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
ESKOM HOLDINGS (SOC) LIMITED	Sixth Respondent

APPLICANTS' ORAL NOTE FOR ARGUMENT

I. INTRODUCTION

1. This oral note deals with certain of the submissions made by the Minister of Energy and the President ("**the Government respondents**") in their main and supplementary heads of argument.

2. We do not intend to repeat the legal and factual grounds of applicants' challenges to the constitutionality of the Government respondents' and NERSA's conduct. These are set out in detail in the applicants' main and supplementary heads of argument.

3. The constitutional issues to be determined by this Court arising from those challenges are as follows:

   3.1 Did the Minister of Energy ("**the Minister**") and NERSA (the statutory energy regulator) violate statutory and constitutional prescripts in making determinations (the 2013 s 34 Determination and 2016 Determination) in terms of section 34 of the ERA that a certain quantity of new nuclear capacity was required and should be procured?

   3.2 Did the President and the Minister violate the Constitution when deciding to sign and then table an intergovernmental agreement (**IGA**) with Russia in relation to nuclear procurement under section 231(3) of the Constitution rather than section 231(2)?

   3.3 Did the Minister violate the Constitution when tabling an American IGA and a South Korean IGA in relation to nuclear cooperation many years and decades after they had been signed?

4. Many of the applicants' legal submissions, all grounded in binding Constitutional Court and SCA authority, arising from the undisputed facts, are not properly addressed in the

Government respondents' heads (the main heads or their supplementary heads), if at all. The Government respondents introduce their argument with an unsubstantiated general suggestion that the case is based on mere speculation, yet at no point in their heads do they point to any instance in the applicants' heads where any material facts that grounds the applicants' case have been put in dispute.

5. Moreover, the Government respondents' case especially as it relates to the IGAs is made as if in another epoch. It is replete (especially in the dilatory points taken on joinder, jurisdiction and standing – which we address below) with reliance on old authorities that are divorced from and overtaken by our new constitutional order, or that have been clearly contradicted by binding Constitutional Court authority. It is telling that they are forced to find recourse to cases no longer applicable in our constitutional democracy, and foreign jurisprudence, when the Constitutional Court has spoken clearly on the issues at hand. It also telling that the Government respondents' have generally failed to engage not only with the Constitution, and the Constitutional Court's relevant and binding decisions, but also the pertinent submissions made by the applicants, in this regard.

6. This is particularly so in relation to this Court's power to determine the constitutional issues presented, the question of whether a foreign government has any legal interest in the constitutionality of the Government's actions, and the Court's power to interpret international agreements.

7. These issues have all presented themselves before the Constitutional Court, yet the Government respondents have persisted in acting and arguing as though those binding findings had never been made. It is not appropriate, with respect, for government litigants to advance submissions as though the highest Court in the country has had nothing to say on the subject. It is, moreover, disrespectful for those litigants to do so where the authority in question is dead against them.

8. In this note, we therefore deal briefly with certain of these issues and issues in relation to the challenges to the section 34 Determinations.

9. This note should be read together with the applicants' main and supplementary heads of argument. In this regard, we point out that many of the Government respondents' key submissions in their answering affidavit, which have often been repeated again in their main heads of argument (and then relied upon by reference in their supplementary heads), have been expressly rebutted in the applicants' main heads of argument. Yet, the Government respondents have failed to reference or engage with these direct rebuttals of their submissions (and have merely repeated their initial submissions).

10. In this note we make use of the same abbreviations used in the applicants' main and supplementary heads of argument.

II. NON-JOINDER

11. The Government respondents allege that certain foreign governments should have

been joined to this litigation.[1] This has been addressed in the applicants' main heads,[2] including with reference to Constitutional Court authority. The Government respondents do not in their heads, filed two weeks after the applicants, even attempt to address this authority and the submissions by the applicants.

12. A full bench of this Court, has recently, held that "*[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*."[3]

13. The subject matter of this litigation is the domestic constitutionality of the President's, the Minister's, and NERSA's actions. Similarly, the orders sought require no more than the exercise of this Court's obligatory powers to declare unconstitutional conduct invalid, to the extent of that unconstitutionality. No relief is sought against any foreign government.

14. In this regard, it is important to dispel a misrepresentation by the Government respondents of the applicants' case and the relief they seek:

14.1 The applicants do not seek any order to "invalidate" any international

---

[1] Government respondents' main heads paras 5 - 11.

[2] Applicants' main heads paras 288 – 291.

[3] *Tlouamma and Others v Speaker of the National Assembly and Others* 2016 (1) SA 534 (WCC) para 159, emphasis added.

agreements.[4]

14.2 Nor do the applicants allege that the IGA are domestic South African contracts – quite the contrary, the applicants' case is that since the IGAs are international agreements the Government respondents were required to comply with relevant requirements of section 231 of the Constitution in relation thereto, but failed to do so.

14.3 The case and the relief sought all relate to the constitutionality, on the domestic plane, of the Minister's and the President's actions.

14.4 In relation to the Russian IGA, the applicants seek an order, in accordance with section 172(1)(a) declaring:

14.4.1 the President's **decision** to authorize the signature, and the Minister's decision to sign, unconstitutional and invalid;

14.4.2 declaring the Minister's **decision** to table the IGA under section 231(3), instead of 231(2), unconstitutional and invalid.

14.5 In relation to the US and South Korean IGAs the applicants seek an order declaring the Minister's decision to table the IGA, under section 231(3), as unconstitutional and invalid, given the unreasonable delay in tabling.

[4] Government respondents' main heads para 8.1 and 8.3

14.6 Lastly, the relief the applicants seek in relation to section 34, relates purely to the proper interpretation of domestic legislation and lawfulness of the exercise of relevant domestic statutory powers. No foreign government has any legal interest (and certainly not because it has signed an international agreement) in the proper interpretation of domestic legislation, and whether a determination under that legislation was lawful. It appears that the Government respondents may not persist with this allegation, since in their supplementary heads and supplementary replying affidavit, which deal with the challenge to the 2016 Determination, they, correctly, do no persist in raising any non-joinder in relation to that challenge.

15. In summary, the relief the applicants seek all relates to the domestic constitutionality of the actions by the President and the Minister (and in the instance of the section 34 Determination, NERSA).

16. The Government respondents are thus wrong to contend that the applicants seek an order declare any international agreements invalid. Moreover, whether the IGAs – international agreements – are valid as a matter of international law on the international plane, which cannot be determined merely on the basis of whether or not domestic constitutional requirements have been complied with,[5] is not before this Court. This is certainly not an issue which this Court has been asked to determine or could determine.

[5] See the Vienna Convention on the Law of Treaties, Article 46 and Article 27.

17. Foreign governments have no legal interest, as a matter of South Africa law, in the domestic constitutionality of the actions of the South African Government, or its agencies.

18. None of the international agreements at issue in this matter, have been approved by Parliament or domesticated, therefore in terms of section 231(4) of the Constitution, they do not create any rights in South Africa.[6] Such IGAs create no legal interest for a foreign state of any nature, let alone a legal interest in the constitutionality of the South African Government's actions.

19. Indeed, the Government respondents later in their main heads, appear to accept as much.[7] The Government respondents' *in limine* points are therefore at war with their case on the merits, that the IGAs do not create domestic rights and obligations.

20. The Government respondents' only authority, as to why they say that certain foreign governments should be joined, is a series of cases that consider whether the validity of a contract can be determined in the absence of the other contracting party.[8] But this authority only relates to the validity of contracts, not international agreements. Most tellingly, it relates to the validity of domestic contracts enforceable as a matter of South African law.

---

[6] See *Glenister II* paras 102 and 181, see also *Progress Office Machines CC v South African Revenue Service and Others* 2008 (2) SA 13 (SCA) para 6.

[7] Government respondent's main heads 15.1 and 20.

[8] Government respondents' main heads para 8.4, and the authority cited in the footnote.

21. This authority is completely irrelevant to the issues and orders sought in this matter which all relate to the domestic constitutionality of the executive's actions in relation to international agreements. As noted above, this Court is not being asked to determine the validity of the international agreements as a matter of international law, it is being asked to determine whether the Executive acted in accordance with the South African Constitution, as a matter of domestic law.

22. The relief sought is to declare the decisions by the Minister and the President in signing, approving and tabling certain international agreements before Parliament, unconstitutional and invalid, as a matter of domestic constitutional law. This is an order that the Court is compelled to give in terms of section 172(1)(a), if it finds that the President's and the Minister's conduct violated the Constitution.

23. It is precisely for this reason that it is indeed, startling, and unheard of, for the Government of a country (A), to suggest that the government of a foreign country (B) has a direct and substantial legal interest before country A's domestic courts in relation to the domestic constitutionality of the government of country A's actions.

24. It is therefore hardly surprising, as was pertinently raised in the applicants' heads of argument, and not dealt with by the Government respondents, that our courts have never required the joinder of foreign governments even where judicial review of the Executive's exercise of its domestic powers has or may have an impact on or relates to

internal relations with a foreign government.[9] As obvious and dispositive examples:

24.1 In *Quagliani*, one of the issues before the Constitutional Court was the validity of the government's actions in entering into an international agreement with the United States in relation to extradition with the United States of America. In that case "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."[10] The Constitutional Court ultimately held that the government had acted lawfully in entering into the international agreement.[11] The United States of America was not a party to the litigation; and 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 the international agreement was to be determined.

24.2 The reason for this is obvious: international agreements do not create any legal interest or rights for foreign governments in South Africa, particularly in relation to whether the South African government acted constitutionally when entering

---

[9] 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).

[10] *Quagliani* para 13.

[11] *Quagliani* para 26.

into such agreements.

24.3 Similarly, in the recent SCA case of *Krok v SARS*,[12] the case centred on an interpretation of a bilateral international agreement between South Africa and Australia. SARS had sought to preserve certain assets in South Africa at the request of the relevant Australian authorities in relation to tax due to Australia. The appellants disputed that the tax was due to Australia primarily on a particular interpretation of the South Africa-Australian agreement, and protocols thereto. Australia and its agencies were not party to the litigation. The SCA did not suggest that the Australian government, or any of its agencies, should be joined or were necessary parties, even though the entire case was about the proper interpretation of the Australian and South African international agreement, and related to whether a preservation of assets for the tax owed to Australia should be discharged.

25. There are many other cases, where the Constitutional Court has been faced with challenges to the legality of Executive conduct, which directly implicated foreign governments. Yet in **not one** of these cases, were the foreign governments joined or found to be necessary parties to the litigation. These include:

25.1 *National Commissioner v SALC* (the *Zimbabwean Torture Docket* case)[13] – the

---

[12] *Krok and Another v Commissioner, South African Revenue Service* 2015 (6) SA 317 (SCA)
[13] *National Commissioner of Police v Southern African Human Rights Litigation Centre and Another* 2015 (1) SA 315 (CC).

Constitutional Court (and the High Court and SCA) found that there was a constitutional obligation on South Africa to investigate allegations of torture by Zimbabwean officials committed in Zimbabwe. Notwithstanding this finding, and that the case raised significant issues in relation to the immunity and sovereignty of Zimbabwe and its officials, the Zimbabwean government was not joined, nor deemed to be a necessary party.

25.2 *Minister of Justice v SALC* (*the Al Bashir case*)[14] – the High Court and the SCA held that the South African government has an obligation to arrest President Al Bashir of Sudan, while he was on a state visit to an AU Conference held in South Africa. Moreover, the High Court had in fact ordered his arrest, and prohibited him from leaving the country, while he was still in South Africa, but the Government failed to comply with this order. The Sudanese Government was not a party to this litigation, notwithstanding that the issue was the obligation of the South African Government to arrest its head of state, and the interim order granted in fact required the Government to prevent the head of the Sudanese Government from leaving the country.

25.3 *Geuking*[15] – the Constitutional Court case related to whether the President's decision to consent to the extradition of Mr Geuking to Germany (at Germany's request), was unconstitutional. Even though the determination of whether or not

[14] *Minister of Justice and Constitutional Development and Others v Southern Africa Litigation Centre and Others* 2016 (3) SA 317 (SCA).
[15] *Geuking v President of the Republic of South Africa and Others* 2003 (3) SA 34 (CC).

the President was entitled to consent to the extradition, would have effected whether Germany's requested was complied with, the fact that the German government was not a party to the litigation was not an issue to the Court.

25.4 *Mohamed*[16]– the Constitutional Court case found that the Government acted unconstitutionally in deporting Mr Mohamed to the United States, and ordered that this be brought to the attention of the United States' court trying Mr Mohamed. The United States was not joined to this litigation.

25.5 *Kaunda*[17] – a Constitutional Court case in relation to the Government's alleged unconstitutional failure to provide diplomatic protection to South Africans being held in Zimbabwe for allegedly plotting a coup in Equatorial Guinea. Neither the Zimbabwean, nor the Equatorial Guinean governments were joined, notwithstanding that the Court was faced with material allegations and evidence in relation to Equatorial Guinea's serious violation of human rights.

25.6 *Tsebe*[18] – a Constitutional Court decision dealing with the surrender of Botswanan accused to Botswana to face the death penalty; in which the Court held that the fact that Botswana was willing to give an assurance that the death penalty would not be imposed was not sufficient to allow the men to be deported - the accused were permitted to stay in South Africa, and the

---

[16] *Mohamed v President of the RSA* 2001 (3) SA 893 (CC).
[17] *Kaunda and Others v President of the Republic Of South Africa And Others* 2005 (4) SA 235 (CC).
[18] *Minister of Home Affairs and Others v Tsebe and Others* 2012 (5) SA 467 (CC).

Botswanan government was not cited in the application.

26. The reasons why the foreign governments were not joined in any of these cases, is that while they may have had an “interest” in terms of their foreign domestic law, or international law, or a non-legal interest, in the case and the order, they did not have a legal interest as a matter of South African law.

27. In short, we are aware of no authority in South African law, nor is any cited by the respondents, where a foreign government was considered to be a necessary party to a challenge in relation to the constitutionality of the exercises of the South Africa Government’s powers under the Constitution, or any other organ of state’s exercise of powers under a domestic statute. In fact, quite the opposite, as the above cases demonstrate.

III. ALLEGED NON-JUSTICIABILITY IN RELATION TO THE RUSSIAN IGA AND ITS INTERPRETATION

28. The Government respondents appear to contend that constitutionality of the President’s and Minister’s actions in approving and signing the Russian IGA is non-justiciable or that this Court should exercise judicial restraint in not determining these issues, and in particular that this Court may not interpret the Russian IGA.

29. In general, the authorities they rely on for these propositions are inapposite foreign jurisprudence, and a high court decision that predated almost twenty years of relevant Constitutional Court jurisprudence on the interpretation of international agreements.

30. The relevant and binding Constitutional Court jurisprudence in relation to the justiciability of these issues and the interpretation of international agreements, was clearly drawn to the Government respondents' attention in the applicants' main heads,[19] but these authorities were not dealt with.

31. For the sake of clarity, we reiterate and summarise a number of points.

32. ***First***, the Government respondents' suggestion that this Court may not even interpret an international agreement which the executive has signed 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)),[20] and the jurisprudence of the Constitutional Court and Supreme Court of Appeal, wherein they regularly interpret international agreements and other international instruments.[21] It suffices to stress a few examples:

 32.1 In *Glenister II*, the Constitutional Court, in determining whether the Government had acted unconstitutionally, interpreted the provisions of and obligations on South Africa flowing from, no less than four international agreements: the United Nations Convention against Corruption (2004) 43 *ILM* 37; the African Union Convention on Preventing and Combating Corruption (2004) 43 *ILM* 5 (AU

[19] Applicants' main heads in particular paras 47, 217.

[20] See sections 39(2), 232, 233 of the Constitution.

[21] See e.g. *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) *("Glenister II*"); *Krok* supra; *National Commission of the South African Police Service v Southern African Human Rights Litigation Centre* 2015 (1) SA 315 (CC) ("*Torture Docket case*"); *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* 2016 (3) SA 317 (SCA).

Convention); Southern African Development Community Protocol against Corruption (SADC Corruption Protocol) adopted on 14 August 2001 and Southern African Development Community Protocol on Combating Illicit Drugs (SADC Drugs Protocol) adopted on 24 August 1996 .

32.2 It also had regard to numerous other documents, including an OECD Report, in interpreting the scope of the obligations flowing from these agreements. In fact, it held that, "[*t]he OECD report* ***is not in itself binding in international law, but can be used to interpret and give content to the obligations in the conventions we have described***".[22]

32.3 In *Glenister II*, the Court also had regard to the Vienna Convention on the Law of Treaties in interpreting the terms of the relevant international agreements.

32.4 Therefore, any suggestion that courts are not entitled to interpret international agreements has been definitively rejected by the Constitutional Court.

32.5 Similarly, the SCA recently, in the matter of *Krok v SARS*, interpreted a bilateral taxation agreement between South Africa and Australia, and Protocols thereto. In so doing so it held that

> "[r]egarding the approach to be adopted in construing the relevant provisions [of the international agreements], consideration must be had to the rules applicable to the interpretation of treaties which are binding on South Africa and all states as rules of customary international law. These rules, which are

[22] *Glenister II* para 187.

> essentially no different from those generally applied by our courts in construing statutes and agreements, are set out in arts 31 and 32 of the Vienna Convention on the Law of Treaties, 1969."[23]

33. Of course, in the present matter the important issue is why the Court is being asked to consider the terms of the Russian IGA. The applicants are not asking the Court to enforce any terms of the Russian IGA; rather they seek a determination whether the President and the Minister acted constitutionally in approving and signing the agreement, and in tabling it under section 231(3), as opposed to section 231(2).

34. Since, the Court can only determine whether the Minister and the President acted constitutionally by having regard to the content of the Russian IGA, they are required to do so. To do anything else would be to effectively shield the Executive's conduct from constitutional scrutiny. This is anathema to our Constitution, as discussed below. For present purposes, it is enough to highlight the Constitutional Court's response to precisely this type of argument, in *Mohamed*, in paras 70 and 71:

> "With regard to the prayer for mandatory relief in the form of an order on the government to seek to intercede with the United States authorities regarding the wrong done to Mohamed, the government's opposition to any form of order was even more forceful. More specifically it was submitted that any such an order would infringe the separation of powers between the judiciary and the executive. In substance the stance was that Mohamed had been irreversibly surrendered to the power of the United States and, in any event, it was not for this Court, or any other, to give instructions to the executive.
>
> [71] We disagree. It would not necessarily be futile for this Court to pronounce on the illegality of the governmental conduct in issue in this case. In the first instance, quite apart from the particular interest of the applicants in this case, there are important issues of legality and policy involved and it is necessary that

[23] *Krok* para 27.

we say plainly what our conclusions as to those issues are. And as far as the particular interests of Mohamed are concerned, we are satisfied that it is desirable that our views to be appropriately conveyed to the trial court".

35. ***Second***, and relatedly, 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 (both their signing and tabling), is certainly justiciable:

35.1 The Constitutional Court has held that "every *exercise of public power, including every executive act"* must comply with the principle of legality,[24] and that the *"exercise of all public power is subject to constitutional control"*.[25]

35.2 This applies equally to exercises of public power in relation to foreign affairs, which the Constitutional Court has held are justiciable.[26]

36. ***Third***, a challenge to the lawfulness and rationality of the exercise the Executive's section 231 powers, requires the Court to have regard to and consider the obligations flowing from the agreements negotiated, signed, and sought to be made binding,

---

[24] *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 69 (CC) at para 69; see also *Democratic Alliance v President of the Republic of South Africa and Others* 2013 (1) SA 248 (CC) para 27; *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 51 and 85.

[25] *National Treasury v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC) at para 64.

[26] *Kaunda and Others v President of the Republic of South Africa* 2005 (4) SA 235 (CC) at paras 78 – 80.

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

37. As Moseneke DCJ held in *SCAW*:

> "In our constitutional democracy all public power is subject to constitutional control. Each arm of the state must act within the boundaries set. However, in the end, courts must determine whether unauthorised trespassing by one arm of the state into the terrain of another has occurred. In that narrow sense, the courts are the ultimate guardians of the Constitution. They do not only have the right to intervene in order to prevent the violation of the Constitution, they also have the duty to do so."[27]

38. By way of example, one of the constitutional issues that this Court is required to consider, necessitates it considering the terms of the Russian IGA. The Government respondents allege, that the legal advice of the State Law Advisor: International Law, that the Russian IGA had to be tabled under section 231(2), since it was an agreement that required Parliamentary approval, was objectively incorrect (and therefore could be ignored, notwithstanding that no alternative advice was received prior to the tabling). They argue that objectively the Russian IGA, was by its content, an agreement that fell within the ambit of section 231(3), despite the advice by the Government's own legal advisor.

---

[27] *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC) para 92.

39. We will return to the correctness of this submission below (which is disputed, as dealt with in the applicants' main heads of argument). But, to determine whether the Government respondents' assertions in this regard are correct, or whether the State Law Advisor: International Law was correct, and thus that the Minister violated section 231 of the Constitution and trenched on Parliament's powers to approve international agreements, the Court has to consider and interpret the Russian IGA.

40. ***Fourth***, if this Court could not determine the legal nature of an international agreement, it could not determine, as it is required to by section 172(1)(a), whether that agreement was constitutionally, or unconstitutionally, tabled under section 231(3), thus bypassing parliament.

41. Where a Court finds that any conduct of the Government is unconstitutional, it is obligated to declare it invalid. It has no discretion, and it certainly may not exercise any judicial restraint to not determine the issues.[28]

IV. THE TERMS OF THE RUSSIAN IGA

42. The Government respondents' heads are for the most part silent on the fact that the Russian IGA includes a series of material and substantive provisions that were not included in any of the other IGAs in relation to nuclear cooperation, nor in the 2004

[28] See section 172(1)(a) of the Constitution; *Pharmaceutical Manufacturers* para 51; and *Bengwenyama Minerals (Pty) Limited v Genorah Resources (Pty) Limited* 2011 (4) SA 113 (CC) paras 81 – 82, 84; *AllPay I* para 56; *National Director of Public Prosecutions v Mohamed NO and Others* 2003 (4) SA 1 (CC) para 56.

Russian IGA in relation to nuclear cooperation. These provisions mark the Russian IGA out from the other IGAs. Yet, the Government respondents appear nevertheless to suggest that all IGAs (including the Russian IGA, despite the material discrepancies) fulfil the same function – creating a mere framework for possible future cooperation in the area of nuclear power.

43. As made clear in the applicants' heads of argument this is certainly incorrect (see the main head of argument paras 148 – 172).

44. In summary, unlike in the 2014 Russian IGA, in the 2004 Russian IGA and each of the other IGAs tabled in June 2015, *inter alia*:

44.1 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;

44.2 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;

44.3 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;

44.4 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

44.5 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.

45. In stark contrast, the 2014 Russian IGA has provisions dealing with each of these issues.

46. As the Appellate Body of the World Trade Organisation has held, "*[o]ne of the corollaries of the "general rule of interpretation" in the Vienna Convention is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility*."[29]

47. Similarly, the International Court of Justice, has recently reaffirmed this long standing principle, holding that where an interpretation of words in a clause of an international agreement renders those words "*meaningless and no legal consequences would be drawn from them*" this would be "*contrary to the principle that words should be given*

[29] United States-Standards for Reformulated and Conventional Gasoline, WTO Doc. WT/DS2/AB/R, at 23 (Appellate Body Report, May 1996), relying on, inter alia, the ICJ decisions of *Corfu Channel* Case (1949) ICJ Reports, p 24 (International Court of Justice); Territorial Dispute Case (Libyan Arab Jamahiriya v. Chad) (1994) ICJ Reports, p. 23 (International Court of Justice);

appropriate effect whenever possible."[30]

48. In light of this principle and all general principles of interpretation, the above mentioned material clauses in the Russian IGA (including indemnification, and a supremacy clause), which on the international plane are intended to create obligations for South Africa, cannot all be simply ignored, and given no meaning. Yet that is what the Government respondents do. They simply fail to address in any way the fact that Russia was treated in a substantively different way to the other potential nuclear partner countries which the Government intends to ask to bid to construct nuclear power plants. Moreover, ignoring all the above material terms and reading them as if they did not exist, would still fail to explain why the further 2014 Russian IGA was required, when a general nuclear cooperation agreement with Russia already existed. Stripped of its offending provisions, the 2014 IGA would be very similar to the 2004 IGA, and thus seemingly unnecessary.

49. In summary, the Government respondents close their eyes to those facts that they cannot deal with or do not want to deal with. The result is that there is no meaningful response to the objective facts which confirm that the decision to sign and approve the Russian IGA could not be said to be rationally connected to a legitimate government purpose, it being irrational to treat one bidding country substantively differently to other countries. Furthermore, the inclusion of the material commitments in the

[30] Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation) (Preliminary Objections), 1 April 2011, I.C.J. Reports 2011, p. 70, paras 134.

Russian IGA meant, for the reasons already articulated in the heads of argument, that the Russian IGA required parliamentary approval in terms of section 231(2), and therefore could not be tabled under section 231(3).

50. Moreover, although the Government respondents state that as an international agreement, the Russian IGA does not implicate section 217 of the Constitution, which they argue only applies to domestic contracts, they say that the Russian IGA "*does not 'contract for goods and services' but **contemplates future contracts to be entered into under the umbrella thereof** and also in accordance with section 217 of the Constitution*."

51. This is a submission which is fatal to the Government respondents' case:

51.1 It demonstrates that the Government respondents at least submit that the Russian IGA "*contemplates*", and will be the "*umbrella*" for, further domestic contracts with the Government in relation to procurement – with apparently those contracts to then comply with section 217 (presumably meaning they will purportedly be domestic contracts entered into after a constitutionally compliant tender process).

51.2 Thus, one needs to look to the Russian IGA to see in what manner it "*contemplates*" that "*future contracts*" will be "*entered into*" under its "*umbrella*".

51.3 The Russian IGA makes clear in Article 16 (Vol 1, pg 297) that "***In case of any discrepancy between this Agreement and agreements (contracts), concluded under this Agreement, the provisions of this Agreement shall prevail*.**"

51.4 This supremacy clause means that the contents of future (apparently) domestic contracts for nuclear power, will be subject to the Russian IGA. Thus, the Russian IGA, while itself not a domestic contract, claims to creates binding obligations (on the international plane), which are to take precedence over the future domestic procurement contracts.

51.5 Yet, the Government decided to sign and table the Russian IGA under section 231(3), prior to the conclusion of any procurement process in accordance with section 217.

51.6 In this regard, we point out that the 2014 Russian IGA, expressly takes note, in its preamble, of "*the rights and obligations of the Parties under the Agreement between rights and obligations of the Government of the Russian Federation and the Government of the Republic of South Africa on the Promotion and Reciprocal Protection of Investments as of November 28, 1998*."

51.7 This is relevant since this bilateral investment treaty,[31] expressly provides protection for all investments (broadly defined to include all kinds of assets,

[31] Available from DIRCO's treaty website, https://treaties.dirco.gov.za/dbtw-wpd/images/19981123RussiaProtectionofInvestments.PDF.

including contractual rights) by Russia in South Africa, and allows for claims to be made against South Africa before international arbitral tribunals.[32]

A. On the issue of civil liability in the French IGA

52. There is now a suggestion in the Government respondents' main heads of argument that in the French IGA[33] there is also something equivalent to the civil liability regime in the Russian IGA. But this is palpably incorrect. The two relevant clauses in the respective IGAs are materially different:

52.1 First, unlike the Russian IGA, the French IGA does not include any actual liability regime, but proposes that one be created and provided for in domestic law.

52.2 Second, the French IGA, unlike the Russian IGA, does not deem South Africa the operator both during the construction and operating phases.

52.3 Third, the French IGA, does not provide that South Africa is liable for all damages wherever they occur in relation to the construction and operating of the plants, and in relation to the transporting of nuclear material.

52.4 Fourth, the French IGA, unlike the Russian IGA, proposes a limited liability regime.

52.5 Fifth, and most importantly, the French IGA, unlike the Russian IGA, does not

---

[32] See Article 10(2) of the Russian-South Africa investment treaty.
[33] Government main respondents' heads para 24.2.

include any indemnification provisions, whereby the South African government indemnifies the Russian government from any liability.

53. Once again, the comparison, far from assisting the Government respondents, shows the clear distinction between what was agreed with the Russian Government and what was agreed with all the other potential nuclear partner countries, including the French Government.

54. For ease of reference, the two provisions should be viewed side by side:

French IGA – Article 11[34]	**Russian IGA – Article 15**[35]
The Parties shall ensure that a civil nuclear liability regime is set up in their respective jurisdictions in accordance with the internationally established principles, including: **(a) exclusive liability of operators of nuclear facilities;** **(b) objective liability of the operator (i.e. liability even in the absence of fault);** **(c) liability limited in amount and duration, covered by a financial guarantee or insurance, where necessary complemented by the State;** **(d) unique and exclusive jurisdiction**	**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**

[34] Record Vol 1 pg 244.
[35] Record Vol 1 pg 296-7.

of the courts of the Party in whose territory the accident occurred to hear claims; **(c) non-discriminating nature of compensation (all damage to persons and property must be covered, except the installation itself and the items therein).**	**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 organizations 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.**

55. Moreover, the Government respondents make no attempt in their heads, to deal with the clear distinctions and conflicts, as set out in the applicants' main heads of

argument, between the legal obligations created by Article 17 of the Russian IGA and the domestic statutory civil liability regime created by the National Nuclear Regulator Act.

B. Whether the Russian IGA was a section 231(2) international agreement

56. As already set out in the applicants' main heads, it is clear from the terms of the Russian IGA that it does not fall within the limited exception to section 231(2), it therefore required parliamentary approval, and could not be tabled under section 231(3).

57. This was the view of the State Law Advisor: International Law, which advice was simply ignored by the Minister.

58. The Government respondents submit that this advice was irrelevant since the question of whether the agreement fell within section 231(3) or (2) is objective. That argument is as self-serving as it is wrong. One of the academic writers that the Government respondents rely on, Prof Botha, has indicated the following:

> "This raises a crucial question in regard to the classification of treaties, namely in whose hands does the determination of the nature of the agreement - and consequently the path it must follow to bind the Republic **-** rest? .....
>
> The Constitution is silent on this point. **Current practice is that the determination of whether a treaty falls under section 231(3) and therefore does not require parliamentary approval, vests in the line-function minister within whose portfolio the subject matter of the treaty falls.** **<u>This decision *must be taken* in conjunction</u>**

with the law advisors of the Departments of Justice and Foreign Affairs."[36]

59. Prof Botha bases his statement, on the Presidency's own internal manual – the Manual on Executive Acts of the President of the Republic of South Africa – which is a guide that sets out the requirements *inter alia* for entering into international agreements, which must be followed by all departments.

60. Given that the practice (advisedly so[37]) is that the Minister must determine the nature of the agreement, inter alia, in conjunction with the State Law Advisor: International Law, this further demonstrates that it was procedurally and substantively irrational for the Minister to ignore the views expressed by the State Law Advisor: International Law, that the Russian IGA required parliamentary approval.

61. In addition, the entry into force of the Russian IGA also provides a further indication

---

[36] Botha *"Treaty making in South Africa: A reassessment'* 25 (2000) South African Yearbook of International Law 69, pgs 77-8.

[37] For as Professor Botha goes on to confirm:

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

that it is certainly meant to be an agreement that had to be tabled under section 231(2).

62. In the Department of International Relations and Cooperation's (DIRCO's) own Handbook to guide Government in relation to concluding international agreements,[38] which provides a practical guide to all departments on drafting, signature and tabling of international agreements, the following is stated in relation to drafting of provisions for entering into force depending on the nature of the international agreement.

63. Importantly, the following is provided, in guideline for drafting international agreements:

> "**ENTRY INTO FORCE**
> **Where the agreement falls within the ambit of section 231(3) of the Constitution of the Republic of South Africa, 1996:**
>
> "This Agreement shall enter into force on the date of signature thereof by the Parties."
>
> **Where the agreement falls within the ambit of section 231(2) of the Constitution of the Republic of South Africa, 1996:**
>
> **"The Parties shall notify each other in writing when their respective constitutional requirements for entry into force of this Agreement have been fulfilled. This Agreement shall enter into force on the date of the last written notification."**

64. The Russian IGA's entry into force provision **clearly mimics the standard terms for an agreement that falls within the ambit of section 231(2**), and not one that falls

[38] Practical Guide and Procedures for the Conclusion of International Agreements 3rd edition, available at http://www.dirco.gov.za/foreign/bilateral/conclusion_agreement0316.pdf.

into section 231(3). That is because it provides, not that it would enter into force on the date of signature (as DIRCO suggests is the case for an agreement that falls under s 231(3)), but 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."**[39]

65. This is in contrast to the 2004 Russian IGA, which provides in Article 12(1) that "This Agreement shall enter into force on the date of signature thereof."[40]

C. STANDING TO CHALLENGES THE TABLING OF THE IGAs

66. The Government respondents persist in their untenable submission that only Parliament would have standing to challenge a tabling of the Russian, American and South Korean IGAs in violation of section 231.[41] They make no attempt to meet the direct Constitutional Court authority against this proposition, pertinently raised in the applicants' heads.[42]

67. The Constitutional Court has confirmed that broad grounds of standing exist in relation to constitutional challenges including in relation to executive actions.[43] This

---

[39] Record Vol 1, pg 297, Article 17(1).
[40] 2004 Russian IGA, Vol 5, p 1490.
[41] Government respondents' main heads paras 30 and 41.
[42] Applicant's main heads paras 215 – 216.
[43] 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

certainly includes a right to challenge unconstitutional exercises of constitutional and statutory powers.[44] The applicants have standing in their own interest and in the public interest,[45] to challenge unconstitutional actions by the executive, in relation to the tabling of IGAs.

68. 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.[46] Actions by the President and the Minister in violation of the 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. Moreover, as the Constitutional Court has affirmed, ultimately it is the courts that must determine whether one branch of government has acted outside of its powers, thus trenching on the powers of another branch of government.[47] They not only have the right to do so,

---

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.

[44] Ibid.

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

[46] See e.g. *Economic Freedom Fighters v Speaker, National Assembly and Others* 2016 (3) SA 580 (CC); see also *Comair supra* para 62.

[47] *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC) para 92.

but the high constitutional duty.[48]

69. It should be noted, that Parliament (via the Speaker and the Chairperson) have been cited in these proceedings, and do not oppose the relief sought in this application.

V. THE CHALLENGE TO THE 2013 AND 2016 DETERMINATIONS IN TERMS OF SECTION 34

70. In terms of the amended relief now sought, there are two section 34 Determinations that now stand challenged before the Court: the 2013 Determination (dealt with in the main heads of argument) and the 2016 Determination (dealt with in the supplementary heads of argument).

71. In view of the submission made by the Government respondents in their main and supplementary heads, we emphasise certain points.

A. The nature of the section 34 Determinations

72. ***First***, in offering an interpretation of section 34, the Government respondents have made no attempt to grapple with the undisputed facts as to the express reasons why the Minister and NERSA made the 2013 s 34 Determination, and the terms of the 2013 s 34 determination.

73. These are all at odds with the strained interpretation offered of section 34, that is

---

[48] *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC) para 92

not borne out by a purposive, contextual, and constitutionally compliant interpretation of the section.

74. The 2013 s 34 Determination, on its own terms,[49] and in the context in which it was decided,[50] certainly was considered to be a necessary statutory step prior to the procurement of nuclear new generation capacity.

75. The same is true of the 2016 Determination. The 2016 Determination was expressly taken based on the acceptance that it was required in order to procure 9.6GW of nuclear power.

76. The 2016 Determination, expressly provided that:

76.1 9.6GW of new generation capacity generated from nuclear energy must be procured; and

76.2 Eskom is empowered to procure the 9.6GW nuclear power.[51]

77. The Minister's letter to NERSA (seeking its concurrence in the 2016 Determination), which is in similar terms to the Minister's letters to Eskom and the MPE, expressly states

"on 11 November 2013, the then Minister of Energy, Minister Ben Martins,

---

[49] Applicants' heads para 57.3, 2013 s 34 Determination, Vol 2, p 499-500.
[50] Applicants' heads para 133.
[51] 2016 Determination, Vol 5A, p 1577.

> sought concurrence from the National Energy Regulator of South Africa ("NERSA") in respect of a Determination in terms of Section 34 (1) of the electricity Regulation Act, 2006 (Act No. 4 of 2006) (as amended) **which provided, amongst others, that 9,6GW of new generation capacity from nuclear power was to be procured with the Department of Energy as the procurement agency in respect of the nuclear programme** .....
>
> In order to ensure the seamless delivery of the nuclear programme I have decided, after having consulted with representatives of Eskom, **that it is necessary for Eskom to be procurer of the 9600 of tile Nuclear Programme and the owner and operator of the nuclear power plants**.
>
> **To effect this change, the Section34(1) Determination must be amended**."[52]

78. This shows a consistent understanding by the Minister and DOE over the years, that both the 2013 and 2016 Determinations were certainly intended to, and necessary to, empower and require first the DOE, and then Eskom, to procure 9.6GW of nuclear power.

79. In the face of this, it is startling, and with respect inappropriate, for the Minister's counsel to submit before this Court (notwithstanding the clear and express position taken by the Minister in the 2016 Determination and in seeking concurrence from NERSA) that:

> "A ministerial determination in terms of section 34 of the ERA is in essence and in substance nothing more than a policy decision by the National Executive, **binding only upon the National Energy Regulator of South Africa** - as provided for in section 34(3) of the ERA - in the issuing of a generation licence.....
>
> **A mere determination in terms of section 34 of the ERA does not legally imply or**

[52] Vol 5A, p 1674.

require that a procurement of new generation capacity must and shall follow: the **legal consequences thereof (if and when one is made)** are spelt out in section 34(3) of the ERA and in effect it constrains NERSA not to go beyond the national policy stance adopted by the National Executive, so that absent such a determination NERSA has more freedom of choice and a larger space for decision-making in the issuing of a generation licence."[53]

80. Not only is no attempt made to explain how this view is consistent with the plain meaning of section 34(1)(e)(i), which also allows the Minister and NERSA to determine that "new generation capacity **must be established through a tendering procedure** which is fair, equitable, transparent, competitive and cost-effective". But more importantly, no attempt is made to explain how this view is consistent with the Determinations in fact made by the Minister, or her and her predecessor's expressed bases for making these Determinations, as set out above, and in the main heads of argument.

81. The Minister's and the DOE's views, and the express terms of the Determinations, are at least relevant since the SCA has recently affirmed that where there is a dispute as to an appropriate interpretation of legislation, evidence of how it has been interpreted and applied over a period of time by the officials administering it, may be used to tip the balance in favour of that interpretation. As Wallis JA held,

"There is authority that in any marginal question of statutory interpretation, evidence that it has been interpreted in a consistent way for a substantial period of time by those responsible for the administration of the legislation is admissible and may be relevant to tip the balance in favour of that interpretation. This is entirely consistent with the approach to statutory interpretation that examines the words in context and seeks to determine the meaning that should reasonably be placed upon

[53] Government respondents' supplementary heads paras 8 and 9.

those words. The conduct of those who administer the legislation provides clear evidence of how reasonable persons in their position would understand and construe the provision in question. As such it may be a valuable pointer to the correct interpretation. In the present case the clear evidence that for at least eight years the revenue authorities accepted that in a DDS scheme the exercise of the option and not the delivery of the shares was the taxable event, fortifies the taxpayers' contentions" (footnotes omitted)."[54]

82. We also point out that one the of academic authorities that the Government respondents rely on, Klees "The Electricity Law of South Africa", opines that

"**specific rules for the procurement of new generation capacity exist in the electricity law [the ERA] which supplement the general public procurement regulation, govern the procurement process and allocate the responsibilities**…. With regard to the procurement of new generation capacity, the ERA stipulates that, when the Minister of Energy makes a determination in terms of s 34(1) of the ERA, he or she 'may (. . .) require that new generation capacity must - (i) be established through a tendering procedure which is fair, equitable, transparent, competitive and cost-effective; (ii) provide for private sector participation'. **The Minister is equipped with far reaching powers to facilitate the procurement or establishment of new generation capacity**."[55]

83. Moreover, if the Government respondents' counsel view of the meaning of section 34 was to be accepted (which is disputed), then on that basis alone the 2013 and 2016 Determinations should be set aside, since the Determinations would (a) be ultra vires, since they purport to do more than section 34 empowers the Minister and NERSA to do; and (b) would be irrational and unlawful since the Minister and NERSA made a material error of law as to the scope of their powers and/or their reasons for making the Determinations were not rationally connected to the purpose for which the power was given.

---

[54] *Commissioner, South African Revenue Services v Bosch & Another* 2015 (2) SA 174 SCA at [17].

[55] Klees, A. *Electricity Law in South Africa* (2014) pgs 265-6, emphasis added.

B. Failure to have any form public participation

84. ***Second***, on the issue of public participation and consultation, the Government respondents have failed to deal with the facts in relation to the 2016 Determination.

85. In particular, as pointed out in the applicants' supplementary heads, in relation to NERSA's decision to concur in the 2016 Determination:

85.1 The NERSA round robin resolution in respect of the 2016 Determination expressly provides that NERSA's decision to concur was taken in terms of section 8(9)(b) of the NERA;[56]

85.2 Section 8(9)(b) of the NERA provides that "*If the Energy Regulator **takes a decision** in any other manner than at a formal meeting, **such decision** comes into effect after it has been reduced to writing and signed by a majority of the members and it must be submitted for noting at the first formal meeting of the Energy Regulator following the decision*"; (emphasis added);

85.3 It is therefore clear that the decision to concur in the 2016 Determination, was understood, and accepted to be a decision by NERSA governed procedurally by the terms of the NERA, which specifies how NERSA must act.

85.4 This certainly confirms that section 10(1) (which applies to "*every decision*" of

---

[56] NERSA Resolution p 1566.

NERSA) applied to NERSA's decision to concur, since it was evidently a decision contemplated by the NERA (as is patent from NERSA's express statement that the decision to concur by resolution was taken in terms of section 8(9)(b) of the NERA).

86. Therefore, NERSA was obligated by section 10(1)(d) of the NERA to conduct a procedurally fair process, which expressly includes a requirement to give affected persons the opportunity to submit their views and present relevant facts and evidence to NERSA.

87. Yet, it is accepted that NERSA conducted no public consultations with anyone.

88. In the circumstances, NERSA's concurrence clearly violated the NERA and the principle of legality insofar as that principle requires procedural rationality.

89. Notably, NERSA does not oppose this application, nor has it filed any affidavits to dispute the facts put forward by the applicants.

90. Furthermore, in seeking to argue that there was no legal obligation to have any consultation prior to making of the 2016 Determination, the Government respondents expressly rely on their erroneous interpretation of the nature of section 34 Determinations in general.[57] However, for the reasons set out above, their interpretation pays no regard to the terms of the 2016 Determination, and the

[57] Government respondents' supplementary heads paras 7 to 10.

Minister's own expressed view in relation thereto.

91. Based on the erroneous view of section 34, the Government Respondents argue that "*the issuing of a generation licence is an official stamp of approval and a licence to start with and complete the actual procurement of new generation capacity: <u>this is where public participation belong and there is with respect no duty or requirement that the National Executive must consult and engage with the public in formulating or implementing its national policies or in performing its executive functions</u>.*"

92. Not only is there no legal basis to suggest that prior to procurement commencing a "generation licence" would be required, but as the Government respondents are at pains to point out, a section 34 Determination **<u>binds</u>** NERSA when issuing such generation licences (section 34(3)).

93. Given that in the 2016 Determination (and also in the 2013 Determination, in relation to the DOE) the Minister and NERSA have determined that 9.6 GW of nuclear power is required and should be procured by Eskom, NERSA is expressly then bound (in terms of section 34(3)) when issuing a generation licence by such 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. This is precisely why section 34 determinations should include public participation.

94. Therefore, at the time that a generation licence is sought for a nuclear power plant, NERSA would be unable, both legally and factually, to conduct consults with the public in relation to whether 9.6GW is required and should be procured by Eskom. In fact, at that stage there would already been a procurement process and contract awarded to building the requisite nuclear power plants, thus rendering any consultation process a hollow sham.

C. NERSA's material misconstrual of its powers

95. ***Third***, one of the material facts in the record which demonstrates that the 2013 s 34 Determination was unconstitutional was that NERSA, materially and irrationally misconstrued its own powers when giving its concurrence. As discussed in the main heads of argument the record reveals that NERSA (who does not oppose this application) laboured under a material error of law, when it gave its concurrence to the 2013 s 34 determination: it mistakenly thought that it was obligated to give its concurrence, even though it did not believe that the Minister's determination was correct.[58]

96. The Government respondents' heads of argument, reveal that they now appear to labour under this material failure to appreciate the discretion given to NERSA, to

[58] Applicants' heads paras 107.1-.6.

consider the proposed determination by the Minister, and either give its concurrence, or withhold it, if NERSA believes, as the expert regulator that the determination proposed by the Minister is incorrect. This error of law appears in their heads of argument where they submit, in order to suggest that the Determination has no external effect, that "a ministerial determination [under section 34] can have no actual or potential adverse effect and/or "*direct and immediate consequences*" for any other person but only impacts on NERSA, **who must concur therewith**".[59]

97. **In relation to the 2016 Determination**, one of the main points made by the applicants,[60] which demonstrated NERSA's concurrence was unlawful, was that the key reason for NERSA giving its concurrence was that it believed that it would be "*mala fides*" for it not to concur.

98. As submitted in the supplementary heads, NERSA formed the view that it had to concur, on the short-cut basis that it had previously concurred some three years earlier in the 2013 s 34 Determination. This rendered NERSA's concurrence unlawful, since, quite aside from abdicating its decision-making role in this way, there is no legal or factual basis for NERSA's understanding. The 2016 Determination was the exercise of a discretionary statutory power, vested in NERSA, regardless of whether it was an amendment of a previous Determination or

---

[59] Government main respondents' heads para 62.9.
[60] Applicants' supplementary heads para 70 -74.

a self-standing Determination. NERSA had the discretion and the duty to decide anew whether to concur or not, and it was not bound by its past decision in 2013 (moreover the new Determination, was materially different, in that it designated Eskom as the procurer, and was to be taken years later when the facts underpinning the previous 2013 determination had or might have changed), nor was NERSA required to accept that the Minister's Determination was correct. NERSA was required to take the appropriate time to exercise an independent mind, on updated facts.

99. The Government respondents, in order to avoid this point, which renders NERSA's concurrence unlawful, seek to downplay what NERSA says in its round-robin resolution. They argue, without substantiation, that "*there is no factual basis to elevate this remark to a so-called 'key reason'*".

100. Yet, NERSA's round-robin resolution is very clear that the erroneous belief that NERSA was compelled to concur, for to do otherwise would be mala fides, is certainly a key reason for the decision (and indeed appears to be the primary basis for the decision). NERSA makes plain in setting out its basis for concurring that:

> "2.3.1 Without the Energy Regulator decision to concur with the proposed amendment, the nuclear programme can be negatively affected.
>
> 2.3.2 Considering that the proposed amendment is on a determination that the Energy Regulator has already concurred, **it can be viewed as mala fide**

for the Energy Regulator to delay or refuse to concur with the proposed amendment." (Emphasis added)[61]

101. Moreover, despite the Government respondents unavailing attempt to ignore the plain terms of NERSA's resolution, NERSA has not opposed the application, or filed any affidavit to dispute that the fear of acting mala fides if it refused to concur, because it had already previously concurred in the original determination, was the key reason for its decision.

D. NERSA's irrational concurrence and the nature of the s 34 determination

102. **Fourth**, in disputing that NERSA's concurrence in the 2016 Determination was irrational and unlawful for failure to have regard to relevant considerations, the Government respondents once again fall back on their flawed interpretation of section 34.

103. The Government respondents say that "*The Applicants again advance the argument that NERSA failed to apply its mind to whether or not 9.6 GW of nuclear new generation capacity was still required but in this regard we need to repeat paragraph 2 above: because of the misconception of the true nature and substance of a ministerial determination under section 34(1) of the ERA, the Applicants argue incorrectly that a number of considerations should have been taken into account but were not whilst those considerations* ***were with respect not relevant for the purposes of developing and implementing national policy or performing an***

[61] NERSA resolution, Vol5A, p 1569.

executive function".

104. Yet, NERSA's own concurrence made clear that it understood the 2016 Determination to allow for nuclear procurement to now be implemented and finalised with Eskom as the procurer. Indeed, NERSA's resolution records that its concurrence would "***bring finality to the implementation of the nuclear procurement programme***."[62]

105. Moreover, as noted above, the Government respondents once again fail to appreciate that once NERSA had concurred in a section 34 Determination has to how much nuclear new generation capacity was required and that Eskom should procure that, NERSA was then bound by that Determination when issuing generation licences. Thus, it should have been, but was not, a highly relevant consideration whether South Africa in fact required 9.6GW of nuclear new generation capacity and whether Eskom should be the procurer therefor.

106. Irrationally and unlawfully, NERSA failed to consider this, before concurring (as no more than a rubber-stamp) in the 2016 Determination.

E. The need for a nuclear procurement procedure

107. ***Fifth***, section 34(1)(e)(i) provides that:

"(1) The Minister may, in consultation with [NERSA]- ..... (e) require that new

---

[62] Vol 5A, p 1569.

generation capacity must- (i) be established through a tendering procedure which is fair, equitable, transparent, competitive and cost-effective;" (emphasis added)

108. To the extent that in proposing an interpretation of section 34(1)(e)(i), the Government respondents can be understood[63] to rely on the "may" in the introduction to section 34(1) as providing a discretion to the Minister as to whether to specify that nuclear procurement must be in terms of a fair, equitable, transparent, competitive and cost-effective tender procedure, this is certainly, contextually and constitutionally incorrect.

109. The Constitutional Court had held that the word "may" can be used for the purpose of conferring a power or discretion coupled with a duty to use it (i.e. in an obligatory sense) in a particular context.[64] This is particularly the case where to give it a purely discretionary meaning would lead to a section being rendered unconstitutional.[65]

---

[63] Government respondents' main heads para 60.2

[64] *Botha And Another v Rich No and Others 2014 (4) SA 124 (CC) para 35; Van Rooyen and Others v the State and Others (General Council of The Bar of South Africa Intervening) 2002 (5) SA 246 (CC) para 178-182, reading with footnote 163.*

[65] *Van Rooyen and Others v the State and Others (General Council of The Bar of South Africa Intervening)* 2002 (5) SA 246 (CC) para 178-182, reading with para 88 and footnote 163. The Constitutional Court interpreted "may" not to be discretionary, since in the context it would have rendered the section unconstitutional, since it would have violated the principle of judicial independence. The Court (per Chaskalson CJ) also referred with approval to Wade and Forsyth in *Administrative Law* (8th ed, Oxford University Press, Oxford, 2000) at 239: _ 'The hallmark of discretionary power is permissive language using words such as ''may'' or ''it shall be lawful'', as opposed to obligatory language such as ''shall''. But this simple distinction is not always a sure guide, for there have been many decisions in which permissive language has been construed as obligatory. This is not so much because one form of words is interpreted to mean its opposite, as because the power conferred is, in the circumstances prescribed by the

110. In the present context, section 217 of the Constitution requires that all organs of state must procure all goods and services in terms of a system that is fair, equitable, **transparent**, competitive and cost-effective. In the circumstances, section 34(1)(e) could hardly, unconstitutionally, be interpreted to create a discretion for the Minister with the concurrence of NERSA to allow procurement of nuclear new generation capacity either absent a system in accordance with section 217, or in a way that was not fair, equitable, transparent, competitive and cost-effective.

111. In any event, in the 2013 s 34 Determination and the 2016 Determination, the Minister and NERSA purport to exercise the power under section 34(1)(e)(i), but merely repeat the wording of the section, coupled with a provision giving a general discretion to the Department of Energy, without specifying what the procedure to be used will entail.[66] Thus the issue, at least in relation to the challenge to the 2013

Act, coupled with a duty to exercise it in a proper case.'

[66] 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;"

Vol 2, p 479-8.

The 2016 Determination provides 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 and provide for private sector participation;

…."

Determination, is not whether the power under section 34(1)(e)(i) could, in the circumstances, have not been exercised, but rather whether given that it was purportedly so exercised, whether the exercise of the power was lawful.

F. Legality review of the Determinations

112. ***Sixth***, in the Government respondents' supplementary heads, in the introduction they allege that if the Minister's and NERSA's decisions in relation to the 2016 Determination are found not to be administrative action, then the challenge to the 2016 Determination "falls away" "on this basis alone".[67]

113. Government respondents' submission is legally and factually unsustainable.

114. As with the applicants' challenge to the 2013 Determination, the challenge to the 2016 Determination is based on PAJA **and** on the principle of legality.[68]

115. As made clear in the applicants' heads of argument, if the 2013 and 2016 Determinations (and the decisions by the Minister and NERSA in relation thereto) are found not to be administration action, then they are still the exercises of public power (which the Government respondents' admit), and therefore reviewable in terms of the principle of legality.

4.that the procurer in respect of the nuclear programme shall be the Eskom Holdings (SOC) Limited or its subsidiaries;"
Vol 5A, p 1577.

[67] Government respondents' supplementary heads para 4.

[68] Applicants' supplementary heads para 33.

116. All the applicants' grounds of challenge in relation to the 2013 and 2016 Determinations are cognisable under both PAJA and the principle of legality.

117. Since, the Government respondents go on in their supplementary heads to deal with the applicants' challenges and expressly engage with the principle of legality, it is evident that they are in fact aware that the applicants' challenge to the 2016 Determination is also based on the principle of legality, and therefore that it is still cognisable, even if the Determination is found to be executive action (as they allege is the case).

G. Failure to deal with the rebuttal of Government respondents' case in relation to the 2013 Determination

118. ***Seventh***, in the applicants' main heads of argument, not only do they set out in detail the various bases upon which the 2013 s 34 Determination was unlawful,[69] but at paragraphs 127 – 145, the applicants set out a detailed rebuttal of the Government respondents' submissions in their answering affidavit based on the facts and the relevant law. Yet, the Government respondents appear in their main heads to mostly repeat the submissions made in their answering affidavit, without engaging with the detailed rebuttal thereof.

VI. COSTS

119. The Government respondents in their main heads of argument submitted, absent

[69] Applicants' main heads paras 57 – 132.

authority, that if they are successful that the application should be postponed or dismissed with "an appropriate order for costs"[70], and in their supplementary heads they submit that the challenge to the 2016 Determination should be dismissed with costs "including the costs incumbent upon the employment of three counsel".[71]

120. It was not clear in the main heads of argument whether the Government respondents meant by an "appropriate order for costs" that they should be awarded costs (as opposed to the constitutionally compliant order, if the Government respondents were successful, of all parties bearing their own costs).

121. However, it now appears plain from the supplementary heads, that the Government respondents do indeed seek costs if the application (including the further relief) is dismissed.

122. Such a cost order, given the nature of this case, has no basis in our law. 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.[72]

---

[70] Government respondents' main heads para 79.
[71] Government respondents' supplementary heads para
[72] *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 323 (CC) para 29-31; and *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) 138-139.

123. There is certainly nothing frivolous, vexatious or manifestly inappropriate in this litigation. It raises important issues that are of grave public import. In any event, the Government respondents have laid no basis for a finding of frivolousness or vexation in their answering affidavit or supplementary affidavits. Indeed, they made no allegation in this regard. Nor could they.

124. Moreover, as set out in the main heads of argument, it is the Government respondents who failed, despite request, to reveal the existence of the 2013 s 34 Determination, until it was belatedly included in the Rule 53 Record, in direct response to this litigation, but only months after the application was instituted.

125. In the circumstances of this case, the principles in relation to costs in constitutional matter laid down by the Constitutional Court in *Biowatch* make plain that no costs order can be made against the applicants, even if they are not substantially successful.

126. The Government respondents also argue, in one brief paragraph of their supplementary heads of argument, that in view of the Minister's suggestion in her supplementary affidavit that the taking of the 2016 Determination was merely discharging her ongoing responsibilities, the scale of the cost order made by this Court when the matter was postponed should be revisited (recalling that the Minister herself tendered the wasted costs of four counsel, albeit on the ordinary scale).

127. In the applicants' heads of argument, they have in detail set out why the fuller facts revealed in the Minister's affidavit further supports the appropriateness of this Court's punitive cost order.[73] In particular, the Minister, knowing the hearing was fast approaching, could have advised the Court and the other side weeks or even months earlier that the 2016 Determination was imminently to be made (as she had advised the MPE and Eskom), and proposed an adjournment or other appropriate steps.

128. The Government respondents' make no attempt to meet these points.

129. More fundamentally, this Court granted the costs order after hearing argument on the question of the correct scale of costs. Therefore, the cost order is final, and is not susceptible to "*revisiting*".[74] As the SCA held in *De Villiers*,

"[14] In the *Firestone* case the following appears at 307H - 308A:

'But, of course, if after having heard the parties on the question of costs, either at the original hearing or at a subsequent hearing . . . the Court makes a final order for the costs, there can be no such ''implied understanding''; and such an order is as immutable (subject to the preceding exceptions)[75] as any other final judgment or

---

[73] Applicants' supplementary heads paras 123 – 130.

[74] *Firestone South Africa (Pty) Ltd v Genticuro Ag 1977* (4) SA 298 (A) 307-308; *De Villiers and Another NNO V BOE Bank LTD* 2004 (3) SA 459 (SCA) par 13 to 17.

[75] None of these exceptions apply in this matter. They are summarised in *De Villiers* para 8 as follows: "In the *Firestone* case at 306H - 308A, after a reference to the *Estate Garlick* case, four exceptions to the rule are spelt out and dealt with. I repeat them and consider their applicability:

(i) The principal judgment or order may be supplemented in respect of accessory or consequential matters, for example, costs or interest on the judgment debt, which the court overlooked or inadvertently omitted to grant.

This exception does not apply as the question of costs was considered and dealt with. …

(ii) A court may clarify its judgment or order, if, on a proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true

order . . . .'

[15] There can be no doubt that the question of costs on the basis that the loan agreements had lapsed was addressed.

[16] Against this background **<u>there can be no question of an implied understanding that, subsequent to the hearing, an aggrieved party could approach this Court to be heard on an appropriate order as to costs. In these circumstances we are *functus officio* and our order is immutable</u>**."

130. In any event, the Government respondents have brought no application to have the costs order made by this Court varied, even if the Court had the power to do so in the current circumstances, and they have not made out a case for the amending of the final cost order based on any of the common law exceptions in *Firestone* or under Uniform Rule 42 – nor could they.

DAVID UNTERHALTER SC
MAX DU PLESSIS
ANDREAS COUTSOUDIS
SHELDON MAGARDIE
Chambers, 22 February 2017

---

intention, provided it does not thereby alter the 'sense and substance' of the judgment or order. …..

(iii) A court may correct a clerical, arithmetical or other error in its judgment or order so as to give effect to its true intention.

…….

(iv) Where counsel has argued the merits **<u>and not the costs of a case</u>** but the Court, in granting judgment, also makes an order concerning costs, it may thereafter correct, alter or supplement its order. The reason for this exception is that, in such a case, the court is always regarded as having made its order with the implied understanding that it is open to an aggrieved party subsequently to be heard on the appropriate order."