

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

CASE NO: 19529/15

In re :-

EARTHLIFE AFRICA - JOHANNESBURG

First Applicant

SOUTHERN AFRICAN FAITH COMMUNITIES'
ENVIRONMENTAL INSTITUTE

Second Applicant

and

THE MINISTER OF ENERGY

First Respondent

THE PRESIDENT OF THE REPUBLIC OF
SOUTH AFRICA

Second Respondent

ESKOM HOLDINGS (SOC) LTD

Third Respondent

DEMOCRATIC ALLIANCE

Fourth Respondent

In the matter between:-

EARTHLIFE AFRICA - JOHANNESBURG

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SOUTH AFRICA

Second Respondent

THE NATIONAL ENERGY REGULATOR OF
SOUTH AFRICA

Third Respondent

SPEAKER OF THE NATIONAL ASSEMBLY

Fourth Respondent

CHAIRPERSON OF THE NATIONAL COUNCIL
OF PROVINCES

Fifth Respondent

ESKOM HOLDINGS (SOC) LTD

Sixth Respondent

FILING NOTICE

DOCUMENT: EXPLANATORY AFFIDAVIT ON BEHALF OF
FIRST RESPONDENT

ON THE ROLL: 29 NOVEMBER 2017

FILED BY: FIRST RESPONDENT'S ATTORNEY
THE STATE ATTORNEY
SALU BUILDING
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cnr FRANCIS BAARD AND
THABO SEHUME STREET
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PRETORIA, 0001
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Enq: Mr C E Snyman

TO: THE REGISTRAR OF THE
ABOVE HONOURABLE COURT
CAPE TOWN

AND
TO:

APPLICANTS' ATTORNEY
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RECEIVED COPY:
TIME:
DATE:

AND
TO:

THIRD RESPONDENT'S ATTORNEYS
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TO:

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IN THE HIGH COURT OF SOUTH AFRICA
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Case No: 19529/15

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**THE NATIONAL ENERGY REGULATOR OF
SOUTH AFRICA**

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**THE NATIONAL ENERGY REGULATOR OF
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SPEAKER OF THE NATIONAL ASSEMBLY

Fourth Respondent

TFM
TFM

CHAIRPERSON OF THE NATIONAL COUNCIL
OF PROVINCES
ESKOM HOLDINGS (SOC) LIMITED

Fifth Respondent
Sixth Respondent

FIRST RESPONDENT'S EXPLANATORY AFFIDAVIT

I, the undersigned

TSELISO MAQUBELA

do hereby make oath and say that:

1. I am an adult male Acting Director-General in the Department of Energy, and I am duly authorised to depose to this affidavit on behalf of the Minister, the First Respondent.
2. The facts contained herein fall within my personal knowledge, unless otherwise stated or the contrary appears from the context, and are to the best of my knowledge and belief both true and correct. Where I make legal submissions, I do so on the advice of the legal representatives which advice I believe to be true and correct.
3. Where I do not have personal knowledge, I attach the relevant confirmatory affidavit(s) of the person(s) from who I obtained the relevant facts.



PURPOSE OF AFFIDAVIT

4. I wish to state at the onset that the Minister believes that the applicants have no legal basis for launching this urgent application. I deal with the grounds on which this view is based in detail below.
5. Despite such belief, the Minister has elected not to oppose the relief sought by the applicants however his rights in this regard remain reserved.
6. The purpose of this explanatory affidavit is to place on record:
 - 6.1. the Minister's response to the urgent application launched by the applicants on 15 November 2017 seeking declaratory and ancillary relief pursuant to the judgment handed down on 26 April 2017 by this Court under the abovementioned case number (the "main application"); and
 - 6.2. the undertaking by the Minister in the terms covered by prayer 2 of the notice of motion in so far as it deals with the Minister (the reason being that the Minister can't give an undertaking in relation to matters that do not fall within his province. i.e. NERSA).

JUDGMENT IN MAIN APPLICATION

7. The judgment and order handed down in the main application on 26 April 2017, in effect, invalidated measures that had been taken by the Minister and

P.F.M.
P.F.M.

his department up to that stage regarding the procurement of new electricity generation capacity from nuclear power.

8. The judgment is relevant to the urgent application launched by the applicants because it informs the legal position for the procurement of new electricity generation capacity from nuclear power. In responding to the urgent application, it is therefore necessary to refer to the relevant findings made by this Court in the judgment, which are pertinent to the issues raised by the applicants in their founding affidavit.
9. I am advised that of relevance are the findings that this Court made in respect of the determinations in terms of sec 34 of the Electricity Regulation Act 4 of 2006 ("ERA"). This Court found:

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

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decision by the Minister, prior to the sec 34 determination being made, for fair administrative action. One link, namely NERSA's action having proved to be fatally flawed from an administrative law point of view, the chain, i.e. the sec 34 determination, is broken.

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

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

[67] From the record it appears that NERSA gave its concurrence to the 2016 sec 34 determination within three days of being asked by the Minister and there was therefore no question of any public participation process or any form of external consultation prior to NERSA's decision. Given the elapse of two years since NERSA's concurrence in the 2013 determination and the changed format of the determination, most particularly in its designation of Eskom Holdings (SOC) Limited or its subsidiaries as the procurer in respect of the nuclear programme it was,

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in my view, incumbent upon NERSA to afford members of the public and/or interested and affected persons (including the applicants) an opportunity to influence the decision. My reasons for reaching this conclusion are in principle the same as those underlying the same conclusion in respect of the 2013 sec 34 determination."

10. The effect of the above findings is that (a) the Minister can only make a sec 34 determination with the consent of the National Energy Regulator of South Africa ("**NERSA**") and (b) NERSA can only make such a decision pursuant to obtaining public input so as to allow both interested and potentially affected parties to submit their views and present relevant facts and evidence to NERSA before it takes a decision on whether or not to concur with the Minister's proposed determination. These findings are binding on the Minister and NERSA.
11. It is incontrovertible that the compliance with an order or decision issued by a court is a constitutional imperative which is enshrined in section 165(5) of the Constitution of the Republic of South Africa, Act 108 of 1996 (the "**Constitution**"). Section 165(5) of the Constitution states that an order or decision issued by a court binds all persons to whom and organs of state to which it applies. Accordingly, the Minister has a constitutional obligation to respect and uphold the findings of this Court.
12. True to his constitutional obligation, the Minister has complied and intends to continue complying with the judgment. The Minister appreciates that his



failure to comply with the judgment would be unlawful and would certainly result in contempt of court proceedings being instituted against him.

13. In terms of prayer 2 of the notice of motion of the urgent application, the applicants seek a declaratory order that that no steps, including the issuing of a Request for Proposals or a Request for Information, may be taken by the Minister (the first respondent) and/or Eskom (the third respondent) for the procurement of new electricity generation capacity derived from nuclear power in the absence of a lawful determination in terms of sect 34 of the ERA that such new electricity generation capacity derived from nuclear power is required, which determination must:

13.1. be with the concurrence of NERSA (the second respondent) in terms of section 34(1) of the ERA; and

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

14. The relief sought in prayer 2 has already been pronounced upon by this Court in the main application. In this regard I refer to paragraphs 9 and 10 above. In the circumstances, this Court cannot grant the applicants the relief sought herein because the issue is *res judicata* as between the applicants and the Minister.

15. Moreover, the outcome that the applicants seek to achieve with the relief set out in prayer 2 is already the *status quo* as a result of the judgment. Whilst

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this is favourable to the applicants, it underscores the fact that the urgent application is wholly unnecessary.

URGENT APPLICATION

16. On 7 November 2017 the applicants addressed a letter to the Minister demanding an undertaking on or before Monday, 13 November 2017 on similar terms to those set out in the urgent application.
17. Effectively, the applicants provided the Minister with 4 days within which to consider their letter and provide an undertaking.
18. This time period was insufficient given the duties of the Minister as a holder of a public office. Moreover, the applicants should have also anticipated that the Minister may require legal advice on whether he was obliged to comply with the undertaking and that in the circumstances, giving him 4 days to respond was unreasonable.
19. On 15 November 2017 the applicants issued the urgent application primarily against the Minister and Eskom Holdings (SOC) Ltd ("**Eskom**") for an order in the following terms:
 - 19.1. "That the non compliance by the applicants with the Uniform Rules relating to form and service be condoned and this application be heard as one of urgency in accordance with Uniform Rule 6(12);

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

19.2.1. be with the concurrence of NERSA (the second respondent) in terms of section 34(1) of the ERA; and

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

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



of any intergovernmental agreements in relation to nuclear cooperation or procurement.

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

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

20. The applicants launched the urgent application based on the "*reasonable apprehension that Government has indeed embarked, or imminently intends embarking, on a course of action to procure new power plants directly in conflict with this Court's judgment.*"

21. The basis for the alleged reasonable apprehension is media statements and reports contained in annexures "EJM3" to "EJM14" of the founding affidavit as well as the that fact the Minister never provided the undertaking sought in the letter dated 7 November 2017.

22. The alleged reasonable apprehension does not provide a legal basis for the relief sought by the applicants.



23. The applicants are not alleging that the Minister has contravened the judgment (which he has not). They are merely speculating that this could be the case. Mere speculation does not entitle the applicants to the relief sought nor would a contravention of the judgment by the Minister as this would result in contempt of court proceedings.
24. This matter should never have been launched least of all on an urgent basis. The applicants have, in any event, failed to make out a case for urgency.
25. Prayers 3 to 5 of the notice of motion are consequential orders flowing from prayers 2.1 and 2.2. In the premise, as the applicants have no basis for the relief sought in prayers 2.1 and 2.2, it follows that there is no basis for the other relief sought in prayers 3 to 5.

UNDERTAKING

26. The Minister undertakes to continue to act in accordance with the judgment. By implication the Minister therefore undertakes to act in accordance with prayer 2 of the notice of motion in as far as it relates to him.
27. As the Minister has complied with prayer 2 of the notice of motion, this disposes of the matter in its entirety in that prayers 3 to 5 are consequential orders flowing from prayers 2.1 and 2.2.
28. The notice of motion made provision for the filing of opposing affidavits on or before 22 November 2017. The Minister due to prior commitments including the parliamentary sitting in Cape Town in the week of 22 November 2017 was

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unable to consult with his legal team in order to finalise and file the affidavit timeously.

29. I submit that there is no prejudice caused by the late filing of this affidavit as the Minister is not opposing the urgent application but filing an explanatory affidavit.

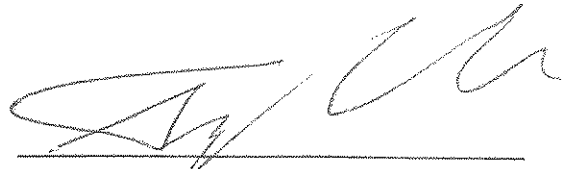
30. On 24 November 2017, a letter was despatched by the Minister's attorney to the applicants' attorney setting out the Minister's position in respect of this matter. A copy of the letter is annexed hereto marked "TM1". The applicants' attorney has given the Minister until noon on 27 November 2017 to file his affidavit. The letter from the applicants' attorney is attached hereto marked "TM2".

31. For avoidance of any doubt, in the event that the applicants persist with this application, notwithstanding the explanation set out herein above, and should the court grant the applicants relief in terms of prayers 3 to 5 of their notice of motion, the Minister reserves the right to appeal this aspect of the relief.

RELIEF

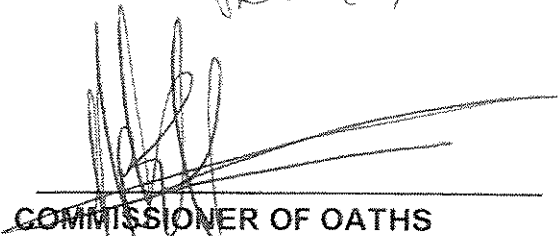
32. For the reasons set out above, this application should be withdrawn as against the Minister whose confirmatory affidavit is attached hereto marked "TM3".

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TSELISO MAQUBELA

I certify that the deponent acknowledged to me that he knows and understands the contents of this declaration, has no objection to taking the prescribed oath and considers the prescribed oath to be binding on his conscience. The deponent thereafter uttered the words: "I swear that the contents of this declaration are true, so help me God." The deponent signed this declaration in my presence at Pretoria on this the 24th day of **NOVEMBER** 2017.



COMMISSIONER OF OATHS

Full Name: **THABO FEKE-MYEKO**
 Designation: **EX OFFICIO
 COMMISSIONER OF OATHS**
 Address: **FEKE-MYEKO ATTORNEYS
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24 NOVEMBER 2017

Enq: C E SNYMAN
Email: esnyman@justice.gov.za

My Ref: 8028/2016/Z46
Your Ref: AP/LP/ELA-JHB
SAFCEI

Email: Adrian@adrianpole.co.za

Messrs Adrian Pole Attorneys
KLOOF

Dear Sir

EARTHLIFE AFRICA-JOHANNESBURG & OTHERS / THE MINISTER OF ENERGY & OTHERS

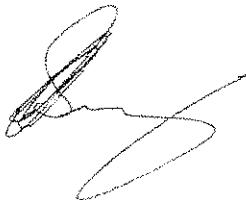
- 1 The above application issued on 15 November 2017 refers. I confirm that I act on behalf of the First Respondent, the Minister of Energy.
- 2 I note that the application has been brought primarily on the basis of nothing other than a suspicion that the Minister of Energy ("the Minister") our client herein, and Eskom, intend to violate the judgment delivered on 26 April 2017.
- 3 The purpose of this letter is to advise you firstly that my client does not have such an intention and secondly to dissuade your clients of that view or suspicion.
- 4 My client has instructed me to convey to yourselves that insofar as the issues raised in your application and those that are covered by the judgment are concerned, he has no intention of conducting himself in a manner that is either contrary to the rule of law or contemptuous of the judgment. Accordingly, the application is not only speculative on your clients' part, but it is wholly unnecessary.

IFM
[Signature]

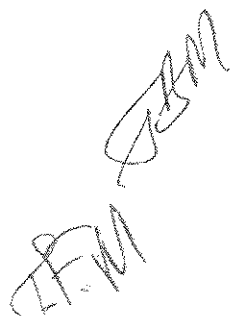
- 5 It is evident thus that there is no justiciable *lis* between your clients and my client.
- 6 The above notwithstanding, and for the sake of clarity, my client is prepared to give an undertaking in the terms covered by prayer 2 of the notice of motion insofar as it relates to the First Respondent. The First Respondent cannot give, and does not purport to give, any undertaking on behalf of the Second Respondent. This should dispose of the matter in its entirety in that prayers 3 to 5 are consequential orders flowing from prayers 1 and 2. They are akin to a structural interdict and/or contempt that is sought without any factual or legal basis.
- 7 In the event that you do not agree with my client's view, I am instructed to further advise you that my client:
- 7.1 intends to oppose the application; and
 - 7.2 will file an explanatory affidavit in which he will expressly reserve his rights to appeal the judgment in the unlikely event that the court grants prayers 3 to 5 of the notice of motion regardless of the circumstances set out hereinabove.

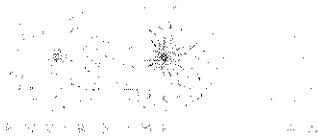
I hope that the above will resolve the matter. Your urgent advice in this regard is awaited.

Yours faithfully



C E SNYMAN
FOR STATE ATTORNEY PRETORIA





TM 2

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Your Reference: The Honourable Minister of Energy
 My Reference: SAFCEI ELA-JHB/ap

Mr. Eben Snyman
 State Attorney Pretoria
 SALU Building
 316 Thabo Sehume Street
 PRETORIA
 0001

E-mail: EbSnyman@justice.gov.za

24 November 2017

Dear Mr Snyman

Re: Earthlife Africa – Johannesburg & Another / The Minister of Energy and 3 Others

We refer to the above matter, noting the failure by your client to have provided any answering affidavit in accordance with the stipulated time period (despite Eskom having done so), and we reference our correspondence in relation to the matter, particularly your letter of this Friday afternoon received at 15h44, in which you record that the Minister agrees to provide our clients with an undertaking in accordance with prayer 2 of the Notice of Motion.

In light thereof and the fact that our counsel remain briefed for the upcoming hearing allocated before Cloete J for 29 November, our clients urgently require the Minister of Energy to provide an undertaking in the following terms (which is in accordance with the declaration sought in Prayer 2 of the Notice of Motion, and which your letter confirms will be given):

1. The Minister of Energy hereby unconditionally undertakes that he and the Department of Energy will take no steps, including the issuing of a Request for Proposals or a Request for Information, for the procurement of new electricity generation capacity derived from nuclear power in the absence of a lawful determination in terms of section 34 of the Electricity Regulation Act 4 of 2006 (ERA) that such new electricity generation capacity derived from nuclear power is required, which determination

Handwritten signature: P.F.M.

must:

- 1.1 be with the concurrence of NERSA (the second respondent) in terms of section 34(1) of the ERA, and
- 1.2 NERSA may only concur after following a procedurally fair public participation process in relation to the said determination.

We look forward to your urgent provision of the undertaking by 12pm on Monday, 27 November 2017. Should you fail to provide such an undertaking, our clients intend to approach the Court on 29 November to seek an order in terms that will secure such an undertaking.

Yours sincerely



Adrian Leonard Pole

