the Russian government foresaw that it could incur liability, at least under South African law, during at least the construction phase of the nuclear plants, and of course also if it were to operate the power plants, that it sought and obtained the indemnification from the South African government (that "[t]he 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**.")

218.3 To indemnify the Russian government and its organisations, which the South African government has agreed to do in Article 15, means that the South African government has already agreed to meet any liability that the law, domestic or international, places on the Russian government and its

organisation for damage caused. It is absurd to suggest that this is simply a repetition of any existing law that would otherwise be applicable. The necessity and value of such a clause, points to precisely the opposite conclusion. The clause is clear: it is included to indemnify the Russian organisations from legal liability for damages that existing law would place on them.

218.4 Moreover, if Article 15 was indeed simply a repetition of an existing civil liability regime that would have been applicable in any event (which it clearly is not), then its inclusion in the IGA would have served no purpose.

218.5 It is also telling that no similar article was included in any of the other IGAs tabled.

219. Furthermore, and importantly, as mentioned above, **the 2004 Russian IGA, when compared to the 2014 IGA** confirms that Russia was being treated differently to the other prospective bidders.

220. **Sixth**, while the deponent avers that the Russian IGA is "not any kind of procurement step", that is inconsistent with other averments by the Government respondents. It will be recalled that the deponent makes clear in the answering affidavit[175] that absent the signing of IGAs by Canada and Japan, they will not be allowed to participate and bid for the production of the 9.6GW of nuclear

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

power to be procured. It is thus clear that the signing of the Russian IGA was a fundamental "kind of procurement step".

221. **Seventh,** the Government respondents tersely dispute the correctness of the advice by the State Law Advisor (International Law) in his memorandum accompanying the Russian IGA prior to its signature, that the IGA required Parliamentary approval, and should be tabled under section 231(2). Yet, it is evident that the Government respondents are able to point to no other legal advice taken prior to tabling the agreement, that took a contrary position to that of the State Law Advisor (International Law), who evidently prepared the draft of the agreement.

222. The view taken by the State Law Advisor (International Law), is relevant and telling, and demonstrates what the state's international law expert and drafter of the agreement believed the substantive nature of the agreement to be.

223. As set out above, the Memorandum itself makes clear that it was prepared prior to the signature of the IGA (which is not disputed by the Government respondents), and accompanied the draft version of the Russian IGA, and therefore was certainly not a memorandum prepared for Parliament for the purposes of tabling (as the Government respondents have erroneously and misleadingly suggested, as an after the fact effort to explain away the legal advice), but evidently was intended to and did serve before the Minister and the President prior to the decision to sign the IGA. That the memorandum served before the Minister and the President (as it must have, since it formed part of

their record of decision), is also not disputed by the Government respondents.

224. The ignoring of the views expressed by the State Law Advisor (International Law), without any evidence of different advice from another legal advisor which might have justified such side-stepping, evidences an irrational decision making process, prior to the tabling of the agreement under section 231(3). The Minister claims no general legal expertise, nor does or could she claim expertise in international law. Therefore, to simply ignore the advice received, and which was before her, and without any plausible justification for doing so, confirms not only that the decision is unlawful but also gives rise to a reasonable apprehension that the decision was motivated by and vitiated because of an ulterior purpose to avoid the parliamentary process. Even if we are wrong in this regard, the government's conduct confirms a steadfast effort to ignore materially relevant considerations. It is difficult to imagine a more salient and important consideration in this regard than the considered advice of the government senior legal adviser on international law.

225. **Seventh**, we point out that no confirmatory affidavit was been filed by the President, or even by any high level official in the Office of the Presidency, nor is there any suggestion in the Government respondents' affidavit that the President or his Office has been consulted in relation to averments made in relation to the President's actions, in particular the President's decision to authorise the Minister to sign the Russian IGA, which would certainly be peculiarly within the President's knowledge. Therefore, all allegations in the

Government respondents' affidavit in relation to the President's actions (including, in particular, his unlawful authorization of the signature of the Russian IGA) are hearsay in the mouth of the deponent, and are inadmissible.

VI. THE UNLAWFUL TABLING OF THE SOUTH KOREAN AND US IGAS

226. As noted above, section 231(3) provides that "[a]n 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**."

227. The US IGA was signed by South Africa and the US on 25 August 1995.

228. The South Korean IGA was signed by South Africa and South Korea on 8 October 2010.

229. As indicated above on or about 10 June 2015, the Minister decided to table a number of IGAs in terms of section 231(3). These included an US IGA and a South Korean IGA, which were both entered into years before the Russian IGA. Given the fact that the Russian IGA had been signed, a reasonable apprehension is created that the real purpose behind the sudden tabling of these agreements and the signature and tabling of the Chinese and French IGAs, was little more than window dressing. As discussed above, the government had already entered into the Russian IGA, which the DOE itself initially announced constituted an

agreement that Russia would construct nuclear power plants for South Africa, which was evidently unconstitutional and unlawful.

230. The US IGA was signed in 1995.[176] The South Korean IGA was signed in 2010.[177]

231. Section 231(3) requires that international agreements that fall within the terms of section 231(3), must be tabled before Parliament within a reasonable time.

232. Tabling the US IGA **twenty years** after it was entered into, and the South Korean IGA **five years** after it was entered into, fails to meet the standard of a reasonable time**.** This is especially so given the constitutional injunction in section 237, that all constitutional obligations must be performed diligently and without delay. If the intention was that these agreements should be made binding without parliamentary approval, then they should have been tabled years ago. This did not happen.

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

234. There is no indication that the Minister sought any advice prior to tabling these agreements notwithstanding so significant a delay – and despite the fact that the

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[176] US IGA, Vol 1, p 280.
[177] South Korean IGA, Vol 1, p 260.

State Law Advisor had otherwise been involved in providing advice (albeit ignored) regarding the tabling of the Russian IGA.

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

236. In any event, the period of delay, certainly would not constitute a "reasonable" period, and therefore the belated tabling violates section 231(3).

237. The Government respondents do not dispute the period of the delay; rather, they seek to argue that the requirement to table within a reasonable time is not a requirement under our Constitution to make an international agreement binding, and is merely a matter of notification.

238. The Government respondents' assertions are clearly wrong, for the reasons that follow.

239. **First**, section 231 creates an election for the relevant member of the executive to determine under which section to table an international agreement. It also creates

a legal obligation to table an agreement that is sought to be made binding without parliamentary approval (under section 231(3)) in a reasonable time, precisely to give effect to the obligation of open and accountable government and the separation of powers.

240. As Ngcobo CJ held in *Glenister II*, "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."[178]

241. Simply to label the tabling process as "notification", as the Government respondents seek to do, is to miss the point that tabling must be done within a reasonable time – and in any event, "notification" of such tabling would also have to be done within a reasonable time. It is telling that section 231(2), has no similar provision. This is so since tabling under section 231(2) simply begins a process of binding the State, only when and if parliament gives its approval. However, section 231(3) allows for the State to be bound absent parliamentary approval. It is for this reason that since the State is to be bound absent approval of Parliament, it is necessary that any such agreements which are to be made binding in this way must be placed before Parliament in a reasonable time. The Executive is not permitted to attempt to bind the State as one arm of government on the international plane and then sit on its hands by secretly keeping the international agreement away from Parliament.

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[178] *Glenister II* para 89.

242. Moreover, an unreasonable delay in tabling does affect the lawfulness of the exercise of the section 231(3) power. This is an extraordinary power given to the Executive which allows it to bind South Africa without Parliamentary approval. It is therefore clear that the exercise of this power is subject to the requirement that where the Government seeks to bind the State under this power, that it make such agreement public and places it before Parliament by tabling it within a reasonable time. It is a composite power and is not complete until the jurisdictional requirement of tabling before Parliament, within a reasonable time, is complied with. On the Government respondents' argument, they have entirely destroyed the purpose of "notification".

243. On an ordinary reading of section 231(3), and given the purpose of the provision within the constitutional scheme of the separation of powers, it is only at the stage of the tabling of the agreement that the requirements of section 231(3) are complied with. Indeed, prior to the tabling under (3), it would always be open to the relevant Minister to rather table the agreement under (2), and thereby seek parliamentary approval. While the Minister may negotiate and sign an agreement with a foreign State as an act of the Executive under section 231(1), it is only when the agreement is tabled under (3) before Parliament, within a reasonable time, that the agreement, as a matter of domestic constitutional law, may be considered to be binding.

244. The Government respondents implicitly accept this, since they argue that "there was no need to table these two treaties in Parliament during the past few years

because the circumstances were such that, although cooperation between the State Parties as contemplated therein did become politically possible … there was no practical or immediate need for such cooperation."[179] In other words, it was only when there was now a supposed need for cooperation, and therefore a need to bring the agreements into force and rely on them as binding, that the Minister believed it was necessary to table them, so that they would be considered to be binding, given apparent compliance with South Africa's internal constitutional requirements. But to have ensured that compliance under section 231(3), the Minister was obliged to ensure that the agreements were tabled before Parliament within a reasonable time – which was palpably not done in this case.

245. **Second**, while the question, as a matter of international law, as to when agreements come into force and become binding by simple signature, is one to be determined with due regard to the terms of the agreement and the intention of the state party to the agreement, to the extent that a relevant issue is whether domestic requirements have been complied with, one of the domestic requirements for an international agreement to become binding, even absent parliamentary approval, is the requirement in section 231(3) that such agreement be tabled before Parliament within a reasonable time. Prior to such tabling, and without that tabling occurring within a reasonable time, no confirmation could be given that the necessary domestic constitutional requirements had been

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[179] Answering Affidavit para 13.3, Vol 3, p 642.

complied with.

246. We point out in this regard that both the US and the South Korean IGAs specifically made such notification of compliance with South African constitutional law a requirement for the agreements to come into effect. In particular:

246.1 The South Korean IGA provides that: "This Agreement shall enter into force on the date on which both Parties have notified each other in writing through the diplomatic channel of **its compliance with the constitutional requirements necessary for the implementation of this Agreement**. The date of entry into force shall be the date of the last notification."[180]

246.2 The US IGA provides that: "This Agreement shall enter into force on the date on which the parties exchange diplomatic notes informing each other that **they have completed all applicable requirements for its entry into force**".[181]

247. The Government respondents have not given any indication that such notifications have been given, nor could they have been given prior to tabling, and moreover, they should not have been given even after tabling, since the constitutional requirement is not mere tabling, but tabling within a reasonable time. It is undoubtedly for that reason that the Government respondents have not

[180] South Korean IGA, Article 14(1), Vol 1, p 260.
[181] US IGA Article 13(1), Vol 1, p 279.

disclosed any notifications that have been given under either Articles 14 or Article 13 of the respective treaties as part of the record or even in their answering affidavit. They were invited to do so in the papers, but they did not seek any opportunity to place this information before this Court, and this Court can draw the relevant inferences from that fact.[182]

248. **Third,** we also note that despite the suggestion that the failure to table the US and South Korean IGAs for two decades and half a decade respectively, might have been reasonable, the Government respondents make clear that if and when the Canadian and Japanese IGAs are finalised they will be tabled before Parliament "as soon as possible thereafter."[183] This clearly shows that the Government respondents in fact accept that it is a jurisdictional requirement for binding the Republic to an international agreement under section 231(3) of the Constitution for the State to table such agreements within a reasonable time after being finalised.

249. This is also the interpretation that gives best effect to the section's fundamental constitutional value of openness and accountability, and to the framework of the Constitution, which is predicated on the fundamental principle of the separation of powers. It is therefore the interpretation that the Court should favour.[184]

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[182] *Pretoria Portland Cement & Another v Competition Commission &* Others 2003 (2) SA 385 (SCA) para 63; *Tantoush v Refugee Appeal Board and Others* 2008 (1) SA 232 (T) at para 51.

[183] Answering Affidavit para 107.4, Vol 3, p 803.

[184] See *Minister of Defence v Potsane; Legal Soldier (Pty) Ltd* 2002 (1) SA 1 (CC) at paras 26-42; *Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional*

250. Secretly signing agreements and failing to place them before Parliament for years, could never be reasonable in an open, and democratic country founded on the principles of accountable government and separation of powers. And the time periods involved in this matter border on the absurd, and hence could never be regarded as compliance with the requirement in section 231(3) for such agreements to be tabled within a reasonable period of time.

251. **Fourth**, it is noted that the Government respondents[185] contend that any alleged unreasonable delay for the tabling of an international agreement in Parliament for "notification" purposes under section 231(3) of the Constitution is a matter for Parliament to deal with. We point out that the Speaker of National Assembly and the Chairperson of NCOP are Government respondents in this matter, and have not sought to oppose the relief sought, or made any submissions to this Court regarding Parliament's opposition to the interpretation put forward by the applicants. Moreover, it is courts which are required to determine whether the executive has failed to comply with the Constitution, and declare such failure invalid.

252. In particular, the Constitutional Court has held that "[c]ourts are required by the Constitution to ensure that all branches of government act within the law and fulfil their constitutional obligations."[186] And, as Langa CJ opined in *Glenister I*,

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Development and Another; Executive Council, KwaZulu-Natal v President of the Republic of South Africa and Others 2000 (1) SA 661 (CC) at paras 44-45 and 48.

[185] Answering Affidavit para 106.2, Vol 3, p 800.

[186] *Doctors for Life* para 38; see also *Pharmaceutical Manufacturers* para 55.

"[i]n our constitutional democracy, the courts are the ultimate guardians of the Constitution. They not only have the right to intervene in order to prevent the violation of the Constitution, **they also have the duty to do so**."[187]

VII. REMEDY

253. Section 172(1)(a) provides that "[w]hen deciding a constitutional matter within its power, a court…must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency".

254. Therefore, in terms of section 172(1)(a) of the Constitution, when a Court considers remedy, the starting point, as a matter of constitutional principle, is that invalid administrative or executive conduct, must be declared unlawful and invalid.[188]

255. While section 172(1)(b) does allow the Court to suspend a declaration of invalidity, it may only do so if it is "just and equitable", and the purpose for which it can do so is limited: as the section makes plain this to "allow the competent authority to correct the defect."

256. The Constitutional Court has also emphasised 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

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[187] *Glenister v President of the Republic of South Africa and* Others 2009 (1) SA 287 (CC) para 33.

[188] *Bengwenyama Minerals (Pty) Limited v Genorah Resources (Pty) Limited* 2011 (4) SA 113 (CC) paras 81 - 82; *AllPay I* para 56.

be prevented. It is an approach that accords with the rule of law and principle of legality."[189]

257. The Government respondents have not urged this court to suspend any of the declarations of invalidity sought in this matter, or provide a justification for why such suspension would be just and equitable.

258. In the applicants' amended notice of motion,[190] there are four main prayers. We deal with each in turn.

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

259. In relation to the Russian IGA, the applicants seek an order in the following terms:

259.1 Declaring unlawful and unconstitutional and reviewing and setting aside:

259.1.1 the Minister's decision to sign the Russian IGA,

259.1.2 the President's decision to authorise the Minister's signature thereof; and

259.1.3 the Minister's decision to table the Russian IGA before Parliament in terms of section 231(3) of the Constitution.

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[189] *AllPay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer of the South African Social Security Agency and others* 2014 (4) SA 179 (CC) para 30.
[190] Vol 2, p 359-360.

260. We have set out in detail above why a) the decision to sign and the decision to authorize the signature of the Russia IGA, and b) why the decision to table the Russian IGA under section 231(3) of the Constitution, were unlawful and unconstitutional.

261. Therefore, in terms of section 172(1)(a) of the Constitution, this Court must declare these decisions unconstitutional and invalid.

262. The invalidity (or setting aside) of the unconstitutional conduct is the natural consequence of declaring such conduct unlawful. Indeed, absent any decision by this Court to suspend such a declaration, the conduct declared unlawful and unconstitutional is *de lege* invalid, *ab initio* as a matter of South African law. However, in order to avoid any uncertainty in this respect, a specific order has also been sought reviewing and setting aside the relevant decisions too.

263. This relief will also make clear that as a matter of South African law the agreement could not be entered into and lawfully be made binding by the government.

264. This is relevant, inter alia, since Article 17.1 of the Russian IGA provides that "[t]his 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."[191]

265. Obviously, it will be for the government to decide what steps may need to be taken on the international plane consequent upon such relief, and the applicants have not sought any order specifically directing the executive as to how to act.

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

266. The applicants have sought the following relief in relation to the US and South Korean IGAs in the following terms:

266.1 Declaring unlawful and unconstitutional and reviewing and setting aside the Minister's decision to table the US IGA and South Korean IGA before Parliament in terms of section 231(3) of the Constitution.

267. As discussed above, it is evident that the tabling of the US IGA twenty years after it was entered into, and the South Korean IGA five years after it was entered into, constituted unreasonable delays.

268. In the circumstances the Minister's decision to table these IGAs in terms of section 231(3) was unconstitutional and unlawful.

269. Therefore, in terms of section 172 of the Constitution this Court is required to declare the Minister's decisions to table these IGAs under section 231(3),

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[191] Russian IGA, article 17.1, Vol 1, p 297.

notwithstanding the unreasonable delay, unconstitutional and it is appropriate and just and equitable to set aside those decisions (which is the natural consequence of declaring their tabling to be constitutionally invalid).

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

270. The applicants have sought a general declarator in the following terms:

270.1 Declaring that prior to the commencement of any procurement process for nuclear new generation capacity (being at the latest prior to the appointment of a bid specification committee or persons tasked with drawing up the invitation to bid) and/or the exercise of any powers under section 34(2) of the ERA in relation to the procurement of nuclear new generation capacity, the Minister and NERSA are required first, after procedurally fair public participation processes, to have taken the ERA nuclear requirement decision[192] and the ERA nuclear procurement system decision.[193]

271. This declaratory relief is necessary for the following reasons:

271.1 First, despite the fact that the 2013 s 34 Determination was taken, and

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[192] The decision that new generation capacity is required and that the electricity must be generated from nuclear power and the percentage thereof, in terms of sections 34(1)(a) and (b) of the ERA.

[193] The decision in terms of section 34(1)(e), read with section 217 of the Constitution, that the procurement of such nuclear new generation capacity, must take place in terms of a procurement system that is fair, equitable, transparent, competitive and cost-effective, which system or procedure must be specified.

belatedly gazetted, the Government respondents have denied that the procurement of new generation capacity can only be predicated on the necessary determination in terms of section 34 of the ERA.

271.2 Second, in order to confirm the requirement that a lawful ERA nuclear requirement decision and the ERA nuclear procurement system decisions are both required prior to the procurement process commencing. This is particularly so, since the 2013 s 34 Determination was only gazetted after the procurement process had begun.

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

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

D. Prayer 4 – the unlawful 2013 s 34 Determination

272. The following relief is sought:

272.1 Declaring that the determination under section 34(1) of the ERA gazetted on 21 December 2015 (GN 1268, GG 39541) in relation to the requirement

and procurement of nuclear new generation capacity, signed by the Minister on 17 December 2013, with the signed concurrence by NERSA on 11 November 2013, is unlawful and unconstitutional, and is reviewed and set aside.

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

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

274. It is submitted that it is therefore just and equitable to declare unconstitutional and set aside the s 34 Determination as gazetted. There is no proper basis to suspend the setting aside and none has been advanced by the Government respondents.

275. The procurement of nuclear power, which is significant at a financial, socio-economic, and environmental level, and will have implications for South Africa for decades, cannot be allowed to be based on an unlawful and unconstitutional determination. There is therefore no justification to suspend the effect of the unconstitutionality.

276. Given the declaration sought in prayer 3 coupled with the order sought in prayer

4, this would mean that any steps in the procurement process would also be unlawful and invalid, since they would be based on an unlawful section 34 Determination, which is a legal prerequisite for nuclear procurement.[194]

277. The Government respondents averred in their answering affidavit that a RFP has not yet been finalised for the nuclear procurement,[195] although, in as early as December 2015, government press releases had indicated that the RFP was imminently to be released.

278. The issuing of an RFP within the context of the 2013 s 34 Determination is certainly the exercise of public power. And the issuing of an RFP in relation to the procurement of nuclear new generation capacity is a step that is legally predicated on there being a valid section 34 determination in place (in fact on its own terms, the impugned 2013 s 34 Determination specifically empowers the DOE to issue an RFP to procure the 9.6GW of nuclear power). Moreover, the relief sought in prayer 4(b) specifically makes clear that the applicants seek an order setting aside any RFP that is issued "*pursuant to*" the 2013 s 34 Determination. For the reasons set out above, it is impermissible for any issuing of a RFP for new generation capacity if there is no section 34 Determination.

279. But in any event the record made clear that the current nuclear procurement process is predicated on the section 34 Determination being in place.

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[194] *Seale v Van Rooyen NO and Others; Provincial Government, North West Province v Van Rooyen NO and Others* 2008 (4) SA 43 (SCA) at para 13.

[195] Answering Affidavit para 70, Vol 3, p 765.

Furthermore, the determination purports to bindingly set this process in motion (including by providing that the DOE is the procuring agency and may issue an RFP). Therefore, if the 2013 s 34 Determination is set aside, the legal consequence thereof would be to invalidate any RFP issued pursuant thereto. The relief in prayer 4(b) simply makes express that necessary legal reality.

280. In this regard, we point out that, even though the Government respondents failed to take the Court into their confidence as to when the RFP would be issued, on 7 September 2016, the Minister in answering questions in Parliament stated that an RFP for the nuclear procurement would be issued on 30 September 2016.

281. Yet in a DOE press statement after the close of pleadings it was made clear that no RFP would be issued on 30 September 2016 after all.[196]

282. It is therefore not clear that prior to this matter being heard the Minister will have issued an RFP for the procurement of 9.6GW of nuclear power. But at the hearing of this matter the Government respondents will be asked to advise this Court as to the current position.

E. Costs

283. Given that the Government respondents have opposed this application, should the applicants be substantially successful, the Government respondents should be ordered to pay the costs, jointly and severally, including the costs of three

[196] http://www.energy.gov.za/files/media/pr/2016/MediaRelease-Nuclear-New-Build-Programme-Request-For-Proposals.pdf

counsel given the complexity, novelty and importance of the matter.

284. Given that NERSA has not opposed this application, no costs order is sought against it.

285. It is also relevant to the issues of cost, regardless of the outcome of the case, that:

285.1 Part of the litigation commenced by the applicants sought a declaratory order (prayer 4, in the original notice of motion) on the predicate of there being no relevant s 34 determination in place. The Minister only revealed in the Rule 53 Record that such a determination was in place, and that she has belatedly decided to gazette the s 34 Determination in part to gain an advantage in this litigation.

285.2 The fact that the Minister despite being pertinently asked about the existence of any section 34 determination, prior to the commencement of litigation, did not disclose the fact of a section 34 determination having been made, means that the Minister is responsible for the wasted costs associated with the applicant having to amend its relief, and delays created by having to supplement its challenge.

285.3 Furthermore, as a mark of this Court's displeasure at the Minister's unlawful and unconstitutional conduct it should order, at least, the Minister to pay the costs of this application, or at least such costs as related

to the requirement to amend the relief sought, on an appropriate punitive scale.

286. More generally, given the size, novelty and complexity of this matter it certainly warrants the awarding of the costs of three counsel (although, four have been used by the applicants).[197]

287. In conclusion, in accordance with trite Constitutional Court authority, the applicants, who are non-government organizations who have brought this important constitutional matter in the public interest, should not have costs awarded against them, even if they were to be unsuccessful in their application to obtain the relief set out in their amended notice of motion.[198]

VIII. IN LIMINE POINT – THE JOINDER OF FOREIGN GOVERNMENTS

288. The Government respondents' allegation in their affidavit that the governments of Russia, the US and the South Korea, needed to be joined in this litigation, given that they are parties to the relevant IGAs, is erroneous for the following reasons:

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[197] See *South African Railway and Harbours v Illovo Sugar Estates Ltd and Another* 1954 (4) SA 425 (N) at 427A; *Van Zyl and Others v Government of the Republic of South Africa and Others* 2008 (3) 294 (SCA) at para 93; and *Van Zyl and Others v Government of the Republic of South Africa and Others* 2005 (11) BCLR 1106 (T) at para 125; and see by way of example *AllPay I,* and *Helen Suzman Foundation v President of the Republic of South Africa and Others* 2015 (2) SA 1 (CC).

[198] *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC) para 29-31; and *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) 138-139.

288.1 No order is sought against any foreign government. The relief that deals with the Russian IGA, and the tabling of the US and South Korean IGAs, is all directed at a determination of the constitutionality of the exercises by the President and the Minister of their domestic constitutional powers as matters of South African law. As noted above, section 172(1) compels a court to declare any conduct, including a decision in terms of section 231, that is inconsistent with the Constitution invalid (as a matter of domestic law).

288.2 This Court is being asked to determine whether the Minister's and the President's actions in terms of section 231 of the Constitution were lawful, as a matter of domestic law, not as a matter of international law.

288.3 As a full-bench of this Court has recently summarised the position in relation to non-joinder, "[i]t 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."[199]

288.4 None of the foreign governments that are party to the IGAs have any direct

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[199] *Tlouamma and Others v Speaker of the National Assembly and Others* 2016 (1) SA 534 (WCC) para 159. See also Erasmus Superior Court Practice RS 1, 2016, D1-125, and the cases referred to there, and *Bowring No v Vrededorp Properties CC and Another* 2007 (5) SA 391 (SCA) para 21.

and substantial legal interest, as a matter of South African domestic law, in the domestic constitutionality of the actions of the executive. The President's and Minister's obligations to act constitutionally are owed to South Africa, its citizens, and those resident in this country, not to foreign governments. Therefore, foreign governments would have no direct and substantial legal interest therein.

288.5 What steps the President and the Minister take on the international plane, if any of their actions are found to be unconstitutional and invalid as a matter of South African law, is a matter for them and the Executive to determine in the conducting of South Africa's foreign affairs.[200]

288.6 The signing of IGAs and their tabling are exercises of executive constitutional power.

288.7 Our courts have never required the joinder of foreign governments even where judicial review of the Executive's exercise of its domestic powers has an impact on or relates to foreign affairs with a foreign government.[201] Importantly, for instance, in *Quagliani*, one of the issues before the

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

[201] See *Minister of Home Affairs and Others v Tsebe and Others* 2012 (5) SA 467 (CC); *President and Others v Quagliani* 2009 (2) SA 466 (CC); *Geuking v President of the Republic of South Africa and Others* 2003 (3) Sa 34 (Cc); *Mohamed v President of the RSA* 2001 (3) SA 893 (CC); *Minister of Justice and Constitutional Development and Others v Southern Africa Litigation Centre and Others* 2016 (3) SA 317 (SCA); and *National Commissioner Of Police v Southern African Human Rights Litigation Centre and Another* 2015 (1) SA 315 (CC).

> Constitutional Court was the validity of the government's actions in entering into an international agreement in relation to extradition with the United States of America. The "applicants submitted that the Agreement with the United States had not been validly entered into because the President had delegated his own responsibilities in this regard to members of his Cabinet." [202] The Constitutional Court ultimately held that the government had acted lawfully in entering into the international agreement. [203] The United States of America was not a party to the litigation. Yet, there was no suggestion by the Constitutional Court that there was any necessity that the Government of the United States of America should be party to the litigation, merely because the constitutional validity of the South African government's action in entering into an international agreement was to be determined.

289. Furthermore, we note that in the Government respondents' concluding remarks in relation to the alleged non-joinder of the Russian, US, and South Korean governments, they also faintly suggest that there is also a non-joinder of the Chinese and French governments.[204] Since there is no challenge to any exercise of power that relates to either the Chinese and French IGAs, the Government respondents' suggestion is based on an argument that these foreign governments may have a direct and substantial interest given the interpretation of section

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[202] *Quagliani* para 13.
[203] *Quagliani* para 26.
[204] Answering Affidavit para 77, Vol 3, p 776-7.

34(1) by the applicants, and since they were involved in vendor parades.

290. To the extent the respondents seek to actively pursue this makeweight argument at the hearing of this matter, full legal argument will be addressed in relation thereto.

291. In summary, no foreign government can claim to have a direct and substantial legal interest as a matter of South African law in the interpretative relief sought in relation to section 34 (in prayer 3), or in the domestic lawfulness of the statutory exercise of power under section 34 (to be determined in prayer 4). Neither the Chinese government or the French government have acquired any direct and substantial legal interest in the whether the exercise of powers under section 34 was constitutional, merely because they have signed an IGA in relation nuclear energy cooperation with South Africa, nor because they have participated in vendor parades.

IX. CONCLUSION

292. The applicants pray for the relief sought in the amended notice of motion, alternatively such relief that the Court, in its constitutional discretion, determines to be just and equitable consequent upon the findings of constitutional invalidity,[205] including the costs of three counsel, given the nature of the matter.

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[205] *President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd* 2004 (6) SA 40 (SCA) at para 18, confirmed in *President of the Republic of South Africa and Another v Modderklip Boerdery* (Pty) Ltd 2005 (5) SA 3 (CC) at para 53, where it was held that "**[i]f a**

DAVID UNTERHALTER SC
MAX DU PLESSIS
ANDREAS COUTSOUDIS
SHELDON MAGARDIE
Chambers, 18 November 2016

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constitutional breach is established, this Court is …mandated to grant appropriate relief. A claimant in such circumstances should not necessarily be bound to the formulation of the relief originally sought or the manner in which it was presented or argued".

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