

**To:** The Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, including Organs of State

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**Submission to the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, including Organs of State by the South African Faith Communities' Environmental Institute (SAFCEI) – Nuclear Energy**

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1.

**1. Introduction**

The Southern African Faith Communities' Environmental Institute (SAFCEI) is a multi-faith organisation committed to supporting faith leaders and their communities in Southern Africa to increase awareness, understanding and action on eco-justice, sustainable living and climate change.

2.

This submission is made in terms of Rule 6.1,<sup>1</sup> which provides that the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, including Organs of State (the Commission) may receive any evidence that is relevant to its mandate, including evidence that might otherwise be inadmissible in a court of law.

3.

These submissions relate to following sections of the Commission's Terms of Reference (TOR):<sup>2</sup>

- 1.4 Whether the President or any member of the present or previous members of his National Executive (including Deputy Ministers) or public official or employee of any state owned entities (SOEs) breached or violated the Constitution or any relevant ethical code or

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<sup>1</sup> Rules of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State, GN397 of 16 July 2018.

<sup>2</sup> Schedule to Proclamation No. 3 of 2018.

legislation by facilitating the unlawful awarding of tenders by SOEs or any organ of state to benefit the Gupta family or any other family, individual or corporate entity doing business with government or any organ of state;

- 1.5 The nature and extent of corruption, if any, in the awarding of contracts, tenders to companies, business entities or organisations by public entities listed under Schedule 2 of the Public Finance Management Act, 1999;
- 1.9 The nature and extent of corruption, if any, in the awarding of contracts and tenders to companies, business entities or organisations by Government Departments, agencies or entities. In particular, whether any member of the National Executive (including the President), public official, functionary of any organ of state influenced the awarding of tenders to benefit themselves, their families or entities in which they held a personal interest.

#### 4.

This memorandum supplements the memorandum (and associated information) emailed to Mr Paul Pretorius SC on or about 4 October 2018 relating to the nuclear-related High Court Review Application successfully brought by Earthlife Africa – Johannesburg (ELA-JHB) and SAFCEI.<sup>3</sup>

#### 5.

The successful outcome of this case resulted in no Request for Proposals (RFP) being published for the procurement of 9.6GW of new nuclear power plants, and as a consequence no procurement contract for the construction of such nuclear power plants was entered into with a successful vendor country, no procurement contracts were entered into with any local entities in relation to the localisation element of any such procurement, and no procurement contract for the supply of uranium was concluded.

#### 6.

Notwithstanding the above, SAFCEI believes that the contextual background to this case may be informative to the Commission's Inquiry into State Capture. It also provides relevant context to two pre-procurement contracts awarded by the Department of Energy (DOE) that appear to be tainted with irregularity, as well as to the later signing by the South African Nuclear Energy Corporation (NECSA) of a co-operation agreement on the non-power related uses of nuclear energy with Russia's Rosatom Healthcare in the face of an instruction by the then Minister of Energy Jeff Radebe not to do so (resulting in the suspension and later dismissal of the NECSA Chief Executive Officer (CEO) as well as the dismissal of the NECSA board of directors).

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<sup>3</sup> Earthlife Africa & Another v. Minister of Energy & Others Case No. 19529/15. The paginated Court record can be accessed at DropBox link: <https://www.dropbox.com/sh/9qh0o2ladxuokj9/AADTPGRiNDFNx4IvK1JRkg1wa?dl=0>

7.

## 2. Context

### (a) Brief Legislative & Policy Context

#### Nuclear Energy

##### *White Paper on Energy Policy, 2008*

The White Paper on Energy Policy stated that whether new nuclear capacity would be an option in the future would depend on the environmental and economic merits of the various alternative energy sources. It pointed out that energy policy under apartheid was governed primarily by the desire for greater energy security, which in turn led to very large investments in synthetic fuels and in the nuclear sector. It is acknowledged that *'[t]he cost to the economy has been significant and the opportunity for investment in more productive social infrastructure has been forfeited... when measured against the objective of self-sufficiency, energy policy under the apartheid government was a costly failure. Clearly, security of supply will have to be achieved through other measures'*.

8.

The White Paper set out five policy objectives in the short term (1-2 years) and medium term (3-7 years), including (among others) increasing access to affordable energy services, improving energy governance (including implementing new regulatory arrangements within the nuclear sector), and securing supply through diversity (including using integrated resource planning (IRP) methodologies to evaluate future energy supply options).

9.

The White Paper indicated that IRP is a decision-making process concerned with the acquisition of least-cost energy resources, which takes into account the need to maintain adequate, reliable, safe, and environmentally sound energy services for all customers. It stated further that the compulsory use of IRP methodologies would ensure that utilities avoid electricity supply investments when it is economical to do so, and that guidelines for the IRP approach would be established through new energy legislation and regulations.

10.

The White Paper pointed out that nuclear energy was a minor component of the South African energy sector (3% of national primary energy supply in 1997), but that *'despite its small contribution the nuclear industry has been the recipient of a major portion of the [DoE's] budget'*. It went on to state that the issue of whether new nuclear capacity would be an option once more generation capacity is required *'will depend largely on the environmental and economic merits of other energy sources*

relative to nuclear and its political and public acceptability, construction lead-times and load characteristics'. The White Paper recognised that, internationally, most countries with nuclear generation capacity had at the time either ceased building plants or had slowed down plans to install additional nuclear power generation capacity.

11.

The White Paper reiterated that while it would not be prudent to exclude nuclear power as a supply option, decisions on the role of nuclear power, as with any other supply option, needed to be taken within the context of an IRP process.

12.

***Nuclear Energy Policy, 2008***

South Africa's June 2008 Nuclear Energy Policy set out the government's vision for the '*development of an extensive nuclear energy programme*'. Amongst other things, this policy envisaged a nuclear energy reactor build programme to be procured on a '*fleet approach*' basis. Nuclear energy was lauded as the solution to South Africa's energy security requirements.

13.

The Nuclear Energy Policy dealt with the development of institutional arrangements, including the establishment of the National Nuclear Energy Executive Co-ordinating Committee (NNEECC), (subsequently renamed the Energy Security Sub-Committee (ESSC)) at Cabinet level.

14.

***Nuclear Energy Act, 1999 and National Nuclear Regulator Act, 1999***

The Nuclear Energy Act<sup>4</sup> and National Nuclear Regulator (NNR) Act<sup>5</sup> deal with various issues relating to the regulation of nuclear energy, including licensing and management of radioactive waste, but these Acts (and the Regulations promulgated thereunder) do not address nuclear power plant procurement.

15.

***National Energy Act, 2008***

The Preamble to the national Energy Act<sup>6</sup> (NEA) indicates that it was promulgated to (amongst other

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<sup>4</sup> 46 of 1999.

<sup>5</sup> 47 of 1999.

<sup>6</sup> 34 of 2008.

things) ensure availability of diverse energy resources, in sustainable quantities and at affordable prices, to the South African economy in support of economic growth and poverty alleviation (while also taking environmental management requirements and interactions with other sectors of the economy into account). This overall purpose is also reflected in the objects of the Act, which include providing for optimal supply in accordance with a balanced consideration of security of supply, economics, consumer protection and sustainable development. The Act also seeks to ensure effective planning for energy supply.

16.

The Minister is obliged annually to publish an analysis forecasting energy supply and demand for no less than twenty years, as well as an analysis of plausible energy scenarios of how the future energy demand and supply landscape could look under different demand and supply assumptions. The Minister is also obliged to publish models used for data and information analysis, all assumptions underpinning these models, and a list of categories of information or data that have been classified as confidential and the reasons thereof.

17.

While section 6 of the NEA deals with integrated energy planning, this section is not yet in force (it will come into effect on a date to be proclaimed by the President in the Gazette). Once in force (amongst other things):

- the Minister will be required to develop, and on an annual basis review and publish, the Integrated Energy Plan (IEP) in the Gazette;
- the IEP must deal with affordability, and economic viability must be taken into account in its development; and
- the IEP must serve as a guide for energy infrastructure developments, must take into account all viable energy supply options, and must guide the selection of the appropriate technology to meet energy demand.

18.

Notwithstanding s6 of the NEA not having been brought into effect, an Integrated Energy Plan (IEP) was gazetted on 25 November 2016.<sup>7</sup>

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<sup>7</sup> GN1430 of 25 November 2016.

19.

***Electricity Regulation Act, 2006***

The Electricity Regulation Act<sup>8</sup> (ERA) was promulgated to (amongst other things) establish a national regulatory framework for the electricity supply industry and to make the National Energy Regulator of South Africa (NERSA) the custodian and enforcer of the national electricity regulatory framework.

20.

Amongst other things, the NERSA Regulator is obliged to issue rules designed to implement the national government's electricity policy framework, the integrated resource plan (IRP) and this Act. The IRP is defined in s1 as meaning 'a resource plan established by the national sphere of government to give effect to national policy'.

21.

With regard to new electricity generation capacity, section 34(1) of the ERA empowers the Minister of Energy, in consultation with NERSA, to undertake a number of specified activities. These include (among other things):

- determining whether new generation capacity is needed to ensure the continued uninterrupted supply of electricity;
- determining the types of energy sources from which electricity must be generated;
- determining that the electricity produced may only be sold to the persons or in the manner set out in such notice;
- determine that electricity thus produced must be purchased by the persons set out in such notice; and
- requiring that new generation capacity must be established through a tendering procedure which is fair, equitable, transparent and cost effective and which provides for public sector participation.

22.

The Minister has also been given such powers as may be necessary or incidental to any purpose set out in section 34(1).

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<sup>8</sup> 4 of 2006.

23.

The Minister is afforded powers to make regulations, including (amongst other things) in respect of electricity new generation capacity, the types of energy sources from which electricity must be generated, the percentages of electricity that must be generated from different sources, and 'any other ancillary or administrative matter that it is necessary to prescribe for the proper implementation or administration of this Act'.

24.

And while the then Minister of Energy Dipuo Peters promulgated Electricity Regulations on New Generation Capacity<sup>9</sup> that apply to the procurement of electricity new generation capacity by organs of state, these regulations expressly exclude new generation capacity derived from nuclear power technology. No regulations relating to electricity new generation capacity in respect of nuclear energy technology have been promulgated.

25.

In 2011, the then Minister of Energy Dipuo Peters promulgated the Electricity Regulations on the Integrated Resource Plan 2010-2030<sup>10</sup> (IRP2010) under the ERA. The IRP2010 derives from an integrated resource plan initiated by the DoE, which laid out the 'proposed generation new build fleet' for South Africa for the period 2010-2030 and was based on the cost-optimal solution for new build options (considering direct costs of new build power plants). Following a first round of public participation in 2010, a Revised Balance Scenario (RBS) was published in October 2010 which 'balanced' the cost-optimal solution in accordance with qualitative measures such as local job creation. The RBS included a nuclear fleet of 9.6 GW as part of a proposed new build fleet totalling 38.3 GW. A second round of public participation led to several changes in IRP assumptions, including the adjustment of investment costs for nuclear units by an increase of 40% based on recent construction experience.

26.

The IRP2010 indicates that the IRP is a:

...living plan that is expected to be continuously revised and updated as necessitated by changing circumstances. At the very least, it is expected that the IRP should be revised by the [DoE] every two years, resulting in a revision in 2012.

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<sup>9</sup> GNR. 399 of 4 May 2011.

<sup>10</sup> GNR. 400 of 6 May 2011.

## 27.

The IRP2010 states that the projected scenarios indicate that the future electricity capacity requirement could, in theory, be met without nuclear, but that this would increase risk to security of supply (from a dispatch point of view and being subject to future fuel uncertainty). Three policy options were identified, namely:

- commit to the nuclear fleet as indicated in the RBS;
- delay the decision on the nuclear fleet indefinitely (and allow alternatives to be considered in the interim); or
- commit to the construction of one or two nuclear units in 2022-4, but delay a decision on the nuclear fleet until higher certainty is reached on future cost evolution and risk exposure for both nuclear and renewables.

## 28.

The IRP2010 indicates that the DoE accepted the nuclear fleet policy option...

...committing to a full nuclear fleet of 9600MW. This should provide acceptable assurance of security of supply in the event of a peak oil-type increase in fuel prices and ensure that sufficient base-load capacity is constructed to meet demand in peak hours each year.

## 29.

The IRP2010 acknowledges that further research is required on the full costs relating to specific technologies (including nuclear) around the costs of decommissioning and managing waste (in the case of nuclear specifically spent fuel).

## 30.

The DoE commenced a process (which included public participation) aimed at updating the IRP2010, which culminated in the Integrated Resource Plan for Electricity (IRP) 2010-2030 – Update Report 2013 (draft IRP2010 Update). The DoE acknowledged on its website and in the draft IRP2010 Update that there had been a number of developments in the energy sector in South and Southern Africa since the IRP2010 was promulgated, and that the electricity demand outlook had changed markedly from that expected in 2010. The draft IRP2010 Update identified various other uncertainties, including uncertainty in the cost of nuclear capacity. It is stated that:

[A]ll these uncertainties suggest that an alternative to a fixed capacity plan (as espoused in the IRP 2010) is a more flexible approach taking into account the different outcomes based on changing assumptions (and scenarios) and looking at the determinants required in making key investment

decisions’.

31.

The draft IRP2010 Update indicated further that in the shorter term (next two to three years) there are clear guidelines arising from the scenarios, including that:

The nuclear decision can possibly be delayed. The revised demand projections suggest that no new nuclear base-load capacity is required until after 2025 (and for lower demand not until at earliest 2035) and that there are alternative options, such as regional hydro, that can fulfil the requirement and allow further exploration of the shale gas potential before prematurely committing to a technology that may be redundant if the electricity demand expectations do not materialise.

32.

The DoE advised stakeholders that a final draft IRP2010 Update would be submitted to Cabinet for final approval by March 2014, whereafter the approved document would be promulgated and published in the Gazette. The draft IRP2010 Update was never gazetted. Then Minister Ben Martins was replaced as Energy Minister by Minister Joemat-Peterson on 25 May 2014.

33.

The then Parliamentary Committee of Energy chairperson, Mr Fikile Majola, is reported as having stated that the IRP2010 Update would not see the light of day.<sup>11</sup>

34.

In August 2018, then Minister of Energy Jeff Radebe published a draft IRP 2018 for public comment.<sup>12</sup> This draft updated IRP did not include nuclear energy as part of the proposed energy mix for South Africa for the period ending 2030.<sup>13</sup>

35.

**(b) *Factual Background***

In April 2010, Oakbay Resources & Energy (with minority shareholders including Mr Duduzane’s Zuma’s Mabengela Investments) acquired Uranium One’s embattled Dominion Mine with the assistance of a R250 million loan from the Industrial Development Corporation (IDC).<sup>14</sup>

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<sup>11</sup> <https://www.engineeringnews.co.za/article/there-is-only-one-irp-necsa-exec-asserts-2014-10-30>

<sup>12</sup> <http://www.energy.gov.za/IRP/irp-update-draft-report2018/IRP-Update-2018-Draft-for-Comments.pdf>

<sup>13</sup> Ibid, at page 41.

<sup>14</sup> <https://www.sowetanlive.co.za/news/south-africa/2018-04-03-gupta-business-rescue-shiva-uranium-to-be-sold/>

36.

On 16 March 2011, Cabinet approved the Policy Adjusted IRP2010 for promulgation by the DOE.<sup>15</sup> As indicated above, the IRP2010 endorsed the nuclear fleet option, and was subsequently gazetted.

37.

In August 2014, then President Zuma visited Russia, accompanied by Deputy Minister of International Relations and Co-Operation (DIRCO) Nomaindia Mfeketo and then Minister of State Security David Mahlobo.<sup>16</sup>

38.

On 22 September 2014, the DOE and Russia's atomic energy agency (Rosatom) both released identical press statements advising that on 21 September 2014 the Russian Federation and the Republic of South Africa signed an Intergovernmental Agreement on Strategic Partnership and Cooperation in Nuclear Energy and Industry (Russian IGA).<sup>17</sup> The DOE's press statement indicated (among other things), that then Minister Joemat-Pettersson had signed the Russian IGA on the margins of the 58<sup>th</sup> session of the International Atomic Energy Agency General Conference in Vienna, and that it laid the *'foundation for the large-scale nuclear power plants (NPP) procurement and development programme of South Africa based on the construction in RSA of new nuclear power plants with Russian VVER reactors with total installed capacity of up to 9,6 GW (up to 8 NPP units). These will be the first NPPs based on the Russian technology to be built on the African continent.'*

39.

It was subsequently reported in the media that the DOE and the Nuclear Energy Corporation of South Africa (NECSA) had clarified that there was no procurement deal but a country-to-country framework agreement that was a necessary precursor to a commercial relationship over nuclear power, that similar framework deals would be signed with other nuclear vendor countries, and that the agreement would not be made public<sup>18</sup>.

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<sup>15</sup> <https://www.gov.za/statement-cabinet-meeting-held-16-march-2011>

<sup>16</sup> <https://mg.co.za/article/2014-08-28-dfdf>

<sup>17</sup> <http://www.energy.gov.za/files/media/pr/2014/MediaRelease-Russia-and-SA-sign-agreement-on-Strategic-Partnership-in-Nuclear-Energy-22September-2014.pdf>. See also <https://mg.co.za/article/2014-10-16-vladimir-putins-quest-for-a-nuclear-monopoly>

<sup>18</sup> Annexure PL8 to paginated record in Earthlife Africa & Another v. Minister of Energy & Others Case No. 19529/15, at page 135. The paginated Court record can be accessed at DropBox link: <https://www.dropbox.com/sh/9qh0o2ladxuokj9/AADTPGRiNDFNx4IvK1JRKg1wa?dl=0>

40.

In November 2014, it was reported in the media that vendor parades hosted by the DOE had been held with a Russian delegation, while China, France and the United States were hosted a few weeks later. The DOE's Deputy Director-General: Nuclear Energy Mr Zizamele Mbambo is reported as stating that this was a "*pre-procurement process*", and that the information presented would be used to draw up a road map to the procurement process<sup>19</sup>.

41.

On 30 January 2015, ELA-JHB and SAFCEI's attorney wrote to then Minister Joemat-Petterson expressing the organisations' deep concern given the press statements indicating that various IGAs had been signed that "*pave the way for establishing a nuclear procurement process*" in the context of evolving energy and resource planning processes, and before establishing a system for nuclear energy procurement. Among other things, concern was expressed that no determination had been made in relation to electricity new generation capacity relating to nuclear energy in terms of s34 of the ERA, that the commitment to the nuclear fleet had been imposed on (rather than being a result of) the IRP process, and that the IRP2010's costing for nuclear energy was severely unrealistic. In ELA-JHB and SAFCEI's view, any decision to procure 9.6GW of nuclear power stations (with estimated costs ranging from R400 billion to R1 trillion) would have a direct and potentially significant detrimental impact on all South African citizens, including future generations as electricity users would ultimately bear the costs of such unprecedented expenditure. No response was ever received from then Minister Joemat-Petterson. Numerous follow-up letters were sent to then Minister Joemat-Petterson in February and March 2015, again with no response.

42.

During this period, information continued to trickle into the public domain.

43.

On 12 February 2015 in his State of the Nation Address, then President Zuma reiterated earlier commitments by government to pursue nuclear energy, stating that "*[g]overnment is also exploring the procurement of the [9.6GW] nuclear build as approved in the Integrated Resource Plan 2010-2030*".<sup>20</sup> The then acting Director-General of the DoE (Dr. Wolsey Barnard) was reported as stating that "[t]his year, the next steps would be taken towards finalising a procurement process, then a decision

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<sup>19</sup> <https://www.fin24.com/Economy/SA-nuclear-project-10-years-late-Necsa-20141127>

<sup>20</sup> <http://www.sapeople.com/2015/02/12/state-nation-address-full-transcript-sona2015/>

would be made by Cabinet'.<sup>21</sup>

44.

Press reports<sup>22</sup> also surfaced suggesting that in October 2013 the DOE set out three nuclear procurement options (models) in a 'top-secret' presentation to the NNEECC, a Cabinet sub-committee chaired at the time by then President Zuma. The NNEECC was established in 2008 and was initially chaired by then Deputy President Kgalema Motlanthe, but by October 2013 he had been replaced by then President Zuma.<sup>23</sup> The Mail & Guardian reported that this was one of three developments that indicated that then President Zuma *'is now directing what is expected to be the largest and most complex tender process in South African history'*. The other two developments were working visits exchanged by then President Zuma and Russian President Vladimir Putin where nuclear co-operation was reportedly high on the agenda (BRICS summit in Durban in March 2014, and Sochi in Russia in May 2013), and a reshuffling of Cabinet in terms of which then Minister of Energy Dipuo Peters (who had successfully lead the procurement of renewable energy from independent power producers) was replaced with Minister Ben Martins (who was reported to be in Russia in July 2013).<sup>24</sup> Then acting government spokesperson Phumla Williams is reported as having denied that the NNEECC was restructured to remove Motlanthe, and stated that it was set up in 2008 to lead, monitor, and ensure oversight of implementation of the country's nuclear policy.<sup>25</sup>

45.

On 13 February 2015, details of the Russian IGA were reported in the media, and an unofficial English translation of a Russian version of the agreement was made available online.<sup>26</sup>

46.

However, the signed English translation of the Russian IGA was initially not made public.

47.

On 19 May 2015, then Minister Joemat-Peterson announced that *'[w]e will commence with the actual procurement process in the second quarter of this financial year to select a Strategic Partner or Partners in a competitive, fair, transparent and cost-effective manner. We expect to present the outcome of this*

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<sup>21</sup> <http://www.bdlive.co.za/business/energy/2015/02/18/department-plans-to-tap-new-power-sources>

<sup>22</sup> <http://mg.co.za/article/2015-02-19-top-secret-nuclear-plan-ducks-scrutiny>

<sup>23</sup> <https://www.news24.com/Archives/City-Press/Government-denies-sidelining-Motlanthe-20150429>

<sup>24</sup> <https://mg.co.za/article/2013-07-26-00-zuma-slips-into-nuclear-drivers-seat>

<sup>25</sup> <https://www.news24.com/Archives/City-Press/Government-denies-sidelining-Motlanthe-20150429>

<sup>26</sup> <https://mg.co.za/article/2015-02-12-exposed-scary-details-of-secret-russian-nuke-deal>

*process to Cabinet by the end of the year',<sup>27</sup>*

48.

On 3 June 2015, then NECSA Chief Executive Officer Phumzile Tshelane was reported as having confirmed to a round-table conference of the BRICS countries that government was planning to name its strategic partner for the nuclear build by the end of this year (2015).<sup>28</sup>

49.

On 10 June 2015, then Minister of Energy Joemat-Petterson signed a letter authorising the Parliamentary Liaison Officer to submit the IGAs signed with various nuclear vendor countries (ranging in date from 1995 to 2014) for tabling in Parliament in accordance with section 231(3) of the Constitution (which made the agreement binding without parliamentary approval).<sup>29</sup>

50.

In his testimony to the Commission, former Minister of Finance Nhlanhla Nene recounted that he had attended the BRICS summit that took place in Ufa, Russia on 8-9 July 2015, where he had refused to sign a letter provided by then Minister of Energy Joemat-Petterson that *'was essentially providing a form of guarantee to the Russian government on the nuclear programme if the Russian government were to finance it'*.<sup>30</sup> Nene also refused to sign a revised letter as the fiscal and financial implications remained, and testified that Joemat-Petterson had expressed concern about what she should say to then President Zuma (who was also at the BRICs summit and was scheduled to meet with Russian President Vladimir Putin).<sup>31</sup>

51.

On 14 July 2015 the DOE issued a press statement indicating (among other things), that the new nuclear power plant procurement would commence in the Second Quarter 2015, and that the

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<sup>27</sup> Annexure PL22 to paginated record in Earthlife Africa & Another v. Minister of Energy & Others Case No. 19529/15, at page 211. The paginated Court record can be accessed at DropBox link:

<https://www.dropbox.com/sh/9qh0o2ladxuokj9/AADTPGRiNDFNx4lvK1JRKg1wa?dl=0>

<sup>28</sup> Annexure PL23 to paginated record in Earthlife Africa & Another v. Minister of Energy & Others Case No. 19529/15, at page 214. The paginated Court record can be accessed at DropBox link:

<https://www.dropbox.com/sh/9qh0o2ladxuokj9/AADTPGRiNDFNx4lvK1JRKg1wa?dl=0>

<sup>29</sup> Annexure PL24 to paginated record in Earthlife Africa & Another v. Minister of Energy & Others Case No. 19529/15, at page 216. The paginated Court record can be accessed at DropBox link:

<https://www.dropbox.com/sh/9qh0o2ladxuokj9/AADTPGRiNDFNx4lvK1JRKg1wa?dl=0>

<sup>30</sup> <https://www.dailymaverick.co.za/article/2018-10-03-zuma-mahlobo-joemat-pettersson-nkoana-mashabane-strong-armed-nene-into-signing-secret-russian-nuclear-deal/>

<sup>31</sup> [https://www.scribd.com/document/390031857/Minister-of-Finance-s-Statement-at-the-State-Capture-Inquiry#from\\_embed](https://www.scribd.com/document/390031857/Minister-of-Finance-s-Statement-at-the-State-Capture-Inquiry#from_embed)

procurement process would be completed by the end of the 2015 financial year.<sup>32</sup>

52.

On 26 July 2015, ELA-JHB and SAFCEI's attorney wrote again to then Minister of Energy Joemat-Petterson,<sup>33</sup> pointing out that given its content the Russian IGA required parliamentary approval under s231(2) of the Constitution, and could not lawfully be tabled and made binding in terms of s231(3). The Minister was also asked (among other things) whether she, in consultation with NERSA, had made any determinations in terms of s34(1)(a) and (b) of the ERA that new nuclear generation capacity was needed. No substantive response was forthcoming from then Minister Joemat-Petterson.

53.

The DOE's Performance Reports to Parliament's Portfolio Committee on Energy on 4 August 2015 indicated that the procurement process for the new nuclear build programme was in progress.<sup>34</sup>

54.

On 9 December 2015 following a Cabinet meeting, then Minister of Finance Nhlanhla Nene was advised by then President Zuma that he was to be removed.<sup>35</sup>

55.

### **3. Earthlife Africa – Johannesburg & Another v Minister of Energy & Others**

In October 2015, ELA-JHB and SAFCEI launched proceedings to challenge (among other things) the Minister's decision to table the Russian IGA in terms of section 231(3) of the Constitution, and (among other things) also sought a declaration that prior to the commencement of any procurement process for new nuclear new generation capacity the Minister, in consultation with NERSA, was required, in accordance with procedurally fair public participation processes, to have made a determination in terms of s34(1)(a) and (b) of the ERA that new generation capacity was required from nuclear energy sources.

<sup>32</sup> <http://www.energy.gov.za/files/media/pr/2015/MediaStatement-Nuclear-Procurement-Process-Update-14July2015.pdf>

<sup>33</sup> Annexure PL32 to paginated record in Earthlife Africa & Another v. Minister of Energy & Others Case No. 19529/15, at page 334. The paginated Court record can be accessed at DropBox link:

<https://www.dropbox.com/sh/9qh0o2ladxuokj9/AADTPGRiNDFNx4lvK1JRkg1wa?dl=0>

<sup>34</sup> [https://www.google.co.za/search?ei=AVVAXevFN8HQwAKw86KQBw&q=department+of+energy+Portfolio+Committee+on+Energy+4th+Qt+2014%2F2015+and+1st+Qt+2015%2F2016+Performance+Reports+4+August+2015&og=d+epartment+of+energy+Portfolio+Committee+on+Energy+4th+Qt+2014%2F2015+and+1st+Qt+2015%2F2016+Performance+Reports+4+August+2015&gs\\_l=psy-ab.3...47070.95267..96541...1.0..7.670.13781.2-1j23i6j5.....29....1..gws-wiz.....0i71.gXat\\_BaU8jc&ved=0ahUKewiryvGI7tziAhVBKFAKHbC5CHIQ4dUDCAo&uact=5](https://www.google.co.za/search?ei=AVVAXevFN8HQwAKw86KQBw&q=department+of+energy+Portfolio+Committee+on+Energy+4th+Qt+2014%2F2015+and+1st+Qt+2015%2F2016+Performance+Reports+4+August+2015&og=d+epartment+of+energy+Portfolio+Committee+on+Energy+4th+Qt+2014%2F2015+and+1st+Qt+2015%2F2016+Performance+Reports+4+August+2015&gs_l=psy-ab.3...47070.95267..96541...1.0..7.670.13781.2-1j23i6j5.....29....1..gws-wiz.....0i71.gXat_BaU8jc&ved=0ahUKewiryvGI7tziAhVBKFAKHbC5CHIQ4dUDCAo&uact=5)

<sup>35</sup> [https://www.scribd.com/document/390031857/Minister-of-Finance-s-Statement-at-the-State-Capture-Inquiry#from\\_embed](https://www.scribd.com/document/390031857/Minister-of-Finance-s-Statement-at-the-State-Capture-Inquiry#from_embed)

56.

The record of the decisions challenged was provided in two tranches and was not provided in accordance with the timeframe set out in the Uniform Rules, and necessitated numerous letters sent by ELA-JHB and SAFCEI's attorneys to then Minister Joemat-Petterson and the [then] President Zuma, and delivery of a Rule 30A notice. Under threat of an application to compel, the record was eventually produced.

57.

Among other things, this record revealed that:

- An Explanatory Memorandum prepared by the State Law Advisor, and which served before the Minister and the President, in discussing the nature of the Russian IGA stated that *'[t]he Agreement falls within the scope of section 231(2) of the Constitution, and Parliamentary Approval is required'*;<sup>36</sup> and
- In late 2013 the [then] Minister of Energy Mr Dikobe Ben Martins, with the concurrence of NERSA, had made a determination in relation to the requirement for, and procurement of, nuclear power in terms of s34 of the ERA. This nuclear s34 determination had been kept secret notwithstanding specific requests made to Minister Joemat-Petterson, and was only made public by promulgation in the Gazette in December 2015<sup>37</sup> (2013 s34 Determination), after ELA-JHB and SAFCEI had launched its High Court application and sought the record of the decisions impugned in the application.

58.

NERSA also eventually provided its 'record', which included the minutes of a NERSA meeting held on 26 November 2013 at which a resolution was taken to concur with the Minister of Energy's nuclear s34 determination.<sup>38</sup>

59.

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<sup>36</sup> Annexure PL43.11 to paginated record in Earthlife Africa & Another v. Minister of Energy & Others Case No. 19529/15, at page 509. The paginated Court record can be accessed at DropBox link:

<https://www.dropbox.com/sh/9qh0o2ladxuokj9/AADTPGRiNDFNx4lvK1JRKg1wa?dl=0>

<sup>37</sup> GN1268 of 21 December 2015 – Nuclear Programme – Determination under section 34(1) of the Electricity Regulation Act 4 of 2006.

<sup>38</sup> See Applicant's Supplementary Founding affidavit page 494 of the paginated case record in Earthlife Africa & Another v. Minister of Energy & Others Case No. 19529/15, at page 509. The paginated Court record can be accessed at DropBox link: <https://www.dropbox.com/sh/9qh0o2ladxuokj9/AADTPGRiNDFNx4lvK1JRKg1wa?dl=0>.

As a consequence, and as provided for in the Rules, ELA-JHB and SAFCEI filed a supplementary founding affidavit and amended Notice of Motion challenging the 2013 s34 Determination.

60.

After close of pleadings, the case was set down (on an expedited basis) for hearing on 13-14 December 2016. In chambers prior to the commencement of the hearing, Mr. Oosthuizen SC (for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents) revealed that a fresh nuclear s34 determination had been made by then Minister of Energy Joemat-Pettersson with the concurrence of NERSA, which he had received around noon the preceding day.<sup>39</sup>

61.

This resulted in the hearing being adjourned to February 2017 (an order was made that ELA-JHB and SAFCEI's wasted costs were to be paid by the DOE on an attorney-client scale, including the costs of four counsel).

62.

A supplementary affidavit<sup>40</sup> was subsequently filed by the then Minister of Energy Joemat-Pettersson providing background to her 2016 nuclear s34 determination. The decision record was attached to this affidavit, and included the DOE's decision memorandum<sup>41</sup> as well as a NERSA document confirming NERSA's approval of a round robin resolution concurring with Minister's 2016 nuclear s34 determination.<sup>42</sup> Among other things, this determination designated Eskom (replacing the DOE) as the procurer for the nuclear power plants. As with the 2013 nuclear s34 determination, no public participation process had been followed.

63.

It might be mentioned that while not a party to the proceedings at the time, Eskom acting CEO Matshela Koko was present at court on 13 December 2016 (Mr. Koko had replaced Mr. Brian Molefe following his 'resignation' in November 2016 in the wake of the Public Protector's 'State of Capture' report). Press reports indicate that Mr. Koko stated that Eskom would release its Request for Proposals

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<sup>39</sup> See the court transcript included in the DropBox folder (file name: 19529 15 Vol 1 – 13 December 2016.pdf), accessible at: <https://www.dropbox.com/sh/9qh0o2ladxuokj9/AADTPGRiNDFNx4lvK1JRkg1wa?dl=0>

<sup>40</sup> See Volume 5A of the paginated record in Earthlife Africa & Another v. Minister of Energy & Others Case No. 19529/15, at page 1516. The paginated Court record can be accessed at DropBox link: <https://www.dropbox.com/sh/9qh0o2ladxuokj9/AADTPGRiNDFNx4lvK1JRkg1wa?dl=0>

<sup>41</sup> Ibid, at page 1546.

<sup>42</sup> Ibid, at pages 1566-1572.

(RFP) for the nuclear power stations when the determination was gazetted.<sup>43</sup> Eskom were subsequently joined in the proceedings.

64.

The court hearing went ahead in February 2017, with judgment handed down in April 2017. The tabling of the Russian IGA in terms of s231(3) of the Constitution and both the 2013 and 2016 nuclear s34 determinations were found by the Court to be unconstitutional and unlawful, and were reviewed and set aside.<sup>44</sup>

65.

By this time, Minister Joematt-Pettersson had been replaced as Minister of Energy by Minister Kubayi. On 13 May 2017 Minister Kubayi issued a media statement advising that the Western Cape High Court ruling would not be appealed.<sup>45</sup>

66.

#### **4. November 2017 Application**

On 17 October 2017, then President Zuma announced a cabinet reshuffle in terms of which Minister Kubayi was replaced as Minister of Energy by former Minister of State Security, Minister Mohlobo.

67.

On 5 November 2017, Eskom's spokesperson was reported in the media as having stated that if the [revised] integrated resource plan (IRP) showed that the nuclear programme could go ahead, Eskom would begin the tender process immediately.<sup>46</sup> This announcement came at a time when then Minister of Finance Gigaba had stated that South Africa would not have the money for a major nuclear build programme for at least the next five years,<sup>47</sup> while other statements suggested that then Minister of Energy Mohlobo was fast-tracking the finalising of a revised IRP.<sup>48</sup>

68.

In the belief that this line of conduct evinced a clear intention to disregard the requirement that there should be a lawful and procedurally fair s34 determination in place before a procurement process for

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<sup>43</sup> See for example: <https://www.fin24.com/Economy/Eskom/breaking-eskom-to-release-nuclear-rfp-this-week-koko-20161213> and [http://www.engineeringnews.co.za/article/renewables-body-baffled-by-timing-of-nuclear-determination-and-proposed-rfp-2016-12-13/rep\\_id:4136](http://www.engineeringnews.co.za/article/renewables-body-baffled-by-timing-of-nuclear-determination-and-proposed-rfp-2016-12-13/rep_id:4136)

<sup>44</sup> Judgment available at DropBox link:

<https://www.dropbox.com/sh/9qh0o2ladxuokj9/AADTPGRiNDFNx4lvK1JRKg1wa?dl=0>

<sup>45</sup> <http://www.energy.gov.za/files/media/pr/2017/MediaStatement-Earthlife-and-Judgement-13May2017.pdf>

<sup>46</sup> <https://www.news24.com/SouthAfrica/News/mahlobo-rushes-nuclear-deal-20171105-2>

<sup>47</sup> <https://ewn.co.za/2017/10/26/gigaba-no-money-for-nuclear-programme-for-at-least-5-years>

<sup>48</sup> <https://www.news24.com/SouthAfrica/News/mahlobo-rushes-nuclear-deal-20171105-2>

new nuclear generation capacity commenced, an urgent application was brought in the Western Cape High Court by ELA-JHB and SAFCEI (assurances had been sought by ELA-JHB and SAFCEI's attorney from the Minister, Eskom and NERSA that procurement would not proceed without a lawful and procedurally fair nuclear s34 determination having been made, but were not provided prior to the litigation).

69.

In its responding affidavit, Eskom explained that statements attributed to its spokesperson had been misinterpreted.

70.

The matter was adjourned *sine die* after written undertakings had been obtained from the Minister of Energy and Eskom to the effect that no further steps would be taken towards the procurement of new nuclear generation capacity without a lawful s34 determination having been made.

71.

##### **5. Department of Energy - Nuclear New Build Programme Contracts**

In September 2016, it came to light that the DOE had procured services from 16 service providers relating to the nuclear new build programme. This section of the SAFCEI submission focusses on two of these procurements.

72.

###### ***(a) Central Lake Trading 149 a company trading as Empire Technology***

On 16 September 2016, the Mail & Guardian published an article headlined '*Zuma pals clinch first nuclear deal*' reporting that '*Shantan Reddy, the son of President Jacob Zuma's friend Vivian Reddy, has clinched what appears to be a landmark deal for the country's controversial multibillion-rand nuclear programme*'.<sup>49</sup> This related to a R171 million contract for the '*procurement of the nuclear build programme management system*', and was listed on the DOE website under the category '*awarded bids*', and named the '*winning bidder of BAC-10/2016 as Central Lake Trading 149 a company trading as Empire Technology*.' In brief, this article:

- Reported that Empire Technology's sole director was Shantan Reddy;

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<sup>49</sup> <https://mg.co.za/article/2016-09-16-00-zuma-pals-clinch-first-nuclear-deal>

- Makes reference to controversy surrounding Vivian Reddy's Edison Power and a R1.2 billion City of Johannesburg tender to roll-out smart electricity meters *'a few years ago'*;
- Appeared on the DOE website listed under the category *'awarded bids'* *'simply naming the winning bidder of BAC-10/2016 as Central Lake Trading 149, a company trading as Empire Technology'*;
- Reported that the DOE director of supply chain management Boitumelo Musi told the Mail & Guardian (M&G) *'that it was never advertised because the "department is participating in the Free State tender, hence the documents are not on the website". It was handled by the department's own adjudicating committee and was personally signed off by the director general in the department, she said. Musi had no details about the specifics of the contract, only that it was commissioned "for the nuclear build and had been awarded around June"*;
- Commented that it was unclear why the energy department would opt to ride on the coat tails of a Free State tender in preparation for one of the country's most anticipated big-money deals; and
- Indicates that *'[t]he M&G was unable to find evidence of the original Free State government tender. It is unclear what it was for, when it was issued and on what basis the energy department sought treasury approval to deviate from normal procurement processes. Despite being sent detailed questions, the energy department confirmed only that the two-year deal with Empire Technology was done in accordance with the treasury regulations. As such it is unclear which arm of the Free State government holds the original contract and why it was used to issue the energy department contract.'*

## 73.

On 19 September 2016, fin24 published an article headlined *'Energy Dept urged to elaborate on nuclear bid list'*, in which it was reported that the DOE had issued a statement revealing *'firms it had sourced or procured to conduct thorough investigations on different aspects of the nuclear new build programme before a procurement decision is taken'*.<sup>50</sup>

## 74.

On 29 November 2016, during the term of office of then Minister of Energy Joemat-Pettersson,<sup>51</sup> the DOE made a presentation to the Parliamentary Portfolio Committee on Energy reporting on the nuclear new build programme procurement of 16 service providers (Annexure S1). With regard to the procurement of a programme management system from Empire Technology, the DOE presentation

<sup>50</sup> <https://www.fin24.com/Economy/energy-dept-urged-to-elaborate-on-nuclear-bid-list-20160919>

<sup>51</sup> 25 May 2014 to 31 March 2017.

indicates that its purpose was to *‘provide the Department with the ability to effectively and efficiently administer programme management and including procurement; project tracking; governance; compliance and information management for the Nuclear New Build Programme (NNBP). The System will also provide the Department with a secured environment for the NNBP information management’*, and that this management system offered *‘e-Procurement & Invoice Tracking, Annual Performance Plan Management, File & Content Management, Contract Management, Business Intelligence & real-time reporting and Support Services’*.

## 75.

The DOE presentation indicates the Empire Technology contract date of completion as 9 December 2017. Given the contract is indicated in the DOE presentation as being for the duration of two years, this implies that the contract commenced during or about December 2015 during the term of then Minister Joemat-Petterson (this date differs from the ‘around June’ 2016 award date attributed to Boitumelo Musi in the M&G report referred to above), and that the R171 million contract value was worth R7.125 million a month. This R171 million contract amount dwarfs the first 15 contracts reported in the DOE presentation (which together totalled R21,696,919.56), and was entered into (and kept secret from the public until September 2016) despite the litigation launched by ELA-JHB and SAFCEI in October 2015 challenging various aspects of the nuclear new build programme.

A Windeed Company Report (request date 30 April 2019) indicates Central Lake Trading 149’s status as ‘ANNUAL RETURN DEREGISTRATION PROCESS’ (Annexure S2).

## 76.

In a statement issued by the Democratic Alliance’s Gordan Mackay on 22 August 2017, reference was made to the Auditor General’s (AG) report for the financial year ending 31 May 2017:

The report makes the following findings:

- The procurement of the Nuclear Procurement Management System (NPMS) – awarded to Central Lake Trading t/a Empire Technology and owned by close Zuma ally, Vivian Reddy, was irregular. The original amount of the contract was also inflated from R60 million to R171 million by the Department of Energy (DoE).

and:

The DA can confirm that AG’s report has served before to the DoEs Audit Committee. However, the DA is reliably informed that the Director General, Thabane Zulu, has refused to sign off.

This may be due to the allegations, as indicated in media reports last week, that Mr Zulu may have played a direct role in both irregular contracts.<sup>52</sup>

77.

An extract of a document understood to be the AG's report on the DOE for the 2016/17 financial year (*Management report of Department of Energy, Detailed Audit findings, Annexure A: Matters Affecting the Auditor's Report – Procurement and Contract Management*) was provided to SAFCEI by National Treasury, and highlights various non-compliances and irregularities with regard to the DOE's procurement of the programme management system from Empire Technology (Annexure S3).

78.

The AG concludes (among other things) that:

- The DOE failed to consult with SITA prior to finalising the specification and contacting the Free State Provincial Treasury;
- The process followed by the DOE was not fair due to the fact that the price and specification was not the same as the one for the Free State Treasury;
- The process was not fair because other suppliers were not given an opportunity to tender, and Empire Technology had the opportunity to quote its own price without competing with other suppliers; and
- The award value at DOE was R171 million whereas it was R60 million at the Free State Treasury (no additional documents were provided by the DOE to justify the price difference).

79.

Minister Joemat-Peterson was replaced as Minister of Energy by Minister Kubayi during then President Zuma's 31 March 2017 Cabinet reshuffle (among other changes, then Minister of Finance Pravin Gordhan was also replaced by former Minister Melusi Gigaba).

80.

Minister Kubayi was subsequently replaced as Minister of Energy by Minister Mohlobo during then President Zuma's 17 October 2017 Cabinet Reshuffle.

81.

It is not known to SAFCEI whether or not the above alleged irregularities relating to the Empire

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<sup>52</sup> <https://www.politicsweb.co.za/news-and-analysis/evidence-first-phase-of-nuclear-deal-is-corrupt-g>

Technology procurement were investigated, and if so what became of any such investigation.

82.

Notwithstanding the above alleged irregularities, a R59 million virement was allocated to the DOE for the nuclear new build programme (as contained in the 2018/2019 medium term budget policy statement). According to a written response by the Minister DOE to National Assembly Question 3202 (Annexure S4), this virement was in respect of services procured by the DOE from Empire Technology:

- (a) The R59 million virement allocated is for an outstanding financial commitment for the Department to pay and settle the outstanding amount owed to the service provider for services rendered during the 2016/17 and 2017/18 Financial Years. It should be noted that the amount is not for any new or proposed services, but rather to settle the long outstanding commitment that the Department has with regards to the development of the Integrated Information Governance Process Management System during 2016/17 and 2017/18 Financial Years.

As a way of background, Cabinet approved back in December 2015 that the Department issue the Request for Proposal (RFP) for a Nuclear New Build Programme (NNBP). Cabinet also approved that the Final Funding model will be informed by the response of the market to the RFP and thereafter be resubmitted to Cabinet for consideration. In preparation to release the RFP during the in 2016/17 Financial Year, the Department procured services for purposes of ensuring readiness to issue the RFP at that time. Consequently, the Department procured an Integrated Information Governance Process Management System.

- (b) (i) The name of service provider that was contracted is Empire Technology.  
(ii) The details of services rendered are to develop and implement Integrated Information Governance Process Management System.  
(iii) The amount that the Department has paid to date is R110.882 million.

83.

Based on the above, this virement was reportedly in respect of services rendered by Empire Technology during the 2016/17 and 2017/18 financial years, which services were procured following Cabinet's December 2015 approval of the issuing of a Request for Proposals (RFP) for the nuclear new build programme.

84.

**(b) Mahlako-A-Phahla Investments**

On 16 September 2016, the Mail & Guardian published an article headlined '*Department of Energy awards R20 million nuclear-related content*' reporting that the DOE had awarded a short-term R20 million contract to Mahlako-A-Phahla Investments (Mahlako) '*to act as transaction advisor to assess*

*the state of readiness for the country's nuclear build programme*'.<sup>53</sup>

85.

On 19 September 2016, fin24 published an article headlined '*Energy Dept urged to elaborate on nuclear bid list*' which indicates Ledwaba Mazwai Attorneys and Worley Parsons as sub-contractors to Mahlako in respect of this contract.<sup>54</sup>

86.

The 29 November 2016 DOE presentation to the Parliamentary Portfolio Committee on Energy indicates that the date of completion was 31 August 2016, and that the contract duration was 3 months. Given the contract value of R20,174,423.84, the contract was worth R6,724,807.94 per month. The contract value is on a par with the sum total of the first 14 procurement contracts reported in the DOE presentation (which together totalled R21,696,919.56).

87.

On 10 August 2017, Times LIVE reported that then Energy Minister Mmamoloko Kubayi had launched an investigation into several officials in her department for alleged tender irregularities relating to the '*possible violation of National Treasury Regulations when the department awarded an R80-million contract to a nuclear transactional advisor, Mahlaka-A-Phalala (M-A-P)*'.<sup>55</sup> According to the report, on 27 September (2016) [then] Energy Minister Joemat-Petterson suspended all payments relating to Mahlako until the DOE had submitted a verification report to her on all deliverables received. This decision was reportedly never communicated to Mahlako and:

Instead, Mbambo, Zulu and Ngwane continued to engage M-A-P and received work deliverables towards the procurement process without a contract and without all regulations being followed...

At the beginning of March, M-A-P, which remained ignorant of Joemat-Petterson's instructions to stop payment, went to see her about payments outstanding, adding R60-million to the initial R20-million contract.

M-A-P also revealed to Joemat-Petterson that it had a hard copy of the deviation request approved by Chetty and Zulu as given to it by Mbambo and Ndaba, despite strict rules regarding the leaking of internal documents.

The whole matter came to a climax on March 16 when the departmental tender committee met and reviewed M-A-P's bills...

During the meeting, it came to light that Mbambo had already on September 1 given verbal

<sup>53</sup> <https://mg.co.za/article/2016-09-16-breaking-department-of-energy-awards-r20m-nuclear-related-contract>

<sup>54</sup> <https://www.fin24.com/Economy/energy-dept-urged-to-elaborate-on-nuclear-bid-list-20160919>

<sup>55</sup> Available online at <https://www.timeslive.co.za/politics/2017-08-10-exclusive-energy-minister-investigates-r80-million-in-irregularities-in-nuclear-contract/>

instructions to M-A-P to extend its contract by a further R80-million to R100-million.

In the end, the Department of Energy shifted funds from the sundries account and paid M-A-P R56-million of the additional R80-million by the end of the financial year (March 31).

88.

A Windeed Company Report (request date 5 March 2019) indicates that the company as being 'IN BUSINESS' with its active directors being Mhlarhi, Mmakgolo Meta (ID 7912040298084) and Mupita, Makole (ID 7712250368084) (Annexure S5).

89.

Mhlarhi, Mmakgolo Meta (Meta Maponya), is reported to have served on the board of NTP, a wholly-owned subsidiary of NECSA.<sup>56</sup>

90.

In a statement issued by the Democratic Alliance's Gordan Mackay on 22 August 2017, reference was made to the Auditor General's (AG) report for the financial year ending 31 Mary 2017:

The report makes the following findings:

...

- The procurement of Nuclear Transaction Advisory Services, awarded to Mahlako A Phahla, was unauthorised as there was vast deviation from the original specifications from 11 work requirements in the original contract to four work requirements – all unrelated to the original, in the subsequent contract issued by the DoE. This deviation meant that the DoE was, in fact, embarking on a new contract which would, in turn, need to be subjected to a new and separate competitive tender process.
- The AG's report further seems to confirm last week's media reports which indicate that Mahlako A Phahla obtained a contract extension without the necessary approval from the DoE's own bid tender committee or National Treasury, as required by law.<sup>57</sup>

91.

Regarding the appointment of Mahlako as transactional advisors to review the state of readiness for the nuclear new build programme (Part 1), an extract from what is understood to be the AG's report on the DOE for the 2016/17 financial year reports that (among other things):

- It was contrary to the requirements of the DOE utilising TR16A6.6 (Treasury Regulation) from NECSA as it did not take into consideration the product specification as required by the regulation. The report notes that *'Therefore the product specification developed by the*

<sup>56</sup> Koeberg Alert Alliance, <https://koebergalert.org/2016/12/01/would-you-like-to-earn-r1-7m-a-week/>

<sup>57</sup> <https://www.politicsweb.co.za/news-and-analysis/evidence-first-phase-of-nuclear-deal-is-corrupt-g>

*participating department must match what the contractor is currently providing to the first organ of state (the organ of state that secured the original contract) and should be at prices charged to that... other organ of state. In this case the DOE is procuring a totally different product. They are not participating in a contract but merely utilising the same supplier'. In its conclusion on this point, the auditor notes the DOE management response (disagreeing with the finding) but points out that in terms of TR16A6.6, the DOE should participate in the contract and not create another contract, and that the product specification developed by the DOE must match what the contractor/service provider was providing to NECSA and at the prices charged to NECSA. Having regard to the NECSA scope of work and the DOE scope of work, the auditor concluded that the DOE was procuring a totally different product, and was not participating in a contract but merely utilising the same supplier which is not within the ambit of TR16A6.6;*

- The deviation from competitive bidding processes with regard to Mahlako with a transaction value of R20 million was not reported to the relevant treasury and the auditor general and/or such report was not submitted. In its conclusion on this point, the auditor notes the DOE management response (disagreeing with the finding) but points out that the DOE did not apply TR16A6.6 as it was intended, did not follow proper procurement processes and did not follow the SCM [supply chain management] policy as the procurement was done outside the SCM unit and its policy. In its conclusion on this point, the auditor states that it is against this backdrop that the procurement of services from Mahlako was a deviation and should have been reported to the national treasury as well as the auditor general in terms of s41 of the PFMA, TR16A66.4 and PN6 of 2007/2008 (the auditor notes that when institutions deviate from competitive bidding processes and award bids with a transactional value in excess of R 1 million, the accounting officer/authority must within 10 working days furnish the relevant treasury and the auditor general with the required information after the award of the bid).

92.

Regarding the appointment of Mahlako as transactional advisors to assist the DOE in reaching a state of readiness to issue a responsive Request for Proposal to the market (Part 2), an extract from what is understood to be the AG's report on the DOE for the 2016/17 financial year reports that (among other things):

- Services that were supplied by Mahlako in respect of this award were paid without a valid written signed contract between the supplier and the DOE;
- The submission for deviation and terms of reference were not tabled before the BAC for consideration and recommendation to the Accounting Officer;

- The DOE did not receive written approval from the national treasury for the deviation exceeding the expansion or variation orders of 15% or R15 million of the original contract value.

93.

The DOE management is indicated as agreeing with this finding, stating that the transaction in question was for Phase 2 and was reported as irregular expenditure in the records. In its conclusion on this point, the auditor notes that the DOE disclosed part of the expenditure incurred as irregular expenditure, but states that the total expenditure incurred on the Mahlako contract should be disclosed as irregular expenditure.

94.

#### **6. NECSA-RUSATOM Agreement on Co-operation in the Sphere of Non-power Related Uses of Nuclear Technology**

On 26 July 2018, various news media publications reported that South Africa's state-owned Nuclear Corporation of South Africa (NECSA) and the Russian Federation's Rosatom Healthcare (a division of Rosatom) had signed a co-operation agreement on the non-power related uses of nuclear energy. Business Live (Annexure S6) reported that:

The agreement, which was signed on the sidelines of the Brics Summit... will see Necsa partner with Rosatom Healthcare to build two small "solution reactors" in SA, designed for making nuclear medicine products. They also plan to build a commercial cyclotron for the production of radio-pharmaceuticals.

95.

Also on 26 July 2016, Rosatom released a press statement announcing this agreement,<sup>58</sup> while four months later (on 27 November 2016) NECSA posted an identical media statement on their website.<sup>59</sup> The NECSA media statement included quotations from the [then] NECSA Chief Executive Officer (CEO) Mr Phumzile Tshelane, [then] NECSA chairperson Dr Kelvin Kemm, and Rosatom Healthcare Director General Mr Denis Cherednichenko, and (among other things) indicated as follows:

The agreement, which is based on friendly relations between the two countries aims to explore the full potential of deepening mutually beneficial cooperation in the sphere of innovation and technological development related to peaceful uses of nuclear energy. It further outlines a number of areas in which the parties intend to cooperate but does not create any rights or obligations under international or national law. The main area of cooperation identified in the document is

<sup>58</sup> <https://www.rosatom.ru/en/press-centre/news/necsa-to-grow-nuclear-medicine-business-through-global-partnership/>

<sup>59</sup> <http://www.necsa.co.za/necsa-to-grow-nuclear-medicine-business-through-global-partnership/>

that of nuclear medicine and particularly cancer treatment in Africa and abroad.

With this in mind and taking note of recent advancements in the sector, Rusatom Healthcare and NECSA are planning to partner in the construction of two innovative solution reactors on the territory of South Africa. Solution Reactors are small scale and relatively inexpensive reactors that are designed specifically for the cost effective production of nuclear medicine products. The parties also plan to construct a commercial cyclotron in South Africa to further increase the production capacity of nuclear medicine in the region. A cyclotron is another cost effective method of producing various radiopharmaceuticals.

96.

On 7 December 2018, Business Live reported that the then NECSA Chief Executive Officer (CEO) Mr Phumzile Tshelane had been suspended and the entire NECSA board, including then NECSA chairperson Dr Kelvin Kemm, had been fired by then Energy Minister Jeff Radebe *‘after “continued ineptitude and deliberate acts of defiance” which caused various setbacks and losses at the organisation’* (Annexures S7). Then Minister Radebe is reported as having told journalists at a media briefing that *‘one such act of defiance was when the NECSA board members signed a “so-called” memorandum of understanding (MOU) with Rusatom Healthcare... after they were expressly instructed not to do so’*. Then Minister Radebe is reported as having said further that *‘serious governance matters relating to the former board also included: repetitive instance of legislative non-compliance; non-adherence to specific shareholder instructions and directives; financial mismanagement; remuneration irregularities; unauthorised international travel and issuance of misleading, inaccurate and/or defamatory media statements’*, and that *‘numerous irregularities had also been raised by the auditor-general of SA during the 2017-18 audit process, which to date remains incomplete and compromises the financial integrity of the organisation’*.

97.

On 10 December 2018, Timeslive reported that ousted NECSA chairperson Dr Kelvin Kemm (Annexure S8) admitted to signing a Russian nuclear medicine deal against the orders of then Energy Minister Jeff Radebe. Kemm attempted to justify this by claiming that he did so to avoid “political embarrassment” – the signing ceremony took place on the side-lines of the BRICS summit attended by Russian President Vladimir Putin.

98.

Kemm’s founding affidavit in the High Court challenge against the removal of himself and Bosman as directors and the suspension of CEO Tshelane from NECSA can be accessed online.<sup>60</sup> Kemm’s explanation for going against the instructions of Minister Jeff Radebe by signing the document is

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<sup>60</sup> <http://www.ee.co.za/wp-content/uploads/2018/12/Kelvin-Kemm-Urgent-Application-Part-1-redacted-V1.pdf>

contained in paragraph 51.5 of this affidavit.

99.

On 12 December 2018, IOLNews reported that a *“source claimed Radebe’s hasty removal of the Nuclear Energy Corporation of SA (Necsa) board last week and placing chief executive Phumzile Tshelane on precautionary leave was an attempt to pave the way for the sale”* of state-owned producer of nuclear medicine NTP Radioisotopes to US-based Lantheus Medical Imaging.<sup>61</sup> Then Minister Radebe has been reported as rejecting these allegations as ‘balderdash’ (Annexure S7).

100.

On 18 January 2019, IOLNews reported that the urgent application brought by three members of the disbanded NECSA board to set aside then Energy Minister Jeff Radebe’s decision to have them removed had been struck from the urgent role at the North Gauteng High Court.<sup>62</sup>

101.

On 11 May 2019, City Press reported that NECSA was poised to fire suspended CEO Phumzile Tshelane after he was found guilty of *‘having signed the nuclear cooperation agreement without the approval of Energy Minister Jeff Radebe, as well as splurging R500 000 on a golf day when the entity could not afford to pay salaries and unlawfully appointing one of the board members and paying him a monthly retainer’* (annexure AC).

102.

Kemm has a long history in the nuclear industry, and in 2010 was reported as having ‘bemoaned’ then Minister of Public Enterprises Barbara Hogan’s decision to abandon the Pebble Bed Modular Reactor (PBMR) programme. R9 billion of public money had been spent on this ill-fated programme, and it has been reported that Kemm stood to benefit from a promised 10% share in Silver Protea Technologies.<sup>63</sup> Kemm was appointed chairperson of a new NECSA board of directors during or about March 2016,<sup>64</sup> at a time when Joemat-Pettersson was still Minister of Energy. A Fin24 article<sup>65</sup> about the appointment stated that Kemm was one of nine new board members that Cabinet approved, and that *‘this will go a long way to stabilising the state-owned company, which seeks to play a significant role in the country’s*

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<sup>61</sup> <https://www.iol.co.za/business-report/companies/fallout-over-nuclear-meds-sale-rumours-18469380>

<sup>62</sup> <https://www.iol.co.za/news/politics/former-necsa-board-members-case-against-jeff-radebe-removed-from-roll-18869629>

<sup>63</sup> <https://www.iol.co.za/business-report/opinion/pebble-bed-projects-closure-generates-explosive-debate-693146>

<sup>64</sup> <https://www.engineeringnews.co.za/article/necsa-ceo-welcomes-appointment-of-new-board-members-2016-03-04>

<sup>65</sup> <https://www.fin24.com/Economy/dr-kelvin-kemm-to-lead-new-nuclear-board-20160303>

9 600 MW nuclear energy programme’.

103.

By way of background to the replacement of the NECSA board, it was reported in the media in February 2015 that NECSA’s board had suspended then CEO Phumzile Tshelane *‘for disciplinary lapses, which included allegedly donating state money to the ANC’*. The media report states that *‘[n]uclear boss Phumzile Tshelane is seen as a lynchpin in President Jacob Zuma’s contested plan for new nuclear power stations... like the president, he has held several meetings with the Russians, the barely disguised frontrunners in the nuclear build race. Necsa... is earmarked to drive the nuclear programme’s local skills development and industrialisation plans’*.<sup>66</sup> Then Minister of Energy Joemat-Petterson is reported to have written to the NECSA board in December 2015 supporting their disciplinary action, but *‘in an astonishing about turn, Energy Minister Joemat-Petterson stands accused of stepping in, allegedly under pressure from above, to protect him’*.<sup>67</sup> In July 2015, it was reported in the media that then NECSA CEO Phumzile Tshelane was a *‘vocal and dedicated proponent of the government’s controversial R1 trillion nuclear new build programme’*, and that the Minister’s *‘change of heart is said to have been a result of political pressure to protect Tshelane because of his key role in driving the nuclear new build programme’*.<sup>68</sup>

104.

In September 2017 while still the chairperson of NECSA, Kemm was reported as having stated on the side-lines of the World Nuclear Association Conference in London that *‘[t]he procurement programme could restart as soon as next month’*, and that *‘[t]he next step would probably be for South Africa to issue a Request-for-Proposals (RFP) to the world’s top nuclear reactor firms’*. Kemm is also reported as having stated that *‘officials had sought environment ministry approval for one of the sites, at Thuyspunt in the Eastern Cape, and the approval could be granted in the next couple of months’*.<sup>69</sup> By way of context, this last statement relates to the environmental impact assessment (EIA) process for Eskom’s proposed Nuclear 1 reactor, which commenced during or about 1998. Environmental authorisation was ultimately granted on 11 October 2017 for the alternative Duynefontein site at Koeberg and not for Thuyspunt, a decision in respect of which SAFCEI lodged an administrative appeal on 5 March 2018.

<sup>66</sup> <https://mg.co.za/article/2015-02-27-energy-minister-shields-key-zuma-nuclear-ally>

<sup>67</sup> Ibid.

<sup>68</sup> <https://mg.co.za/article/2015-07-23-nuclear-storm-breeds-as-board-tries-to-oust>

<sup>69</sup> <https://www.iol.co.za/business-report/energy/sa-is-to-push-nuclear-deals-restart-button-11258295>

To date successive Environmental Ministers have made no decision on this appeal.

105.

A Windeed director report for Kelvin Kemm (Annexure S9) indicates that he is an active director in the following companies:

- Silver Protea Nuclear Consortium (2004/006321/07)
- LTE Provider (2006/001739/07)
- Nuclear Africa (2013/146896/07)
- Stratek (1990/013522/23)
- Weyer Africa and Associates (2004/006341/07)

106.

During the time that Kemm was an active director of these companies, he was also a non-executive director of NECSA. The director report also list him as having resigned as director of Nuclear Industry Association of South Africa.

107.

Nuclear Africa's website event page (annexure S10) outlines that Nuclear Africa's 2017 Conference outlines *'was once again held in collaboration with NECSA. Keynote speakers included Director General of the World Nuclear Association (WNA), Agnetta Rising and Mr Phumzile Tshelane, CEO of NECSA. The Programme Director was Dr Kelvin Kemm. The sponsors are listed as: Rosatom, Urenco, SNPTC, Eskom and ICEPCO'*.

108.

Nuclear Africa had also hosted a conference in 2016. The programme (annexure S11) shows that the DOE endorsed the conference. Rosatom was listed as a diamond sponsor, and the conference was *'in collaboration with'* NECSA, with Kemm the programme director. On day 1, speakers at the conference included then CEO of NECSA Phumzile Tshelane, then Minister of Energy Joemat-Pettersson, then Group Chief Executive of Eskom Brian Molefe, Director - International Business Department: Rosatom Nikolay Drosdov: and Project Director: JSC Rusatom Overseas Irina Manina.

109.

## **7. Conclusion & Recommendations**

Based on the publicly available information set out in this submission, SAFCEI is of the view that, on

the face of it, a number of steps and events surrounding the then proposed nuclear new build programme planning and procurement process bear the features of State Capture, and warrant further investigation by the Commission. These include (but are not limited to): the secretive IGA signed with the Russian Federation in 2014 (and the steps leading up to its signature, including various visits to Russia and meetings with President Putin); the signing of the Russian IGA containing various potentially prejudicial clauses, and the tabling thereof in terms of s231(3) of the Constitution (thereby making it binding on South Africa without the need for parliamentary approval); the secretive s34 nuclear determination signed in 2013 but only made public in December 2015 in the teeth of ELA-JHB and SAFCEI's litigation; the December 2016 s34 nuclear determination revealed on the day of the first court hearing; various Cabinet re-shuffles affecting the Departments of Energy and Finance; the role of the NNEECC (and its successor the ESSC) chaired by former President Zuma in driving the nuclear new build programme in the absence of reliable information on affordability and economic viability; reliance on the outdated IRP2010 to justify the nuclear new build programme and the stalling of the 2013 update thereof; the apparent irregular awarding of certain large pre-procurement contracts by the DOE; and the signing of a co-operation agreement with Rusatom Healthcare in the face of a Ministerial instruction not to do so.

110.

While ELA-JHB and SAFCEI's successful litigation put on hold what would have been the single largest public infrastructure procurement programme in South Africa's history, the co-ordinated, determined and often secretive efforts to commence the R1 trillion nuclear new build programme procurement process threatened to not only undermine South Africa's sovereignty, but posed a risk of economic calamity. Not only would current and future generations of ordinary electricity users (or the South African taxpayer) ultimately have had to bear the excessive costs by way of increased electricity prices, but socio-economic developmental projects aimed at uplifting the majority of South Africans would likely have been compromised.

111.

These events could only have unfolded with the complicity of various senior individuals in government and state owned entities. Given the high levels of opacity, the full story remains untold. In order to fully understand the nature and extent of State Capture relating to the nuclear new build programme, and to prevent a recurrence thereof, SAFCEI is of the view that a number of key individuals need to be called upon to testify under oath before the Commission on nuclear-related issues. These persons include (but are not necessarily limited to):

- Former President Jacob Zuma (to, among other things, explain his role promoting the nuclear new build programme, his various secretive meetings with Russian President Putin, and various Cabinet reshuffles affecting the Departments of Energy and Finance);
- Former Minister of Energy Joemat-Petterson (to, among other things, explain her role in signing the Russian IGA, her reasons for ignoring the State Law Advisor by tabling the Russian IGA in terms of s231(3) of the Constitution, her failure to respond to correspondence querying the existence of a s34 nuclear determination, her decision to gazette the 2013 s34 nuclear determination and the timing thereof, and her decision to gazette the 2016 s34 nuclear determination and the timing thereof);
- DOE Director General Thabane Zulu (to, among other things, explain the apparently irregular preparatory contracts awarded to Empire Technology and Mahlako, and to provide clarity on what disciplinary steps, if any, were taken against implicated officials in the DOE);
- Former Minister of Energy Kubayi (to explain why she suspended DOE officials implicated in the apparently irregular preparatory contracts awarded to Empire Technology and Mahlako);
- DOE Deputy Director-General: Nuclear Energy Mr Zizamele Mbambo (to, among other things, explain his role in the apparently irregular preparatory contracts awarded to Empire Technology and Mahlako);
- Dr. Kelvin Kemm (to, among other things, explain the role of NECSA in the nuclear new build programme, his involvement in the signing of a co-operative agreement with Rusatom Healthcare, and his potential conflicts of interest);
- Former NECSA CEO Phumzile Tshelane (to, among other things) explain the role of NECSA in the nuclear new build programme);
- Shantan Reddy (to clarify the circumstances surrounding the R171 million contract awarded to Empire Technology); and
- Minister of Minerals and Energy Gwede Mantashe (to, among other things, explain the ANC's role in the nuclear new build programme during his term as ANC Secretary General).

#### 112.

It is recommended further that the nuclear pre-procurement contracts awarded to Empire Technology and Mahlako be investigated to clarify what disciplinary measures (if any) were taken against DOE officials implicated in the award of these contracts (and if so, what became of these disciplinary proceedings), and that the awarding of the contracts and products provided pursuant thereto be reviewed by independent experts (including verification of the products delivered).

113.

SAFCEI makes the following suggestions regarding recommendations that the Commission may wish to make with a view to minimising the potential for State Capture in any future nuclear energy procurement processes:

- To minimise the risk of potential corruption in major infrastructure projects, that a mechanism be legislated and established to ensure that all major procurement projects (including but not limited to nuclear energy) be subjected to independent oversight at all stages (pre-procurement, procurement and post-procurement), as was done with the establishment of the internationally acclaimed Independent Power Producers Office under the direction and guidance of the DOE and National Treasury to oversee South Africa's Renewable Energy Independent Power Producers (REIPP) procurement process (which according to former Energy Minister Jeff Radebe has attracted R209.4 billion in committed private sector investment while creating 38 701 jobs);<sup>70</sup>
- That the President brings section 6 of the National Energy Act into effect, to give legislative effect to the IEP, and to reinforce the requirement for affordability and economic viability in new energy planning and procurement. Section 6 contains important enabling (mandatory) provisions which are aimed at ensuring sound energy planning, including affordability and economic viability requirements, that should serve as a guide to energy infrastructure developments, and which should in addition guide the selection of the appropriate technology to meet energy demands (which would of course include nuclear technology as one such option); and
- That accounting officers and/or accounting authorities of SOEs be held to account for expenditure exceeding approved budgets.

114.

It is hoped that the above is of assistance to the Commission. Should the Commission require any further information or clarification, please do not hesitate to contact SAFCEI.

Yours sincerely

**Elizabeth Jane McDaid**

For and on behalf of the Southern African Faith Communities Environment Institute  
(transmitted electronically)

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<sup>70</sup> <https://www.gov.za/speeches/media-statement-minister-energy-jeff-radebe-renewable-energy-independent-power-producer>