THE REPUBLIC OF SOUTH AFRICA

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

Case No: 19529/2015

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

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

In the review application between:

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

and

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

JUDGMENT

BOZALEK J (BAARTMAN J concurring)

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

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

THE PARTIES

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

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

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

BACKGROUND

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

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

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

EVOLUTION OF THE LITIGATION

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

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

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

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

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

OUTLINE OF THE PARTIES' CASES

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

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

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

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

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

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

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

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

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

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

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

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

THE ISSUES

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

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

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

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

CHRONOLOGY OF EVENTS

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

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

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

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

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

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

6. The press releases recorded inter alia that:

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

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

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

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

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

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

11. The following IGA's were tabled:

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

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

    11.3 Agreement between the Government of the Republic of South Africa and the Government of the Russian Federation on Strategic Partnership and Cooperation in the fields of Nuclear Power and Industry ('the Russian IGA'), signed on 21 September 2014;

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

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

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

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

THE SECTION 34 DETERMINATIONS

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

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

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

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

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

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

(e) require that new generation capacity must:

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

(ii) provide for private sector participation.

2. ...

3. The Regulator, in issuing a generation licence –

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

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

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

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

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

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

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

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

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

2. *electricity produced from the new generation capacity ("the electricity"), shall be procured through tendering procedures which are fair, equitable, transparent, competitive and cost-effective;*

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

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

5. *the procurement agency in respect of the nuclear programme will be the Department of Energy;*

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

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

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

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

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

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

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

(a) an organ of state, when -

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

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

...

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

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

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

'(b) developing and implementing national policy'.

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

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

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[4] President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1) SA 1 (CC).

[5] S Woolman and M Bishop *Constitutional Law of South Africa* 2nd ed vol 4 [original service: 06-08] p 63-32.

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

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

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

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

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

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

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

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

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

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

[36] There is nothing to suggest that the decision taken by NERSA to concur in the Minister's proposed 2013 sec 34 determination was one which fell outside the ambit of sec 10 of NERA. An independent requirement for a valid decision of this nature was thus that it be taken *'within a procedurally fair process in which affected persons have the opportunity to submit their views and present relevant facts and evidence to the Energy Regulator'*. Section 10(3) specifically provides for judicial review of administrative action by NERSA.

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

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

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

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

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

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

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

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

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

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

> *'(I)n order to give effect to the right to procedurally fair administrative action, must decide whether -*
>
> *(a) to hold a public inquiry in terms of subsection (2);*
>
> *(b) to follow a notice and comment procedure in terms of subsection (3);*
>
> *(c) to follow the procedures in both subsections (2) and (3);*
>
> *(d) ... or;*
>
> *(e) to follow another appropriate procedure which gives effect to section 3.'*

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

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

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

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

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

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

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

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

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

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

He went on to state:

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

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

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

A FURTHER PROCEDURAL CHALLENGE BASED ON DELAY

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

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

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

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

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

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

> *'3.4 Although the determination process was completed in 2014 with NERSA and signed by the previous Minister of Energy, Ben Martins, the determination was not gazetted due to change in the leadership in the Ministry and to further conduct some work prior to gazetting. As a result there has been progress on the nuclear build work done by the Department and relevant stakeholders, it is therefore deemed appropriate to publish it. The determination needs to be gazetted ...'*

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

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

> *'3.6 During the meeting of 27 November 2015 to brief the legal counsel defending the Department ... (t)he legal counsel requested to include the determination when filing the record for the court papers. The legal councel (sic) advised that the inclusion of the determination in the answering affidavit will weaken the case for the applicant as it will show that their application is based on false assumption.'*

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

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

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

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

[17] *SARFU* n 4 para 44.

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

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

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

SUBSTANTIVE CHALLENGES TO THE 2013 SECTION 34 DETERMINATION

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

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

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

THE 2016 DETERMINATION

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

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

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

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

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

PART A

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

1. that energy generation capacity needs to be procured to contribute towards energy security and to facilitate achievement of the greenhouse gas emission targets for the Republic of South Africa, accordingly, 9 600 megawatts (MW) should be procured to be generated from nuclear energy ("nuclear programme"), which is in accordance with the capacity allocated under the Integrated Resource Plan for Electricity 2010-2030 (published as GN 400 of 06 May 2011 in *Government Gazette* No. 34263) ("IRP 2010-2030" or as updated);
2. that electricity produced from the new generation capacity ("the electricity"), shall be procured through tendering procedures which are fair, equitable, transparent, competitive and cost-effective and provide for private sector participation;
3. that the nuclear programme shall target connection to the Grid as outlined in the IRP2010-2030 (or as updated), taking into account all relevant factors including the time required for procurement;
4. that the procurer in respect of the nuclear programme shall be the Eskom Holdings (SOC) Limited or its subsidiaries.'

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SUBSTANTIVE CHALLENGES TO THE 2016 SECTION 34 DETERMINATION

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

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

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

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

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

2.2 Issues

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

...

2.3 Problem Statement

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

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

2.4 Motivation

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

...

6 RECOMMENDATIONS

It is recommended that Electricity Subcommittee approve the:

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

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

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

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

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

THE IGA'S

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

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

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

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

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

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

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

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

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

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

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

NON-JOINDER

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

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

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

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

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

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

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

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

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

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

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

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

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

DO THE APPLICANTS HAVE STANDING?

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

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

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

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

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

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

(d) anyone acting in the public interest; and

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

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

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

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

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

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

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

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

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

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

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

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

IS THE RUSSIAN IGA JUSTICIABLE?

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

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

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

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

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

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

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

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

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

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

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

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

THE TERMS OF THE RUSSIAN IGA

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

'1. *The Parties collaborate in areas as outlined in Article 3 of this Agreement which are needed for the implementation of priority joint projects of construction of two new NPP units with VVER reactors with the total capacity of up to 2,4 GW at the site selected by the South African Party (either Koeberg NPP, Thyspunt or Bantamsklip) in the Republic of South Africa and other NPP units of total capacity up to 7,2GW at other identified sites in the Republic of South Africa and construction of a multi-purpose research reactor at the research centre located at Pelindaba, Republic of South Africa. The mechanism of implementation of these priority projects <u>will</u> be governed by separate intergovernmental agreements, in which the Parties <u>shall</u> agree on the sites, parameters and installed capacity of NPP units planned to be constructed in the Republic of South Africa.'* [my underlining]

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

8. Article 6.4 provides as follows:

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

9. Article 7 provides that:

   'Cooperation in areas as outlined in Article 3 of this Agreement, will be governed by separate agreements between the Parties, the Competent Authorities' and goes on to state *'(t)he Competent Authorities of the Parties can, by mutual consent, involve third countries' organizations for the implementation of particular cooperation areas in the framework of this Agreement.'*

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

10. Article 9 provides as follows:

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

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

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

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

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

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

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

13. Article 17 provides in part as follows:

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

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

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

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

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

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

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[42] Media Release n 1 p 131.

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

THE CORRECT PROCEDURE TO RENDER THE RUSSIAN IGA BINDING

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[47] *Glenister* n 41 para 89.

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

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

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

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

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

THE APPROPRIATE RELIEF

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

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

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

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

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

....

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

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

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

THE RUSSIAN IGA

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

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

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

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

THE TABLING OF THE US AND SOUTH KOREAN IGA'S

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

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

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

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

THE 2013 AND 2016 SEC 34 DETERMINATIONS

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

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

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

FUTURE PUBLIC PARTICIPATION PROCESSES

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

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

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

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

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

COSTS

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

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

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

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

1. It is declared that:

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

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

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

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

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

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

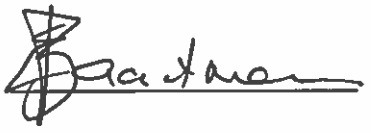
1.4. the determination under sec 34(1) of Electricity Regulation Act gazetted on 14 December 2016 (GNR 1557, GG 40494) in relation to the requirement and procurement of nuclear new generation capacity, signed by the first respondent on 5 December 2016, with the concurrence of NERSA given on 8 December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

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

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

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

BOZALEK J



BAARTMAN J

APPEARANCES

For the Applicants	:	*Adv D Unterhalter (SC)* *Adv M Du Plessis* *Adv A Coutsoudis* *Adv S Magardie*
As Instructed by	:	*Adrian Pole Attorneys* *Ref: A Pole*
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As Instructed	:	*State Attorney: Pretoria* *Ref: E Snyman*