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

Case No: 19529/2015

In the matter between:

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

and

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

FILING NOTICE

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1. **Date on roll:** Not yet allocated

2. **Document filed:** Answering affidavit for First and Second Respondent

3. **Filed by:** Mr E Snyman (State Attorney)

Signed and dated at Pretoria this ..... day of April 2016.

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ANSWERING AFFIDAVIT FOR FIRST AND SECOND RESPONDENTS

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I, the undersigned

ZIZAMELE SMODENI MBAMBO

declare the following under oath:

1. I am an adult male and an officer employed in the Public Service of the Republic of South Africa, holding and appointed in the position of the Deputy Director-General: Nuclear in the Department of Energy with my office situated at Matimba House, No 192 Visagie Street, Pretoria, Gauteng Province.

2. The facts contained in this answering affidavit fall within my personal knowledge, unless the context indicates otherwise, and are to the best of my knowledge both true and correct. Where perforce I have to deal with legal issues, I do so on the advice of the legal representatives of the President of the Republic of South Africa (cited herein as the Second Respondent and hereinafter referred to as the

President) and the Minister of Energy (cited herein as the First Respondent and hereinafter referred to as the Minister).

3. I have perused the Notice of Motion and the founding affidavit, with the annexures filed in support thereof, as well as the Amended Notice of Motion and the supplementary affidavit, with the annexures filed in support thereof. I depose to this answering affidavit in support of the opposition of the President and the Minister to the relief pursued by the Applicants in this matter.

4. In my capacity as the Deputy Director-General: Nuclear in the Department of Energy (which I joined in July 2012), I am overall responsible for the general management and administration of all matters pertaining to nuclear energy and nuclear technology in the Department of Energy (hereinafter referred to as "*the Department*" and before 2009 part of the erstwhile Department of Minerals and Energy). All officials in the Department report to me on such matters and I report to and liaise with the Director-General of the Department, the Minister and ultimately the Cabinet and the President in this regard. I was intimately involved in most, if not all, of the relevant events since July 2012.

5. This matter has far wider implications than the possible procurement of a number of nuclear power plants. At the heart of this matter lies a policy direction, already adopted by the Government some years ago, in favour of establishing a self-sufficient nuclear industry for the industrialisation and development of the Republic of South Africa and already given recognition in a

number of statutes as well as other instruments. Moreover this policy direction allows the Republic of South Africa to discharge its international obligation to reduce CO_2 emissions - emissions of carbon dioxide, a so-called greenhouse gas, from our historical fleet of coal-driven power stations - in line with its pledge submitted to the Copenhagen Accord on 29 January 2010 (to undertake mitigation actions with the aim of reducing emissions below the "*business-as-usual level*" by 34% in 2020 and by 42% in 2025) and in line with the Intended Nationally Determined Contribution submitted on 25 September 2015 (with a target of reducing its greenhouse gas emissions to between 398 and 614 metric tons of CO_2 per year). Given the nuclear policy direction taken since at least 2008, the path of the Department has crossed on a number of occasions with that of especially the First Applicant, who is on record as having a very strong and clear position against nuclear power: it is an anti-nuclear organisation that believes South Africa should not build any more nuclear power plants.

SUMMARY OF CASE FOR FIRST AND SECOND RESPONDENT

6. For the sake of convenience I briefly set out the basis and grounds upon which the President and the Minister will rely for opposing this review application.

Introduction

7. **Firstly**, by way of an introduction to provide the necessary background and context at the outset, I will sketch the broader picture for certain high-level and

nuclear-related steps and actions that were taken by the National Executive.

7.1 This broader picture will deal with the nuclear programme in general (in short, the vision to create and establish a self-sufficient nuclear industry in South Africa that will move this uranium-rich country forward to greater industrialisation and development in order to alleviate poverty through growth in the economy) and with the nuclear power policy in particular (in short, the vision that, as part of the nuclear programme, the energy and/or electricity needs of South Africa are to be provided for by a mix which includes nuclear power plants so as to ensure *inter alia* the security of electrical supply, a stimulus for a nuclear industry, and also the reduction of CO_2 emissions in line with the international obligations of the Republic of South Africa).

7.2 As part of this broader picture, I also plan to deal with the legal framework which already gives recognition to the establishment and development of a nuclear industry for the Republic of South Africa and which is at present squarely founded on the international obligations of the Republic of South Africa as one of the founding members of the International Atomic Energy Agency (hereinafter referred to by its acronym "*the IAEA*") and as a State Party to various international treaties in this regard. The domestic side of that legal framework provides for public participation in the course of some decision-making processes but not in respect of all the decisions to be taken in connection with the establishment and development of a

nuclear industry for the Republic of South Africa.

7.3 In this regard there is a distinction which is fundamental to this whole review application - namely, the distinction between the policy-making power of the National Executive and the procurement power of the State.

7.4 Against this background and in this context it will become clear that essentially all the relevant steps and actions, taken by the National Executive and/or the Government to the date hereof, were duly, lawfully and rationally taken within the confines of its policy-making powers and that, up to the date hereof, there was no exercise of any of the procurement powers of the State - albeit that some preparatory or pre-procurement steps or actions for a nuclear power procurement process were taken and are under way.

7.5 These and other related topics are dealt with more fully in **paragraph 19-71 below**.

Non-joinder

8. **Secondly**, there was a material non-joinder of parties with a direct and substantial interest in the subject-matter as well as in the relief being pursued in this litigation and/or of parties whose rights and interests will be prejudiced if the relief that is being pursued by the Applicants is sustained or carried into effect.

In essence that relief directly pertains to the interpretation and nature, and even the validity or binding force, of the bi-lateral international agreements or treaties between the Government of the Republic of South Africa as the one State Party and the Government of the Republic of Korea, the Government for the United States of America and the Government of the Russian Federation as the other State Party respectively. However, none of those foreign states or governments have been cited nor are they a party to the litigation before this domestic court, sitting in judgment on international agreements or treaties at the behest of the Applicants, who are not even a party to any of those treaties. This topic is dealt with more fully in **paragraph 72-70 below**.

Merits

9. **Thirdly**, as far as the alleged merits of the review application are concerned, we are called upon to deal with a case and with arguments that are premised on a number of false assumptions or incorrect facts and/or in some instances presented out of context, with disparate issues and matters being lumped together. As a result and in order to meaningfully structure the case and argument of the President and the Minister, in their opposition to the review application, I will deal with the alleged merits of the review application in the manner as set out in **paragraph 10-17 below**.

10. By way of general introduction I will explain why essentially all of the steps and actions to date, taken under the policy-making powers of the National Executive

under section 85(2)(b) and/or (e) of the Constitution, are not "*administrative action*" as defined in the Promotion of Administrative Justice Act 3 of 2000 (hereinafter referred to as "*the PAJA*") and are thus not reviewable under the PAJA but I do not dispute that those steps or actions may well be subject to a constitutional and/or legality review. This is dealt with more fully in **paragraph 80-86 below**.

11. With reference to the relief pursued in prayer 1(a) and (b) of the Amended Notice of Motion - **[**page 359-360 of the record, seeking an order declaring unconstitutional and unlawful, and reviewing and setting aside, the following two decisions: **(1)** the decision of the President to authorise the Minister to sign the "*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*" (annexure **'PL 24.4'** to the founding affidavit and hereinafter referred to as the Russian Treaty); and **(2)** the decision of the Minister to sign the Russian Treaty**]** - the case and arguments for the President and the Minister are as follows:

11.1 **<u>In the first place</u>** the Russian Treaty was negotiated and signed by virtue of the powers entrusted to the National Executive in section 231(1) of the Constitution, which reads as follows:

> "*(1) The negotiating and signing of all international agreements is the responsibility of the national executive.*"

The conclusion of the Russian Treaty was thus authorised by law, was rational and did not call for any process of public participation for reasons more fully explained in **paragraph 87-93 below**.

11.2 **In the second place** section 217 of the Constitution finds no application to the Russian Treaty because:

- it is an international agreement of which the content is not cognisable, open to interpretation and construction or to enforcement by a domestic court; and
- consistent with the doctrine of separation of powers and as far as international relations are concerned, a State should not speak with two voices on the same matter;

but, in any event and even if the Honourable Court regards the conclusion of the Russian Treaty as justiciable under section 217 of the Constitution, then upon a proper and correct interpretation of that international agreement as a whole and in context it does not have the legal effect and contents as portrayed by the Applicants: the Russian Treaty can by no stretch of the imagination be regarded as a contract for goods and/or services as contemplated by section 217 of the Constitution and its conclusion was not part of any actual procurement process or commercial transaction, but it is simply an international agreement regulating the international relationship between two State Parties within the scope or ambit and on the plane of the international public law. This is dealt with in more detail in **paragraph 52 below**.

11.3 **<u>In the third place</u>** the Russian Treaty did not compromise any future nuclear procurement process in any respect at all. To recognise the Government of the Russian Federation as a strategic partner in the Russian Treaty (on the plane of international relations) is no different from confirming the already existing strategic partnership with the People's Republic of China in the preamble to "*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*" (annexure **'PL 24.5'** to the founding affidavit and hereinafter referred to as the Chinese Treaty). The claim of irrationality with the early pursuit of a strategic partnership is with respect speculative. It is also misconceived in that, on the one hand, it is based on an incorrect interpretation and construction of the Russian Treaty and, on the other hand, it ignores the wider vision of the nuclear programme of the Government of the Republic of South Africa as well as the uniqueness of the field of international relations.

11.4 **<u>In the last place</u>** section 34 of the Electricity Regulation Act 4 of 2006 (hereinafter referred to as "*the ERA*") also finds no application to the Russian Treaty because it is not only an international agreement but, upon a proper and correct interpretation, it is also not any kind of a procurement step or domestic contract, and no determination in terms of section 34(1) of the ERA is required as a jurisdictional condition for a treaty. In any event and on the level of fact, a determination in terms of

section 34(1) of the ERA was made in 2013, which stands at least on the level of fact and has legal effect or force until it is set aside by a court of law.

11.5 This is dealt with in more detail in **paragraph 87-93 below**.

12. With reference to the relief pursued in prayer 1(c) of the Amended Notice of Motion - **[**page 360 of the record, seeking an order declaring unconstitutional and unlawful, and reviewing and setting aside, the decision of the Minister to table the Russian Treaty in Parliament in terms of section 231(3) of the Constitution**]** - the case and arguments for the President and the Minister are as follows:

12.1 **In the first place** I respectfully submit that the Applicants have no standing to claim this relief. If by reason of a ministerial decision an international agreement is tabled in Parliament in terms of the wrong section or procedure (which I do not concede), then it is with respect a matter for Parliament to take up with the Minister. Under section 92 of the Constitution the members of the National Executive are, collectively and individually, accountable to Parliament for the exercise of their powers and the performance of their functions. No right, interest or expectation on the part of the Applicants is affected thereby in whatsoever respect, and definitely not adversely. There is no demonstration at all by the Applicants in their papers of how they are affected or what special damage they have suffered by the alleged wrong

tabling procedure of the Russian Treaty in Parliament. Whether the correct or incorrect tabling process was followed with the Russian Treaty is thus not a matter concerning the Applicants: it is for Parliament to make such a call and to question the Minister if Parliament was of the view that there was some dereliction of duty (which I do not admit).

12.2 **In the second place** I respectfully submit that the decision of the Minister to table the Russian Treaty under section 231(3) of the Constitution is not justiciable in a domestic court because:

- it is an international agreement of which the content is not cognisable, open to interpretation and construction or to enforcement by a domestic court; and
- consistent with the doctrine of separation of powers and as far as international relations are concerned, a State should not speak with two voices on the same matter.

12.3 **In the third place** and if the Honourable Court finds that the decision of the Minister, as to the category in which the Russian Treaty falls for the purposes of tabling in Parliament, is justiciable, then I respectfully submit that the Russian Treaty is, upon a proper interpretation and construction thereof, not a "*procurement contract*" with immediate financial implications as portrayed by the Applicants. The Russian Treaty is an international agreement of a technical, administrative or executive nature and a bi-lateral one which does not require either ratification or accession (as

is the case with multi-lateral treaties); as a treaty it has no legislative or extra-budgetary implications *per se* and it is in essence an international agreement on an executive level of cooperation between the two State Parties in two specific fields, namely the field of nuclear power and the field of nuclear industry. In this regard the reliance by the Applicants on a passing and unsubstantiated remark by the State Law Advisor in an explanatory memorandum (on page 509 of the record) is unfounded and speculative because, in this context, the issue is not the flawed subjective exercise of a discretionary power but the correct category in which the Russian Treaty objectively falls for the purposes of tabling in Parliament.

12.4 All of this are dealt with in more detail in **paragraph 94-100 below**.

13. With reference to the relief pursued in prayer 2(a) and (b) of the Amended Notice of Motion - **[**page 360 of the record, seeking an order declaring unconstitutional and unlawful, and reviewing and setting aside, the decision of the Minister to table the "*Agreement for Cooperation between the Republic of South Africa and the United States of America concerning Peaceful Uses of Nuclear Energy*" (annexure **'PL 24.3'** to the founding affidavit and hereinafter referred to as the American Treaty) and the "*Agreement between the Government of the Republic of Korea and Government of the Republic of South Africa regarding Cooperation in the Peaceful Uses of Nuclear Energy*" (annexure **'PL 24.2'** to the founding affidavit and hereinafter referred to as the South-Korean Treaty) in Parliament in terms of section 231(3) of the Constitution**]** - the

case and arguments for the President and the Minister are as follows:

13.1 **In the first place** I respectfully submit that the Applicants also have no standing to claim this relief. Again this is a case where no right, interest or expectation on the part of the Applicants is affected by the alleged late tabling of these two treaties in Parliament. In the context of section 231(3) of the Constitution, the purpose of tabling in Parliament is to notify or inform Parliament of the existence of a treaty that binds the Republic of South Africa (even if it is also regarded as a measure to account to Parliament under section 92(3) of the Constitution). Once there was such a tabling, no court order can undo the fact of notification to Parliament or delete the knowledge thereof from the individual minds of Members of Parliament; in fact, I cannot think of any practical effect that such a court order will have. If there was an unreasonable or unconstitutional delay with, or any suspicion about the motives for, the tabling of the American Treaty or the South-Korean Treaty in Parliament, it is thus for Parliament to make that call and take it up with the Minister.

13.2 **In the second place** I respectfully submit that, even if one was to assume an unreasonable delay in the tabling of the American Treaty and the South-Korean Treaty in Parliament, it is only the delay itself that is unconstitutional and such a delay does not affect the validity or effectiveness of the tabling itself nor does it make either of those two treaties invalid or without any binding or legal effect in the field of

international public law or international relationships. A contrary argument implies that a State Party is allowed to escape from binding treaty obligations by what amounts to be its own unlawful conduct. Accordingly the relief pursued in this regard is of an academic nature and has no practical effect.

13.3 **In the third place** I respectfully submit that there was in any event no unreasonable delay. In a nutshell there was no need to table these two treaties in Parliament during the past few years because the circumstances were such that, although cooperation between the State Parties as contemplated therein did become politically possible (with international doors having been opened at an expedient time as far as the peaceful use of nuclear energy was concerned and at a time when it was opportune to foster international relationships with these two State Parties in general), there was no practical or immediate need for such cooperation. Only recently, when the policy-decision was taken that the Republic of South Africa should in general opt for the Pressurised Water Reactor technology as far as nuclear power plants are concerned, did we make an inventory or list of the countries that are able to provide this technology. The United States of America and the Republic of Korea fall in that category, as do the French Republic, the Russian Federation, the People's Republic of China and the Kingdom of Japan (although we are still in the process of negotiating an international agreement with Japan in this regard, which will also be tabled if and as soon as it is signed).

The tabling of the American Treaty and the South-Korean Treaty in Parliament (together with the treaties of other countries with Pressurised Water Reactor technology) was thus not mere window-dressing and the wild accusations by the Applicants in this regard are false; in fact, those unfounded allegations amounting to bad faith on the part of the Republic of South Africa in its international relations with two other Sovereign States are irresponsible and damaging to the international reputation and goodwill of this country. Under these circumstances, the tabling of those two treaties was valid and rational, and there was with respect no delay and in any event no unreasonable one nor was there any ulterior purpose therewith.

13.4 This is dealt with in more detail in **paragraph 101-110 below**.

14. With reference to the relief pursued in prayer 3(a) and (b) of the Amended Notice of Motion - **[**page 360-361 of the record, seeking a declaratory order on the proper interpretation of section 34 of the ERA**]** - the case and arguments for the President and the Minister are as follows:

14.1 **<u>In the first place</u>** I respectfully submit that this relief is superfluous in that, to deal with certain of the grounds relied upon by the Applicants for relief in respect of the Russian Treaty (referred to in **paragraph 11 above**) and for relief in respect of the determination that was made during 2013 (hereinafter referred to as "*the 2013 determination*") by a previous

Minister of Energy in consultation with the National Energy Regulator of South Africa (hereinafter referred to by the acronym "*NERSA*") in terms of section 34(1) of the ERA (referred to in **paragraph 15 below**), the proper interpretation of section 34 of the ERA in any event has to be determined and then applied in the reasoning of the Honourable Court.

14.2 **In the second place** I respectfully submit that in essence this relief and the case for the Applicants are premised on three propositions for the alleged proper interpretation of section 34 of the ERA, namely:

- that a ministerial determination in terms of section 34(1)(a), (b) and (f) of the ERA must be made in consultation with NERSA and thus (when read with section 10(1)(d) of the National Energy Regulation Act 40 of 2004) in accordance with a procedurally fair and public participation process;
- that a ministerial determination in terms of section 34(1)(f) of the ERA must specify the procurement system for the nuclear new generation capacity; and
- that the ministerial powers provided for in section 34(2) of the ERA can only be exercised and/or the procurement process (from the moment of bid specification onwards) can only commence after such determinations.

The Applicants are with respect wrong with all three propositions. Firstly, section 10(1)(d) of the National Energy Regulation Act 40 of 2004 (hereinafter referred to as "*the NERA*") does not apply to the ministerial

decision to be taken in terms of section 34(1) of the ERA and no public participation process is required in law for what is in substance an executive policy decision on electricity generation that binds NERSA. Secondly, the Minister is given the discretionary power to require that a specific procurement method, namely tendering, be used where appropriate and she is not called upon to reinvent the wheel where a procurement system is already in place. Thirdly, the ministerial powers provided for in section 34(2) of the ERA are not limited to a stage after such determinations and not all of those powers are premised on procuring nuclear new generation capacity from the private sector. These three propositions and our answer thereto are dealt with more fully in **paragraph 111-122 below**.

15. With reference to the relief pursued in prayer 4(a) of the Amended Notice of Motion - **[**page 361 of the record, seeking a declaratory order that the 2013 determination, which was made with the concurrence of NERSA, and the decision to publish it, are unconstitutional and unlawful, and reviewing and setting it aside**]** - the case and arguments for the President and the Minister are as follows:

15.1 **In the first place** I submit that neither the 2013 determination nor the decision to publish it are, on the one hand, "*administrative action*" as defined in PAJA and, on the other hand, in violation of the principle of legality. I explain why this is so more fully in **paragraph 80-86 below**.

15.2 **<u>In the second place</u>** I submit further that the Applicants' claim, that the 2013 determination and/or the decision to publish it was procedurally unfair for lack of public participation, is completely misconceived because no public participation was required. I explain why this is so more fully in **paragraph 123.2 below**.

15.3 **<u>In the third place</u>** I submit that the Applicants' claim, of an alleged "*unlawful*" delay of some 2 years in gazetting the 2013 determination, making it unreasonable and/or irrational and/or unlawful, is also completely misconceived, given that the gazetting thereof is not required by legislation. I explain this more fully in **paragraph 123.3 below**.

15.4 **<u>In the fourth place</u>** I also submit that the Applicants' claim, that the 2013 determination should have but did not establish a separate and specific system of procurement of nuclear new build capacity in violation of section 34 of the ERA read with section 217 of the Constitution, is also without foundation in view thereof that there already existed two alternative procurement systems. I explain why this is so more fully in **paragraph 123.4 below**.

15.5 **<u>In the fifth place</u>** I submit that the Applicants' claim, that the 2013 determination by the Minister was irrational, unreasonable and taken without regard to relevant considerations and with regard to irrelevant considerations, is wrong because of a fundamental misunderstanding of

what section 34 of the ERA is all about. I explain why this is so more fully in **paragraph 123.5 below**.

15.6 **In the sixth place** I respectfully submit that the Applicants' claim, that the concurrence of NERSA in the 2013 determination was irrational, unreasonable and taken without regard to relevant considerations and with regard to irrelevant considerations, is also wrong. I explain why this is so more fully in **paragraph 123.6 below**.

15.7 **In the last place** I respectfully submit that there is no ground or reason for a declaratory order that the 2013 determination, which was made with the concurrence of NERSA, is unconstitutional and unlawful, and reviewing and setting it aside.

16. With reference to the relief pursued in prayer 4(b) of the Amended Notice of Motion - **[**page 361 of the record, seeking an order setting aside any Request for Proposals that were issued by the Department pursuant to the 2013 determination**]** - the case and arguments for the President and the Minister are as follows:

16.1 **In the first place** I submit that this prayer is completely premature in that to date no Request for Proposals has been issued.

16.2 **In the second place** and in law a Request for Proposals can be issued

under the existing procurement systems without the 2013 determination.

16.3 **In the third place** the preparation and formulation of a Request for Proposals is not a process to be subjected to public participation and consultation. Even the decision to issue a Request for Proposals is not an "*administrative action*" as defined in PAJA.

17. In the result I respectfully submit that no case for any of the prayers has been made out on the papers before the Honourable Court.

18. In the premise the President and the Minister will seek a postponement so that the necessary parties can be joined, alternatively a dismissal of this review application with costs, in both instances with such costs to include the costs of three counsel.

BACKGROUND AND CONTEXT

19. In essence the Applicants aver that the National Executive, secretly and without public participation, precipitously embarked upon the arbitrary procurement of a fleet of nuclear power plants in a manner that is unconstitutional and unlawful, thereby flouting the constitutional imperatives for an open and transparent government. This averment is false and, in order to demonstrate this, I need to deal with the background and context for this matter mostly in a chronological order.

Period 1944-1993

20. The South African nuclear programme already began in 1944 and, in the period between 1944 and 1993, included not only a programme for the peaceful use of nuclear energy (which was openly and publicly pursued) but also a secret programme for the potential military use thereof as a weapon. Between 1989 and 1993, the then South African Government decided to discontinue its secret nuclear weapons programme and to this end dismantled and destroyed the nuclear weapons it had in its arsenal. A public announcement, which created a lot of sensation at the time, was made in this regard on 24 March 1993 by the then President FW de Klerk. The IAEA officially verified this dismantling and discontinuation of the nuclear weapons programme. The so-called "*past strategic nuclear facilities*" that were used in and for the nuclear weapons program, were inherited by the present South African Government. Some of those facilities were suitable for and could be allocated to the peaceful use of nuclear energy (such as commercial activities in the field of medicine and research) but some of those past strategic nuclear facilities are of no use to the present South African Government. In respect of those facilities, we have an action plan in place for the ongoing decommissioning and decontamination of those past strategic nuclear facilities and the Republic of South Africa has committed itself in terms of the international law to do so. This is currently reflected in section 50 read with the definition of "*institutional obligations*" in section 1 of the Nuclear Energy Act 46 of 1999.

Period 1993-1998

21. After the advent of the new constitutional dispensation for the Republic of South Africa in 1993, the new South African Government had a massive task ahead of it. As far as nuclear matters were concerned, the focus at the time fell on two main aspects: firstly, an active pursuit of the non-proliferation of nuclear weapons (which resulted in the enactment of the Non-Proliferation of Weapons of Mass Destruction Act 87 of 1993) and, secondly, maintaining the *status quo* in the nuclear sector until such time as informed decisions could be taken.

22. The first relevant development was in August 1995, with the start of an active process of consultation by way of the publication of the Green Paper entitled "*Energy Policy Discussion Document*" for comments and discussion.

22.1 This Green Paper was drafted by a multi-disciplinary team of experts. They described the energy sector and also identified 111 major energy policy issues. I was unable to find a copy of the original document but I do have access to a policy document of the ruling party that was written for discussion purposes and which was the genesis of the Green Paper. In this regard I refer the Honourable Court to annexure **'ZM 1'** hereto, a copy of the discussion document of the African National Congress on the topic "*Draft Mineral and Energy Policy*", prepared when minerals and energy were located in one department, and more specifically the part from page 15-29 thereof.

22.2 After some formal and informal workshops with stakeholders, including four regional workshops for community representatives (in September 1995 and October 1995, attended by some 250 persons), a team of expert "*issue rapporteurs*" was tasked to prepare a first draft White Paper (setting out the proposed energy policy on various issues). A review of their contributions followed, with the Department and the Cabinet approving the release of a revised draft White Paper in July 1998.

22.3 Public hearings and deliberations took place before the Parliamentary Portfolio Committee (on 21-24 July 1998) and an opportunity for the submission of written comments to the Department by members of the public followed.

22.4 From this process, a final draft of the proposed White Paper on energy policy was then prepared and was submitted by the Department to the Cabinet for its approval.

22.5 There was nothing secretive about this process, which was concerned with the development of policy and not with procurement.

22.6 The Green Paper process was concluded when the Cabinet approved the "*White Paper on the Energy Policy of the Republic of South Africa*" on 2 December 1998. This White Paper was freely available and was widely distributed. Although it is a bulky document, I attach a copy thereof as

annexure **'ZM 1A'** hereto.

23. The approval of the White Paper on the Energy Policy of the Republic of South Africa (annexure **'ZM 1A'**, generally referred to as "*the White Paper*" in this answering affidavit) flowed from the executive policy-making power as contained in section 85(2)(b) of the Constitution, which provides that the President exercises the Executive Authority, together with the other members of the Cabinet, by developing and implementing national policy.

24. Within the confines and constraints of this answering affidavit it is not possible to deal in any great detail or depth with the White Paper (annexure **'ZM 1A'**). By necessity I will therefor only highlight what I consider to be relevant for the purposes of this matter and, to that end, I refer mainly to the executive summary thereof.

24.1 The foreword to the White Paper (page 2-5 thereof) makes it clear that there is a direct causal relationship between the supply of energy and the socio-economic development of our country, which in turn is also about reducing poverty and about providing for basic human needs.

24.2 The White Paper records (on page 5 read with page 17 thereof) that, with the end of Apartheid and the United Nations oil embargo, South Africa experienced fundamental shifts resulting in significant changes in the energy policy context.

24.3 The White Paper recognises at the outset (on page 6 thereof) that, before going into detailed energy policy objectives, it is necessary to understand the energy policy context and energy sector challenges: especially three aspects are to be considered, namely:

- economic, social and environmental policies and forces;
- the nature of the South African energy sector and its linkages with broader forces; and
- what the sector needs to achieve as overall policy goals.

24.4 The White Paper points out (on page 7 thereof) that there has been an important shift as a result of the international context: the lessons learnt from abroad is that energy security is now being achieved through greater diversification and flexibility of supply. One of the implications hereof is an increasing reliance of the energy sector on market-based pricing and another is a greater emphasis by the State on commercialisation and competition. Global financial markets are also changing and private financing is becoming increasingly important. There is also a realisation that the energy sector has larger environmental impacts than most other economic sectors - energy policies are thus suited to reduce emissions into the atmosphere as energy investments (and the goods exported from the national economy wherein such investments were made) are subjected to greater environmental scrutiny both nationally as well as internationally.

24.5 In the national context the White Paper aligns itself (on page 7-8 thereof) with the two major social and economic policies approved after 1994: the Reconstruction and Development Programme (commonly known as the RDP) and the Growth, Employment and Redistribution macro-economic strategy (commonly known as the GEAR). The two core strategies, also underlying the energy policy as adopted in this White Paper, are:

- promoting growth through exports and investment; and
- promoting redistribution (of wealth) by creating jobs and reallocating resources through the budget.

The immediate need for growth and development is directly linked to the urgent need for eradicating poverty in this country.

24.6 Even the White Paper shrinks (on page 8 thereof) from providing a coherent and comprehensive overview of the South African energy sector (combining as it does more than six different fuel types, multiple supply institutions and various categories of users); the fact is, however, that the energy sector can greatly contribute to a successful and sustainable national growth and development strategy.

24.7 The White Paper sets out (on page 8-9 thereof) five policy objectives for the energy sector, namely:

- increasing access to affordable energy services;
- improving energy governance: in terms of this objective, the Government commits to a break with the excessive need for

secrecy which was a feature of the Apartheid Government and opting for a more transparent as well as accountable approach and consultation with stakeholders in the formulation and implementation of new energy policies (spelled out in more detail on page 24-25 thereof);

- stimulating economic development;
- managing energy-related environmental and health impacts; and
- securing supply through diversity: in terms of this last objective, the Government intends to pursue energy security by encouraging a diversity of both supply sources and primary energy carriers.

24.8 The White Paper discusses (on page 9-11 thereof) the various energy demand sectors in South Africa (namely: households; industry, commerce and mining; transport; and agriculture).

24.9 The White Paper also discusses (on page 12-14 thereof) the various energy supply sectors in South Africa (namely: electricity; nuclear energy; the exploration and production of oil and gas; liquid fuels; gas; coal; renewable energy sources; and transitional fuels such as low-smoke fuels).

24.10 Some cross-cutting issues are also touched upon in the White Paper. The then lack of institutional capacity to do integrated energy planning (on page 14 thereof), the need for good data to do proper planning (also on

page 14 thereof), the inevitable interaction between environmental goals and developmental goals which requires an acceptable balance to be found by using an integrated approach (on page 15 thereof) and the intention of Government to develop strategies for reducing international trade barriers, facilitate regional cooperation and establish energy sector cooperation with other countries and international bodies (on page 16 thereof) are examples hereof.

24.11 I wish to deal in more detail with the discussion in the White Paper (on page 58-63 of the White Paper) of the nuclear energy supply sector in South Africa.

24.11.1 After referring to the existing nuclear energy supply and the existing nuclear industry in South Africa (albeit that both are minor components respectively of the energy sector and of the national economy), the White Paper states that, based on projections of power demand and taking Eskom's current surplus capacity into account, it is not expected that more generation capacity will be required in South Africa before the year 2007 at the earliest. I interpose to point out that this "*current surplus capacity*" no longer exists and has not existed for some ten years.

24.11.2 The White Paper does not close the door on nuclear

energy as a supply sector in South Africa; in fact, it leaves that option open (on page 58 thereof): "*Whether new nuclear capacity will be an option at that point or beyond will depend largely on the environmental and economic merits of other energy sources relative to nuclear and its political and public acceptability, construction lead-times and load characteristics*."

24.11.3 An overview of the nuclear industry in South Africa is presented in the White Paper (on page 58-59 thereof). The requirements for the generation of electrical power from uranium ore (one of the many mineral resources to be found in South Africa) is first spelt out, namely:

- the mining, milling and processing of uranium ore in order to produce uranium oxide power;
- conversion of the uranium oxide to gaseous uranium hexafluoride;
- enrichment of the uranium hexafluoride in order to increase the proportion of usable uranium;
- fuel fabrication, during which enriched uranium hexafluoride is reconverted to uranium oxide which is then packed into metal-clad fuel elements;
- utilisation of the fuel elements in a nuclear power plant where they remain until spent;

- subsequent on-site temporary storage of the spent fuel for the medium term; and finally
- long term disposal of the spent fuel.

The sum of these activities is often referred to as the "*nuclear fuel cycle*", starting with the mining of uranium ore and ending with the long-term disposal of spent fuel. The South African nuclear industry is then compared with these requirements, showing that we do not have a full nuclear fuel cycle in the nuclear industry and were thus not self-sufficient.

24.11.4 An overview of the existing legal framework for the governance of the nuclear industry in South Africa (including two Bills) is presented in the White Paper (on page 59 thereof). What is important, however, is the recognition by the Government, in defining its policy on nuclear regulation, of ... "*the difference between nuclear installations, on the one hand, where the potential exists for acute exposure and catastrophic accidents, and therefore requiring a special liability regime with compulsory financial security, sophisticated safety assessment to ensure that the risk is engineered to acceptably low levels, and where the high level spent fuel waste requires specially engineered storage and disposal facilities. On the other hand there are*

other industries where relatively low levels of naturally occurring radioactivity are by-products of the process, where the hazzard can be controlled within the overall occupational/industrial hygiene program and the risk is covered by a regular civil liability regime, and where the mostly huge volumes of waste containing lower levels of radioactivity is not amenable to engineered disposal facilities."

Today such a special liability regime for nuclear damage in our domestic law is contained in chapter 4 (dealing with financial security and liability in section 29-35) of the National Nuclear Regulator Act 47 of 1999 and it has been a part of the international law since at least 1963 under the Vienna Convention on Civil Liability for Nuclear Damage. The incorporation of such a special liability regime in a bi-lateral treaty, such as the Russian Treaty, is thus nothing extraordinary.

24.11.5 The White Paper recognizes (on page 59-60 thereof) that the then state of affairs in the nuclear sector is a product of history but that South Africa now faces a substantially different situation. Accordingly there are two types of problems requiring resolution: firstly, what long-term

contribution can nuclear power make to the energy economy of the country and, secondly, how can the existing nuclear industrial infrastructure be optimised? In this regard the existing nuclear industry in South Africa is a repository of scientific and technical expertise that could be of great benefit to the country. One of the things that the Government thus needed to do over the short to medium term was to separate nuclear energy matters from other matters relating to the nuclear sector.

24.11.6 As far as the future role of nuclear power in South Africa is concerned, the position adopted in the White Paper (on page 60 thereof) is that, whilst it is unlikely that additional nuclear capacity will be required for a number of years, it would not be prudent to exclude nuclear power as a supply option. Decisions on the role of nuclear power, as with any other supply option, need to be taken within the context of an integrated resource planning process. Also mentioned is that Eskom was, already in 1999, conducting feasibility studies on the possibility of constructing a pebble bed modular reactor nuclear power plant.

24.11.7 The policy adopted by the Government in respect of the future role of nuclear power in South Africa is stated (in the

White Paper on page 60 thereof) to be that "*Government will ensure that decisions to construct new nuclear power stations are taken within the context of an integrated energy policy planning process with due consideration given to all relevant legislation, and the process subject to structured participation and consultation with all stakeholders*" (own underlining added for the sake of emphasis). This was not a decision that every step or decision on nuclear matters in the exercise of the constitutional policy-making power of the National Executive will be subjected to a public participation process but was a decision that the place for public participation was during the exercise of a procurement power when the decision, whether a specific nuclear power plant should be constructed, is under consideration.

24.11.8 A number of other nuclear-related matters are also discussed in the White Paper: the Koeberg nuclear power plant (on page 60-61 thereof); the Atomic Energy Corporation (on page 61-62 thereof); radioactive waste management (on page 62 thereof); the safety, health and environmental impact (on page 62-63 thereof); nuclear emergency planning (on page 63 thereof); clarifying nuclear industry governance (on page 63 thereof); and the separation of nuclear energy and other nuclear issues (on

page 63 thereof).

24.12 The White Paper points out (on page 83 thereof) that, by virtue of its size and economic importance, the energy sector periodically requires considerable investments in new supply capacity, which impacts on the economy. Historically such decisions were primarily driven by concerns with maintaining supply security, without giving full consideration to the economic, environmental and social impact of all alternatives. As a result the stated policy is that the Department will ensure that an integrated resource planning approach is adopted for large investment decisions by energy suppliers and service providers, in terms of which comprehensive evaluations of the economic, social and environmental implications of all feasible supply and demand side investments will have to be undertaken.

24.13 The White Paper reiterates (on page 88 thereof) that there is an inevitable interaction between environmental and developmental goals, necessitating an integrated approach which encompasses these two issues; the key environmental challenge for the energy sector is to maintain an acceptable balance between these two goals and, where they converge, it is essential that full advantage be taken of such opportunities. A practical demonstration in this regard is the reduction of climate-changing emissions from our notorious coal-fired power stations that becomes possible when additional nuclear power capacity is added to the mix of sources of supply for the energy and/or electricity needs of

our country. In this regard the White Paper also records (on page 92 thereof) that the Republic of South Africa ratified the United Nations Framework Convention on Climate Change in August 1997 in order to become a State Party to that Convention. South Africa is thus part of the effort by international community to address climate change and the impacts of greenhouse gasses, and has a number of international obligations in this regard.

24.14 In conclusion I wish to add the following: this White Paper was the product of an open and transparent process, in the course of which the energy policy of the National Executive and/or the Government was made known and which energy policy formed the basis or platform for the events that unfolded at a later stage.

Period 1998-2008

25. Shortly thereafter Parliament, after as always inviting public comment on the Bills, passed some nuclear-related legislation during 1999.

25.1 The Nuclear Energy Act 46 of 1999 was enacted:

- to provide for the establishment of the South African Nuclear Energy Corporation Limited, a public company wholly owned by the State and in general the successor-in-title of the previous Atomic Energy Corporation;

- to define the functions and powers of the South African Nuclear Energy Corporation Limited (commonly referred to by the acronym "*NECSA*" - the Nuclear Energy Corporation of South Africa) , and its financial and operational accountability, and provide for its governance and management by a board of directors and a chief executive officer;
- to provide for responsibilities for the implementation and application of the Safeguards Agreement and any additional protocols entered into by the Republic of South Africa and the IAEA in support of the Nuclear Non-Proliferation Treaty acceded to by the Republic of South Africa;
- to regulate the acquisition and possession of nuclear fuel, certain nuclear and related material and certain related equipment, as well as the importation and exportation of, and certain other acts and activities relating to, that fuel, material and equipment in order to comply with the international obligations of the Republic of South Africa;
- to prescribe measures regarding the discarding of radioactive waste and the storage of irradiated nuclear fuel; and
- to provide for incidental matters.

25.2 The National Nuclear Regulator Act 47 of 1999 was enacted:

- to provide for the establishment of a National Nuclear Regulator in order to regulate nuclear activities, for its objects and functions, for

the manner in which it is to be managed and for its staff matters;

- to provide for safety standards and regulatory practices for protection of persons, property and the environment against nuclear damage; and
- to provide for matters connected therewith.

25.2.1 The National Nuclear Regulator was established as a juristic person and is in general the successor-in-title of the previous Council for Nuclear Safety.

25.2.2 In **paragraph 24.11.4 above** I have already touched upon the special liability regime for nuclear damage in our domestic law, contained in chapter 4 of this statute.

25.2.3 In passing I wish to point out that, in terms of section 21 of the National Nuclear Regulator Act 47 of 1999, any person wishing to site, construct, operate, decontaminate or decommission a "*nuclear installation*" (which by definition includes any nuclear power plant) may apply in the prescribed format to the Chief Executive Officer for a nuclear installation licence and that a procedure, allowing for public publication, must be followed in order for such an application to be considered and granted.

25.3 The enactment of this nuclear-related legislation was consistent with the energy policy as contained in the White Paper.

26. For reasons that will become apparent when the interpretation of section 34 of the Electricity Regulation Act 4 of 2006 is dealt with in **paragraph 111-122 below**, note should also be taken of the Eskom Conversion Act 13 of 2001. In terms hereof the juristic person and public utility corporation referred to in section 2 of the Eskom Act 40 of 1987 was converted into a public company having a share capital with its entire share capital held by the State. With the benefit of hindsight I can describe this as the start of a process of preparing the energy supply sector, and more specifically the electricity supply sector, for the possible privatisation of Eskom (or at least of some of its core functions) and/or entry by Independent Power Producers from the private sector into this field. As I will show later, section 34 of the Electricity Regulation Act 4 of 2006 is not an additional procurement mechanism for the State but a control mechanism for the Minister to make her policy-decisions regarding new generation capacity binding on the private sector.

27. In the electricity supply sector there were also some legislative developments, with Parliament again inviting public comment on the relevant Bills and also consistent with the energy policy as contained in the White Paper.

27.1 The National Energy Regulator Act 40 of 2004 (referred to in this answering affidavit as "*the NERA*") was enacted to establish a single

regulator to regulate the electricity, piped-gas and petroleum pipeline industries; and to provide for matters connected therewith. This is the statute that deals in section 10 thereof with the decisions of the National Energy Regulator of South Africa (commonly referred to as "*NERSA*") and on which the Applicants especially rely for their case to have the 2013 determination reviewed and set aside. I deal with this provision more fully in **paragraph 123.2.2 below**.

27.2 The Electricity Regulation Act 4 of 2006 (referred to in this answering affidavit as "*the ERA*") was enacted:

- to establish a national regulatory framework for the electricity supply industry;
- to make NERSA the custodian and enforcer of the national electricity regulatory framework;
- to provide for licences and registration as the manner in which generation, transmission, distribution, reticulation, trading and the import and export of electricity are regulated;
- to regulate the reticulation of electricity by municipalities; and
- to provide for matters connected therewith.

27.2.1 The 2013 determination, one of the subject-matters of this review application, was made in terms of section 34(1) of the ERA.

27.2.2 Section 34 of the ERA and its proper interpretation is a cornerstone of the case for the Applicants and is dealt with in **paragraph 111-122 below**.

27.3 Again the enactment of this energy-related legislation was consistent with the energy policy as contained in the White Paper.

28. In 2005 the Radioactive Waste Management Policy and Strategy for the Republic of South Africa (2005) was also made public and published on the website of the then Department of Minerals and Energy. A copy of that policy is attached as annexure **'ZM 2'** hereto.

Period 2008-2010

29. Next was the development of the Nuclear Energy Policy for the Republic of South Africa (finalised in June 2008), which was published under Government Notice No 1347 in the Government Gazette No 31965 of 12 December 2008. A copy thereof is attached as annexure **'ZM 3'** hereto.

29.1 The Nuclear Energy Policy (June 2008) was also the result of an open and transparent process that involved consultation with stakeholders as well as public participation. Once it was finalised, it was published for all and sundry to see and there was nothing secret about it.

29.2 The stated purpose of this policy (on page 3 thereof) is to present a policy framework within which prospecting, mining, milling and use of nuclear materials as well as the development and utilisation of nuclear energy for peaceful purposes by South Africa shall take place.

29.3 The stated vision of this policy (on page 3 and 6 thereof) is one of industrial and technological leadership, to secure alternative energy resources for the future, through the development of a globally competitive infrastructure and skills for the peaceful utilisation of nuclear energy and technology in the design, manufacture and deployment of state of the art nuclear energy systems, nuclear power reactors and the nuclear fuel cycle.

29.4 The stated scope of the policy (on page 3 thereof) covers the prospecting and mining of uranium ore and any other ores containing nuclear materials as well as the nuclear fuel cycle in its entirety focussing on all applications of nuclear technology for energy generation.

29.5 Already in 2008 the proclaimed and published policy of the National Executive and/or the Government went much further than the possible procurement of a number of nuclear power plants; already then the policy decision was taken, and was made known by publication, that the Government was and is in favour of establishing a self-sufficient and comprehensive nuclear industry, based on the peaceful utilisation of

nuclear energy and technology, for the industrialisation and development of the Republic of South Africa. An extensive nuclear energy programme, for peaceful purposes and self-sufficient in all aspects of the nuclear fuel cycle, was envisaged with the confidence that South Africa already had more than 20 years experience of safe nuclear power plant operation (at Koeberg with its two Pressurised Water Reactors) and experience in the research, development and use of nuclear-related technology such as uranium conversion and enrichment (at the Atomic Energy Corporation, of which NECSA is the successor in title).

29.6 Without oversimplifying the multitude of considerations and objectives that went into the adoption of the Nuclear Energy Policy (June 2008), the main drivers in this regard were (not in any order of preference or priority):

29.6.1 the need for the industrialization and development of South Africa so that, through healthy economic growth, poverty can be eradicated, our country can be transformed and the fundamental rights in chapter 2 of the Constitution can be respected, protected, promoted and fulfilled;

29.6.2 the need for ensuring a national energy security through greater diversification and flexibility of supply; and

29.6.3 the important role of nuclear energy in mitigating climate

change by reducing greenhouse gas emissions, especially in view thereof that nuclear power is one of the least carbon-intensive generating technologies.

29.7 The Nuclear Energy Policy (June 2008) records as background (on page 6-7 thereof) that South Africa has an energy intensive economy, mainly as a consequence of the exploitation of the mineral resources of our country, with coal accounting for more than 90% of the total electricity generating capacity. In areas where there are no coal reserves (such as the Western Cape), nuclear power becomes very important. Furthermore concerns over increases in the price of coal, reserve exhaustion and global warming necessitate a departure from the over-reliance on electricity generated from coal.

29.8 The wider perspective of the Nuclear Energy Policy (June 2008) is stated as follows (on page 7 thereof):

> "*The White Paper on Energy Policy calls for the achievement of energy security through the diversification of primary energy sources. Further, South Africa's electricity generation capacity has to be increased significantly in the next few decades to facilitate the economic growth and social progress, while remaining sensitive to climate change. This presents an opportunity to promote diversity in primary energy sources, considering that the use of nuclear energy is increasingly being recognized worldwide as one of the strategies to mitigate*

greenhouse gas emissions and global warming, since it is an important low carbon emission source of electricity generation compared to fossil fuels."

29.9 The Nuclear Energy Policy (June 2008) also explains in general (on page 7-8 and 9 thereof) why nuclear energy as a viable alternative is attractive:

29.9.1 South Africa has sizeable uranium (and other potential nuclear material) reserves and a vibrant mining industry, so that the extraction of uranium does not present any major challenges.

29.9.2 Value addition in the form of beneficiation of the uranium ore and the implementation of a strong nuclear energy programme would lead to job creation and the further development of a skilled workforce.

29.9.3 A solid regulatory framework, which would facilitate a structured development of the nuclear sector, already exists in South Africa.

29.9.4 The non-proliferation credentials, policy and legislative framework of South Africa allow for the pursuit of a peaceful nuclear energy programme consistent with our national and international nuclear non-proliferation

obligations.

29.9.5 The low carbon emissions, based on the full life cycle (of a nuclear power plant), play a significant role in achieving clean air by avoiding polluting emissions as compared to fossil fuels.

29.9.6 Safer and more efficient new generation nuclear power technologies are available.

29.9.7 There are a number of energy resources available for bulk electricity generation.

In this regard the Republic of South Africa is not alone in its views pertaining to the energy industry and the possibilities opened up by the use of nuclear energy: by and large there is an international resurgence of interest in electricity generation through the use of nuclear energy.

29.10 Very importantly the Nuclear Energy Policy (June 2008) also shows (on page 8 thereof) that there is a difference in approach or a change in emphasis between the White Paper (referred to in **paragraph 24.11.2 above**) and this Policy: whereas previously additional nuclear power plants were simply an option kept open for investigation, the fundamental position of the National Executive and/or Government, on the

diversification of energy resources to ensure the security of supply, makes nuclear energy a viable energy resource for base load electricity production in the areas of South Africa that have no alternative energy resources that can be used for base load power. Base load is the minimum level of demand on an electrical supply system over 24 hours, requiring power plants which can generate dependable power to consistently meet that demand and which are the foundation of a sound electrical system. As far as public consultation on the construction of new nuclear power plants is concerned, the Nuclear Energy Policy (June 2008) also points out (on the same page) that new legislation promulgated since the White Paper in 1998, makes provision for such consultation during the environmental impact assessment process and the nuclear installation licensing process.

In other words, since 2008 the National Executive and/or the Government was on record (1) as viewing nuclear power as a viable energy resource for electricity generation, (2) as striving for the establishment of a comprehensive nuclear industry in South Africa, and (3) as contemplating future public consultation on the construction of new nuclear power plants to take place within the scope and context of the implementation of legislation dealing with the environmental impact assessment process and the nuclear installation licensing process for such new nuclear power plants.

29.11 The Nuclear Energy Policy (June 2008) then spells out (on page 15-17 thereof) the policy principles for nuclear energy use in South Africa by which the vision of the Government for nuclear energy shall be guided (bold print in the original text):

> "*P1. Nuclear Energy shall be used as part of South Africa's* ***diversification*** *of primary energy sources and to ensure security of energy supply.*
>
> *P2. Nuclear Energy shall contribute to* ***economic growth*** *and* ***technology development*** *in South Africa through investment in infrastructure, creation of jobs and the further development of skilled workers.*
>
> *P3. Nuclear Energy shall form part of South Africa's strategy to* ***mitigate climate change****.*
>
> *P4. All activities undertaken in pursuit of nuclear energy shall be in a manner that takes the* ***environmental impact into account****.*
>
> *P5. All Nuclear energy sector activities shall take place within a* ***legal regulatory framework consistent with international best practice.***
>
> *P6. Nuclear energy shall be used only for* ***peaceful purposes*** *and in conformity with national and international legal obligations and commitments.*
>
> *P7. In pursuing a national nuclear energy programme there shall be* ***full commitment to ensure that nuclear and radiation safety*** *received the highest priority to provide for the protection of persons, property and the environment.*
>
> *P8. South Africa shall endeavour to* ***use uranium resources in a sustainable manner*** *through the*

recognition of the three interdependent and mutually reinforcing pillars of sustainable development namely economic development, social development and environmental protection. To the extent possible technologies chosen for Nuclear Power plant shall be those that allow for optimum utilisation of uranium resources including the use of recycled uranium.

P9. Government shall encourage the ***development of appropriate institutional arrangements*** *and thereby ensure the development of human resources competent to discharge the responsibility of managing a nuclear infrastructure.*

P10. South Africa shall strive to acquire technology know-how and skills to enable design, development, construction and marketing of its own nuclear reactor and fuel cycle systems. To this end an ***industrial support base*** *for the nuclear sector shall be developed as appropriate, taking into account the scale of the national programmes.* ***Technology transfer*** *shall be optimised in any procurement of nuclear and related equipment.*

P11. All facets of the nuclear energy sector shall always be subjected to ***appropriate safeguards and security measures*** *in conformity with South Africa's international obligations.*

P12. Government shall ***support research, development and innovation*** *in the use of nuclear technology. Government shall also support participation in global nuclear energy technology innovation programmes.*

P13. Government shall put in place effective ***mechanisms to protect and safeguard the South***

African nuclear energy industry Intellectual Property rights and innovative technology designs.

P14. Government shall create programmes to stimulate public awareness and inform the public about the nuclear energy programme.

P15. Government will ensure that adequate funding will be made available to support the technology development initiatives that are essential to the implementation of this policy. Although the Nuclear Energy Policy aims for the development of a globally competitive infrastructure price support mechanisms can be implemented to enable the ongoing operations of key technologies.

P16. Government shall endeavour to implement a fleet approach to power reactor procurement which is needed to optimise the industrialization process and ensure economy of scale."

29.12 The Nuclear Energy Policy (June 2008) also lists (on page 18 thereof) the responsibilities of the National Executive and/or Government with regard to nuclear energy, which responsibilities include (1) overall policy-making regarding nuclear energy; (2) arranging international and regional cooperation; and (3) facilitating foreign government engagements and investment.

29.13 Every policy decision or step that was taken since June 2008 (including the 2013 determination, the negotiation and signing of bi-lateral international agreements with countries having Pressurised Water

Reactor technology to offer, and the tabling in Parliament of the relevant bi-lateral international agreements) in the proper discharge of these responsibilities by the National Executive and/or Government, was taken within the parameters of these policy principle guidelines and on the basis of the reasoning contained in the White Paper (1998) as well as the Nuclear Energy Policy (June 2008), both of which were subject to a process of public participation, were made public and were known to all concerned.

29.14 The Nuclear Energy Policy (June 2008) confirms the awareness of the National Executive and/or Government (on page 20-21 thereof) of its international legal obligations and commitments with regard to nuclear activities and the use of nuclear energy. Already in 2008 the stated intention is that, with due regard to these international legal obligations and commitments as well as national legislation, South Africa shall pursue bi-lateral cooperation with other states (1) that have the relevant nuclear programmes from which South Africa can learn from or may benefit from, (2) that have nuclear programmes from which South Africa requires technology, material or equipment transfer, and (3) that present export opportunities for South African nuclear services and manufactured goods (also on the regional basis of Africa cooperation).

29.15 The Nuclear Energy Policy (June 2008) recognizes that the multi-faceted nature of nuclear fuel cycle activities necessitates the formation of a co-

ordination committee at the level of the National Executive or Cabinet, which will ensure coordination of actions and alignment of all actions with national policies and legislation. As a result, the National Nuclear Energy Executive Coordination Committee was established during November 2011. Being a committee of Cabinet and operating on a high level of government, the mandate of that committee did not call for it to have its debates, studies, investigations and considerations conducted in public nor did it require a process of public participation or consultation for any of its decision-making: it reported to and advised Cabinet.

29.16 The Nuclear Energy Policy (June 2008) records (on page 28 thereof) the stated intention of South Africa to pursue both a Pressurised Water Reactor programme and a nationally developed Pebble Bed Modular Reactor programme (subject to the success of the first demonstration unit, under the auspices of Eskom):

> "*Government's intention is to use the opportunity created by these programmes to establish a modern nuclear technology industry including manufacturing and construction capabilities as well as services. In particular, where viable, the conventional nuclear built programme must be associated with technology transfer, an investment programme and the building of institutional capacity to establish a national industry capability for the design, manufacture and construction of nuclear energy systems*."

In this regard I respectfully point out that one cannot achieve this

objective without international cooperation and without creating, by way of appropriate bi-lateral international agreements to the satisfaction of the IAEA, a legal platform for the transfer of modern nuclear energy technology and nuclear-related intellectual property from one country to another.

29.17 The Nuclear Energy Policy (June 2008) goes further (on page 29 thereof) by setting out, openly and transparently, the potential timeline for the systematic implementation of the three phases required for proceeding towards meeting the national objectives on nuclear energy. We are still in phase 1 of that guideline and, as far as this review application is concerned, still engaged in conducting preparatory work for extension of the nuclear infrastructure across the nuclear fuel cycle, including funding and preparations for the construction of nuclear power plants.

30. During or about the same time, further relevant legislation was introduced:

30.1 The National Energy Act 34 of 2008 was enacted:

- to ensure that diverse energy resources are available, in sustainable quantities and at affordable prices, to the South African economy in support of economic growth and poverty alleviation, taking into account environmental management requirements and interactions amongst economic sectors;
- to provide for energy planning, increased generation and

consumption of renewable energies, contingency energy supply, holding of strategic energy feedstocks and carriers, adequate investment in, appropriate upkeep and access to energy infrastructure;

- to provide measures for the furnishing of certain data and information regarding energy demand, supply and generation;
- to establish an institution to be responsible for promotion of efficient generation and consumption of energy and energy research; and
- to provide for all matters connected therewith.

30.2 The National Radioactive Waste Disposal Institute Act 53 of 2008 was enacted:

- to provide for the establishment of a National Radioactive Waste Disposal Institute in order to manage radioactive waste disposal on a national basis;
- to provide for its functions and for the manner in which it is to be managed;
- to regulate its staff matters; and
- to provide for matters connected therewith.

30.3 The parliamentary process for passing these Bills into Statutes again allowed for a process of public participation and comments.

31. In a media release of 26 May 2010 the Department announced that a nuclear cooperation agreement was signed between the Republic of South Africa and the People's Democratic Republic of Algeria, making provision for cooperation in the peaceful use of nuclear energy and also for facilitating exchanges in the production of medical radioisotopes. A copy of the media release is attached as annexure **'ZM 4'** hereto.

32. The Department also alerted the media to the hosting of the International Youth Nuclear Congress by the South African Young Nuclear Professional Society, together with the Department, which Congress was held at the Cape Town International Convention Centre on 12-18 July 2010. A copy of the media alert is attached as annexure **'ZM 5'** hereto. As set out in the media alert, one of the key objectives of the Congress was to develop a new approach to communicate the benefits of nuclear power as part of the balanced energy mix. The Congress also highlighted youth and nuclear skills development, skills transfer and knowledge sharing at the research and technical levels, resulting in positive spin-offs for the much needed social and economic development programmes. The basic theme was to promote the peaceful use of nuclear science and technology for the welfare of mankind. All sessions were open for the media, and the previous Minister as well as various officials from the Department addressed these open meetings.

Period 2010-2012

33. The "*Integrated Resource Plan for Electricity 2010-2030*" (referred to in this answering affidavit as the "*Integrated Resource Plan (2010-2030)*") was published by way of Government Notice R.400 in Government Gazette No 34263 of 6 May 2011. A copy thereof is attached as annexure **'ZM 6'** hereto.

33.1 An "*integrated resource plan*" is defined in section 1 of the ERA to mean a resource plan established by the national sphere of government to give effect to national policy. That national policy is then given effect (1) under section 4(a)(iv) thereof, by obliging NERSA to issue rules designed to implement *inter alia* the integrated resource plan, and (2) under section 10(2)(g) thereof, by requiring an applicant for any licence in terms of this statute (such as an application for a generation licence in respect of new nuclear power plants) to include in his or her application evidence of compliance with any integrated resource plan applicable at that point in time or provide reasons for any deviation for the approval of the Minister. The Integrated Resource Plan (2010-2030) thus has a legal status which cannot be ignored.

33.2 The approval and publication of the Integrated Resource Plan (2010-2030) was preceded by a first round of public participation in June 2010. This first round resulted in what was called a Revised Balanced Scenario: it is called a balanced scenario because it does not only consider a cost-

optimal solution but also qualitative measures such as local job creation; in other words, from the outset the issue was not only about pricing or the financial impact on the ultimate cost of electricity for the consumer, but was focussed on a larger picture that took into account the direct and indirect benefits as well as the socio-economic and environmental impact of the poly-centric policy choices to be made with regard to the supply of electricity or energy to the general public.

33.3 The Revised Balanced Scenario was published in October 2010 for a second round of public participation, conducted during November and December 2010 and including 3 workshops that were held. Pursuant to the public participation, some 479 submissions containing 5090 specific comments were received from organisations, companies and individuals. Of relevance for the moment is that this second round of public participation led to several changes in underlying assumptions that were used for the Integrated Resource Plan Model: one of those changes was the adjustment of the assumed investment costs for new nuclear units by an increase of 40% based on recent construction experience (after a comment that the risks and costs associated with nuclear power was under-estimated in the model). The end result was what was called the Policy-Adjusted Integrated Resource Plan and, after approval by Cabinet, it became the Integrated Resource Plan (2010-2030).

33.4 Some of the reasons why the Policy-Adjusted Integrated Resource Plan

also included a nuclear fleet with the capacity of 9.6 GW (that is, one gigawatt which is a billion watt, with watt being a unit of power that can be defined as joule per second and expressing the rate of energy conversion or transfer with respect to time) were, in no particular order: (1) to account for the uncertainties associated with the costs of renewable sources of energy and of fuel, (2) to ensure the security of supply through a diversification of energy sources, (3) to take a major step towards building local industry clusters, and (4) to assist in fulfilling the commitments of South Africa to mitigate climate change as expressed at the Copenhagen climate change summit (a conference of State Parties to the United Nations Framework Convention on Climate Change as well as to the Kyoto Protocol thereof).

33.5 During public participation some opposition to nuclear generation was raised and additional research was conducted. The scenarios investigated, indicated that the future capacity requirement for the generation of electricity could, in theory, be met without nuclear generation but this would increase the risk of security of supply. Three policy-choice options were identified in the Integrated Resource Plan (2010-2030) (on page 11 of annexure **'ZM 6'**) namely:

- to commit to the nuclear fleet as indicated above;
- to delay the decision on the nuclear fleet indefinitely and allow alternatives to be considered in the interim; or
- to commit to the construction of one or two nuclear units in

2022-2024 but delay a decision on the full nuclear fleet until higher certainty is reached on future cost evolution and risk exposure, both for nuclear sources of supply and for renewable sources of supply.

The Department accepted (and recommended) the first option, namely committing to a full nuclear fleet of 9.6 GW, mainly because this should provide acceptable assurance of security of supply in the event of a peak oil-type increase in fuel prices and should ensure that sufficient dispatchable base-load capacity is constructed to meet demand in peak hours each year.

33.6 The Integrated Resource Plan (2010-2030) explains (on page 13 in paragraph 5.4 thereof) that the policy adjustment thereto indicate a balance between different government objectives, specifically: economic growth, job creation, security of supply and sustainable development. One of the mainstays of this plan is the belief that the security of supply of energy and/or electricity should not be compromised.

33.7 The Integrated Resource Plan (2010-2030) notes under the heading of points for decision (on page 16 in paragraph 6.3.2 thereof) that, because of the long lead times for new nuclear power plants, a firm commitment to the first 3.0 GW of nuclear power was required immediately (in 2011) but that government policy was to pursue the full nuclear fleet of 9.6 GW.

33.8 The Integrated Resource Plan (2010-2030) does a full risk analysis (on page 17-19 in paragraph 6.6-6.9.9 thereof) which I do not wish to repeat herein. What I do want to point out, however, is that the decision to go for a diversification of energy resources (so as to include a nuclear option) was not arbitrarily taken but was the result of a serious and rational consideration. There is one aspect of the risk analysis that I must highlight. The Applicants claim that the 2013 determination (which pertains to a capacity of 9.6 GW of new nuclear capacity) was irrational because the then Minister did not take into consideration that the actual demand manifested after 2011 was lower than the forecast demand assumed in this document. Paragraphs 6.9.1 (on page 18 thereof) records that the forecast demand used in the document was at the higher end of the anticipated spectrum and identifies the risk that the actual demand might turn out to be lower than forecast. In such a case, however, the effect would be limited to a temporary over-investment in capacity but security of supply will not be jeopardised because of the conservative assumptions regarding energy efficiency and thus demand-reducing measures. There was nothing irrational about the 2013 determination and this contingency was anticipated: in this regard an approach of least regret was followed, in terms whereof the impact of over-estimation is less than that of under-estimation.

33.9 The Integrated Resource Plan (2010-2030) was submitted to Cabinet and approved in March 2011, just after the Fukushima incident. Its publication

in the Government Gazette then followed a few months later.

34. The media was invited to attend the Second Regional Conference on Energy and Nuclear Power in Africa, held in Cape Town on 30-31 May 2011. A copy of the media invite is attached as annexure **'ZM 7'** hereto.

34.1 On this occasion the various African Member States (including South Africa) made presentations on their national positions and programmes.

34.2 The opening remarks were made by the then Minister, of which a copy is attached as annexure **'ZM 8'** hereto.

34.3 In her remarks (on page 3 thereof) she pointed out that globally security of energy supply is becoming one of the key focus areas, mainly because of decreasing natural resources, global warming, climate change, pollution and that rapid global growth. She described the situation as a "*race to have a secure energy future*" and questioned why our resources were being exported to develop and grow other economies, countries and continents while we risk not having these resources or the more advanced technologies when we need them for the generations to come. She also portrayed a stark reality: due to lack of access to electricity for most of our population, and the lack of access to more advanced electricity generation technologies, we are faced with energy supply solutions that further lead to the demise of our people's health and the

environment, both of which cannot continue indefinitely.

34.4 She repeated (on page 4-5 thereof) the main explanations for having nuclear energy making a significant 23% contribution to the anticipated generation mix: reducing greenhouse emissions and ensuring security of energy supply.

34.5 Note was also taken (on page 10 thereof) of the assistance by the IAEA to Member States to set up the required documents and institutions for a nuclear power programme by way of workshops, technical meetings, conferences and guidance documents. The fact that South Africa had already started on an Integrated Nuclear Infrastructure Review process (with the help of the IAEA) was also mentioned.

34.6 On the same occasion the Department also made a presentation on the "*Prospects for Nuclear Power*" as part of South Africa's Electricity Plans, of which a copy is attached as annexure **'ZM 9'** hereto.

34.7 Some information on our more than 20 year track record with French technology in Pressurised Water Reactors at Koeberg was shared, as well as our research reactor known as SAFARI (the South African Fundamental Atomic Research Installation situated at Pelindaba) and which is currently the world leader in medical isotope production.

34.8 A synopsis of the Integrated Resource Plan (2010-2030) was also presented in the open meeting to which the media was invited. At the time the plan was that bidding would have been completed by January 2013, but that target was not achieved and we are currently in the process of preparing Requests for Proposals.

35. On 20 June 2011 the Department released a media statement concerning the participation of the Minister in the Ministerial Conference of the IAEA on Nuclear Safety held 20-24 June 2011 in Vienna, Austria. The Minister again pointed out that there was a need for energy to ensure the development of the African continent and that nuclear power was regarded as the most feasible for supplying base-load electricity; the recent approval by Cabinet of the Integrated Resource Plan (2010-2030) (annexure **'ZM 6'**) and the intention to have 23% or 9.6 GW of electricity to come from nuclear power was again openly mentioned. A copy of the media statement is attached as annexure **'ZM 10'** hereto.

36. Already then the public media started speculation and claimed that an alleged tender process was already under way for the construction of six (6) nuclear reactors by 2030 at a cost of some R 1 trillion.

36.1 This allegation was false and a complete misrepresentation of the steps, decisions and policy-development that had taken place up to that point in time. The Department issued a media statement on 7 October 2011 in response to this newspaper article.

36.2 The media statement clarified that the Minister, on 15 September 2011, informed the media of a proposal to Cabinet that she has signed off for the roll-out of the new nuclear power plants. This proposal addressed the issue of the future decisions that are required in this regard for the actual procurement thereof and it addressed the governance framework within which these future procurement decisions were to be taken. Precisely because the National Executive and/or Government recognised the complexity and magnitude of the new nuclear built programme (which is concerned with much more that acquiring a few nuclear power plants, which is part of the larger endeavour to establish a complete and self-sufficient nuclear fuel cycle industry), it was in the process of putting in place an appropriate government structure to instil confidence in and protect the credibility of the process. No actual tender process was under way and allegations to that effect were factually incorrect.

36.3 In other words, only the governance and policy framework within which the future procurement decisions had to be taken, was proposed to Cabinet and no actual or final procurement decision in this regard was in fact taken.

36.4 This media statement also clarified that the National Executive and/or Government has committed itself to 9.6 GW of new nuclear energy and not to specifically build six new nuclear reactors (of 1.6 GW each). The ultimate number of nuclear power plants to provide a total of 9.6 GW

depends on the specific design and technology selected. At that stage (in October 2011) the National Executive and/or the Government had not selected any design, vendor or suppliers of nuclear power plants. The vendors of nuclear power plants worldwide are few and their technologies are known: for example, one vendor may be able to deliver a 1 GW plant whilst another may be able to provide a 1.2 GW plant and a third one may be able to provide a plant with a different capacity. Only at the appropriate time in future, during the actual procurement decision when a particular vendor and technology is decided upon, will it be possible to determine and decide upon the actual number of nuclear power plants to be constructed. Moreover this matter was explained during the engagements with the public and the media on the Integrated Resource Plan (2010-2030) (annexure **'ZM 6'**), where it was pointed out that the 1.6 GW used in the planning of the different scenarios was indicative only and did not suggest any preference for a particular design or vendor. In this regard I draw the attention of the Honourable Court to page 10 of annexure **'ZM 9'** (the presentation by the Department on the "*Prospects for Nuclear Power*").

36.5 A copy of the media statement is attached as annexure **'ZM 11'** hereto.

36.6 The actual or final costs for the nuclear programme or the procurement of new nuclear power plants will only become ascertainable with a measure of certainty or reliability once there is a formal response from

vendor countries and their consortiums submitted in reaction to either a Request for Proposals or perhaps a later invitation to tender.

37. The media was also invited to a nuclear energy seminar that was held in Durban on 30 November 2011 as a side event to the Copenhagen Conference of the Parties under the United Nations Framework Convention on Climate Change. The purpose of the seminar was to review the climate mitigation benefits of nuclear energy and to compare the benefits of nuclear energy with the risks thereof, to explore the role for nuclear energy in electricity production after the incident at Fukushima, to present the South African perspective on nuclear energy and to describe the IAEA capacity building in developing countries for energy system analysis and climate change mitigation. A copy of the media invite is attached as annexure **'ZM 12'** hereto.

38. During 2011 the National Executive decided that a so-called "*phased approach*" would be followed as far as the nuclear programme was concerned: the scope, complexity and magnitude of such a programme make that it must be developed in phases so that, for each phase and upon successful completion of the previous phase, the further decisions required for the next phase can be taken upon the basis of lessons learned and experience gained from the previous phase as well as on the basis of the relevant information gathered for such further decisions. I may add that this phased decision-making approach was developed along the guidelines of the IAEA, taking into account the 19 infrastructure milestones associated with an Integrated Nuclear Infrastructure

Review. Over the 100 year lifespan of a nuclear programme, several complex decisions will need to be made: ongoing government or institutional memory and intelligent customer capabilities are essential to ensure optimum decisions are made in the best interest of the Republic of South Africa. The phased decision-making approach is a way of ensuring that such decisions are taken on an informed basis, timeously and in a co-ordinated manner. It is also a mechanism to define a high level decision-making framework in order to maximize the benefits of the nuclear power programme and to mitigate the risk of cost and schedule overruns typically associated with the large complex infrastructure programmes. In this phased approach there is only a policy commitment to a nuclear programme and to a capacity of 9.6 GW from nuclear power plants but no final commitment to the actual procurement thereof, which commitment is ultimately to be made during the procurement phase itself. In the result and if it turns out during any phase, and even in the procurement phase itself before a decision to procure these nuclear power plants is taken, that the actual procurement of nuclear power plants is not viable for whatever reason, the National Executive and/or the Government is still able and entitled to decide that the country is not proceeding with that option.

39. During 2012 the "*National Development Plan 2030*" (referred to in this answering affidavit as "*the National Development Plan (2012)*") was approved by Cabinet and published. Because it is a voluminous document and is also a document in the public domain, I do not attach it but an executive summary as well as the complete text thereof are available on the internet.

39.1 The National Development Plan (2012) arose out of the appointment by the President, during May 2010, of the National Planning Commission. The National Planning Commission was an advisory body consisting of 26 people, drawn largely from outside government, chosen for their expertise in key areas and consulted widely on the draft plan. The public forums of the National Planning Commission drew in thousands of people; it met with members of Parliament, with members of the Judiciary, with National Departments of State, with Provincial Governments, with development finance institutions, with state-owned entities and with local government formations; it also held talks with unions, business, religious leaders and non-profit organisations.

39.2 According to the Executive Summary (in the first introductory paragraph of the overview on page 14 thereof) the National Development Plan (2012) "*aims to eliminate poverty and reduce inequality by 2030. South Africa can realise these goals by drawing on the energies of its people, growing an inclusive economy, building capabilities, enhancing the capacity of the state, and promoting leadership and partnerships throughout society*."

39.3 The point of departure of the National Development Plan (2012) (on page 1 thereof) is a truism already expressed in 1994 in the Reconstruction and Development Programme:

> "*No political democracy can survive and flourish if the mass of our people remain in poverty, without land, without tangible prospects for a better life. Attacking poverty and deprivation must therefore be the first priority of a democratic government.*"

The National Development Plan (2012) (on page 1 thereof) confirmed that the Reconstruction and Development Programme (1994) formed the basis of government's attempt to attack poverty and deprivation, and to build a united, non-racial and non-sexist South Africa. Informed by the principles of inclusivity, government translated that programme into policies, programmes and budgets. What is envisaged is a cycle of national growth and development.

39.4 In chapter 4 of the National Development Plan (2012) the topic of our economic infrastructure is dealt with (on page 137-178 thereof). I only highlight some aspects thereof.

39.4.1 The introductory paragraph (on page 137 thereof) states that, to achieve sustainable and inclusive growth by 2030, South Africa needs to invest in a strong network of economic infrastructure designed to support the country's medium- and long-term objectives. Achieving this vision is possible if there is <u>targeted development</u> of transport, of energy, of water resources, and of information and communication technology networks.

39.4.2 In summary the energy sector vision for South Africa as contemplated in the National Development Plan (2012) is that by 2030 South Africa will have an energy sector that promotes:

- economic growth and development through adequate investment in energy infrastructure and the provision of the quality energy services that is competitively priced, and reliable and efficient, with the local production of energy technology supporting job creation;
- social equity through expanded access to energy services, with affordable tariffs and well-targeted and sustainable subsidies for the needy households; and
- environmental sustainability through efforts to reduce pollution and mitigate the effects of climate change.

39.4.3 The National Development Plan (2012) (on page 147 thereof) called for a re-assessment of the desirability of nuclear power investments in these words (own underlining added for the sake of emphasis):

> "*According to the Integrated Resource Plan, more nuclear energy plants will need to be commissioned from 2023/24. <u>Although</u>*

nuclear does provide a viable base-load alternative, South Africa needs a thorough investigation on the implications of nuclear energy, including its costs, safety, environmental benefits, localisation and employment opportunities, uranium enrichment, fuel fabrication, and the dangers of weapons proliferation.

South Africa will face major challenges in financing the capital costs of a nuclear fleet. Nuclear plants involve massive, lumpy investments (given that a single unit can now be as large as 1 600 MW). It will also be extremely challenging to build the institutional and skills base for running new-generation nuclear plants. All possible alternatives need to be explored, including the use of shale gas, which could provide reliable base-load and mid-merit power generation through combined cycle gas turbines. Developing nuclear power plants requires long lead times. A maximum of one year remains to agree on a decision-making process for new nuclear investments."

39.4.4 In accordance with an approach of phasing the necessary activities for the move to a different energy context by 2030 according to short-, medium- and long-term priorities, the National Development Plan (2012) (on page 151-152

thereof) identifies the activity to investigate the implications of greater nuclear energy use, including the potential costs, safety, environmental benefits, localisation and employment opportunities, uranium enrichment aspects, fuel fabrication, and the dangers of weapons proliferation as part of the short term priorities (to be conducted over the next five years). It also called for a decision-making process to support the assessment of possible investments in nuclear energy (or alternative base-load options) to be defined (in the course of that investigation).

39.5 In chapter 5 of the National Development Plan (2012) the topic of our transition to a low carbon economy is dealt with (on page 179-192 thereof). I only highlight one aspect thereof. The National Development Plan (2012) warned (on page 185-186 thereof) that money invested in the current economic structure runs the risk of being a sunken cost if spending is not aligned with the country's future goals. There is the additional risk that South Africa is locked into an economic pathway that could undermine its competitiveness and flexibility in taking up future opportunities. Policy instruments and mechanisms will need to factor in the long-term costs. Areas of existing and possible future lock-ins and trade-offs that require investigation include electricity, transport, liquid fuel supply, the coal sector, and expanding energy-intensive industry. In this context future energy sources (the extent of the use of coal, nuclear,

hydro, gas, bio-fuels and renewables) were mentioned as a specific example.

39.6 For the purposes of this matter there were in the main two relevant aspects of the National Development Plan (2012): the National Executive and/or Government (1) was again made aware how complex the ideal or vision for establishing a nuclear industry was and (2) was made aware of what investigation and activities were still outstanding before a decision on the possible investment in and procurement of nuclear energy could be taken.

40. The aforesaid Executive Summary can be accessed at the following internet address:

http://www.gov.za/sites/www.gov.za/files/Executive%20Summary-NDP%202030%20-%20Our%20future%20-%20make%20it%20work.pdf

The full text of the National Development Plan (2012) is available at the following internet address:

http://allafrica.com/download/resource/main/main/idatcs/00041101:c9bd950570730f3cabe7f67cdaf618a2.pdf

41. I have pointed out in **paragraph 39.4.3 above** that the National Development Plan (2012) accepted nuclear energy as a "*viable base-load alternative*" for South Africa but called for a thorough investigation on the implications of nuclear energy, including its costs, safety, environmental benefits, localisation and

employment opportunities, uranium enrichment, fuel fabrication, and the dangers of weapons proliferation.

Period 2012-2016

42. I interrupt the chronology to deal briefly with one development that took place in the period between 2012 to 2015.

42.1 In this period the Department led the Nuclear Energy Working Group, an interdepartmental task team reporting to the National Nuclear Energy Executive Coordination Committee, and its substructures to develop strategic recommendations and conduct some *in situ* studies to address the investigatory requirements of the National Development Plan (2012) as well as the gaps that were previously identified in an Integrated Nuclear Infrastructure Review Mission Report (done under the auspices of the IAEA) and in the Emergency Preparedness Review Missionary Report (also done under the auspices of the IAEA). These recommendations and studies were either done internally by the Nuclear Energy Working Group or were commissioned to external consultants by way of a proper procurement process.

42.2 These strategic recommendations and the *in situ* studies dealt and covered the implications of nuclear energy in respect of its costs, safety, environmental benefits, localisation and employment opportunities,

uranium enrichment, fuel fabrication, the dangers of weapons proliferation and other related topics. In essence the Department and the National Nuclear Energy Executive Coordination Committee proceeded to gather information and to thoroughly investigate all those aspects identified by the National Development Plan (2012), so that if and when the time for the procurement of nuclear power plants arrived, the Republic of South Africa will be in the position of an informed customer and will be in a position to take full advantage of the nuclear fuel cycle.

42.3 Nuclear power carries tremendous benefits for the Republic of South Africa in terms of low cost base-load electricity, a broader energy mix, the beneficiation of uranium and the mitigation of CO_2-emissions; however, in order to achieve this, South Africa must deal with the high level of risk, planning and complexity of a nuclear power programme.

42.4 There was no public participation or consultation in respect of the development of these strategic recommendations and the conducting of these *in situ* studies, nor was there a general dissemination of any of the information so gathered. The reason for that should be obvious: these recommendations and studies were and are of a confidential and strategic nature, intended to assist the National Executive and the Government in future decision-making. The information so gathered, at great effort and cost and expense for the State, is of a sensitive nature and has enormous commercial value. Making this information available

in the public domain to all and sundry, means that it will also be available and known to those potential vendors or vendor countries that may ultimately be the participants in a future procurement process and this will leave the Republic of South Africa at a serious disadvantage. Whatever leverage, bargaining power or manoeuvring space we have as a result of the information so gathered, will be lost. For this reason I also do not wish to discuss the detail and information contained in those various studies and strategic recommendation reports, nor do I wish to refer to them by name or date. In any event there was no requirement in law or otherwise that a process of public participation or consultation, or a general dissemination of any of the valuable information so gathered, had to take place.

42.5 Because the National Executive and/or the Government is already on record with its declared preference for Pressurised Water Reactor technology, I can reveal that during this process it was again confirmed that this technology is by far the best choice for the nuclear programme. Pressurised Water Reactors are the largest proportion (more than 62%) of operating nuclear reactors in the world and more than 80% of the nuclear reactors planned or currently under construction are Pressurised Water Reactors. This technology therefore represents the largest export market for the supply of fuel and nuclear equipment whilst providing a leading platform for technology improvement (based on the largest and longest operating history), with the lowest of the risk of technology

redundancy. Pressurised Water Reactor technology also has the largest number of competing suppliers, which favours market competition factors in order to reduce the cost of the nuclear power plants. Last but not the least is our more than 30 year track record with Pressurised Water Reactor technology at the Koeberg Nuclear Power Plant in the Western Cape. I may also add that many Pressurised Water Reactors are also used for marine propulsion in, for example, ice breakers and even some large passenger and cargo ships (as provided for in section 21(2) of the National Nuclear Regulator Act 47 of 1999).

42.6 After the tabling of the various international agreements in Parliament on or about 10 June 2015, we have now reached the phase where a basic model for the establishment of a nuclear programme and the future procurement of nuclear power plants is under consideration. This model is still under discussion, not only within the Department, and no model has yet been approved. That model will be developed and finalised within the framework and context of the Constitution (as the supreme law of the land), the international obligations of the Republic of South Africa under international law, the national legislation applicable to all public revenue and expenditure, the existing procurement systems and also the national legislation specifically applicable to the nuclear industry or sector.

43. I now return to take up the general chronology with the release of a media statement on 29 March 2012. The purpose of this media statement was to

clarify the role of certain state-owned entities in the Nuclear Build Programme. The media statement specifically dealt with the role of NECSA and the National Nuclear Regulator in the nuclear expansion programme. Therein the media was informed that to date the Department has ensured that the two state entities have been involved in the development of the nuclear expansion programme in line with their respective mandates. The development of a Nuclear Fuel Cycle Strategy and several pre-feasibility studies by NECSA, as required by the Nuclear Energy Policy of 2008 (annexure **'ZM 3'**), were mentioned. The involvement of both entities in a government-led self-assessment on the Integrated Nuclear Infrastructure Review (conducted on the milestones approach of the IAEA) since November 2010 was recorded, which involved a comprehensive evidence-based assessment of the readiness of the South African infrastructure for nuclear power expansion. The outcome of this review included an action plan and an independent assessment by a team of experts from the IAEA was planned for November 2012. The media statement also pointed out the importance for the National Nuclear Regulator to remain independent (which is in fact obligatory for the Republic of South Africa under international law); it also emphasized that its involvement was constrained to aspects of nuclear safety and licensing but did not cross the line into involvement in aspects of the expansion of the nuclear programme. A copy of the media statement is attached as annexure **'ZM 13'** hereto.

44. On 17 May 2012 a further media statement was released during the briefing of the media on the budget vote speech for the Department. A few relevant

aspects were touched upon. The need to maintain certainty with regards to energy security where the current energy resources are finite, was mentioned. One of the milestones announced by the Department was the approval of Cabinet for the establishment of the National Nuclear Energy Executive Coordination Committee (in November 2011), to oversee the roll-out of the 9.6 GW nuclear build programme by 2030. One of the significant plans announced for implementation in that financial year was the disbursement of R 544 million for NECSA to continue with its central role as the anchor for nuclear energy, research, development and innovation. Whilst cognisance was taken of concerns raised by international developments, including the Fukushima incident, the Department announced at this briefing that the Nuclear Build Programme as provided for in the Integrated Resource Plan (2010-2030) (annexure **'ZM 6'**) was another important programme due to commence in that financial year. I point out that "*commence*" does not mean immediately proceeding to the procurement phase or starting with the construction of the foundations of a new nuclear power plant. Mention was also made of the review of the existing regimes for the design and safety of nuclear reactors in South Africa that were being assessed in order to ensure the integrity of the programme. A copy of the media statement is attached as annexure **'ZM 14'** hereto.

45. The media statement of 17 October 2012 was concerned with the Integrated Nuclear Infrastructure Review by the IAEA.

45.1 The self-assessment completed by the South African nuclear stakeholders and key government departments, on the basis of the milestone approach by the IAEA, was mentioned.

45.2 This media statement further announced that the IAEA would conduct its own Integrated Nuclear Infrastructure Review in South Africa during February 2013. In preparation for that mission, workshops with the relevant stakeholders were planned. Those workshops would focus on comments on the voluntary self-assessment report by South Africa and on defining the scope, the work plan and the logistical arrangements for the mission.

45.3 The IAEA was to perform an independent and objective Integrated Nuclear Infrastructure Review but it was not the intention to do an external audit of the national infrastructure; rather, the aim was to describe the sequential development through the three phases for each of the 19 milestones.

45.4 The IAEA guidelines provide a phased "*milestone*" approach to the establishment of nuclear power capacity in a country, applying it to 19 issues. In broad outline the three phases for each milestone are:

- the pre-project phase 1 (1-3 years), leading to knowledgeable commitment to a nuclear power programme, resulting in the set-up of a Nuclear Power Programme Implementing Organisation to deal

with the programme and not the particular projects;

- the project decision-making phase 2 (3-7 years), involving preparatory work after the decision is made and up to the invitation of bids, with a regulatory body being established and the role of government progressively giving way to that of the regulatory body and the owner-operator; and
- the construction phase 3 (7-10 years) with the regulatory body operational, from construction up to commissioning and operation.

45.5 The 19 milestones in question are: (1) the national position, (2) nuclear safety, (3) management, (4) legislative framework, (5) funding and financing, (6) safeguards, (7) the regulatory framework, (8) radiation protection, (9) the electrical grid, (10) human resource development, (11) stakeholder involvement, (12) siting and support facilities, (13) environmental protection, (14) emergency planning, (15) security and physical protection, (16) the front end of the nuclear fuel cycle (such as uranium enrichment), (17) radioactive waste, (18) industrial involvement and (19) procurement. A copy of the media statement is attached as annexure **'ZM 15'** hereto.

46. The Government of the Republic of South Africa and the Federal Government of the Federal Republic of Germany issued a joint declaration of intent on the establishment of an energy partnership, announced by way of a media release on 21 February 2013. The two governments signed a memorandum of

understanding in this regard. Both recognized the importance of creating appropriate market environments for the increasing role of private sector involvement, along with an enabling framework for strong public-private partnerships, for successful commercial applications and for the long term viability of renewable energy and energy efficiency technologies. They underlined their shared objective to guarantee the security and sustainable supply and utilisation of energy, also in the light of international climate-protection efforts. They further underlined the importance of and aim to strengthen international cooperation on energy research and development. One of the areas to be focussed on was specifically the opportunities for cooperation in the field of nuclear safety and security. A copy of the media statement is attached as annexure **'ZM 16'** hereto.

47. On 14 May 2013 the Department again released a media statement during the briefing of the media on the budget vote speech for the Department. I mention only a few relevant aspects thereof.

47.1 The stated mandate given to the Department was to take responsibility for all national energy issues, including ensuring an energy security while promoting alternative energy sources for the country.

47.2 The status of the Integrated Resource Plan (2010-2030) (annexure **'ZM 6'**) as the blueprint for the future energy mix and energy requirements for the country was confirmed, as well as the fact that this

plan informed all the energy decisions and developments of our country.

47.3 In line with the Integrated Resource Plan (2010-2030) (annexure **'ZM 6'**), nuclear power was described as an integral part of the national energy mix and the plan to have the new nuclear build programme add 9.6 GW to the national grid from 2023 was mentioned. Also announced was the fact that, in November 2012, certain decisions by the National Nuclear Energy Executive Coordination Committee were endorsed by the Cabinet. These included the designation of Eskom as the owner and operator of nuclear power plants in South Africa, as per the Nuclear Energy Policy of 2008 (annexure **'ZM 3'**). The benefits of nuclear power were again canvassed: low and clean base-load levelised costs; broader energy mix; alignment with our beneficiation strategy (to create jobs and add value to our natural resources here in South Africa); industrialization and localisation; mitigation of CO_2 emissions; and leapfrogging South Africa into the knowledge economy and massive industrial development. The Department also gave the clear indication that it intended continuing working towards the roll-out of the nuclear programme, including reaching a final investment decision towards the procurement of nuclear power plants.

47.4 A copy of the media statement is attached as annexure **'ZM 17'** hereto.

48. The participation of the Department in the summit of BRICS (the acronym for an

association of five major emerging national economies: Brazil, Russia, India, China and South Africa) during March 2013, where the possibility was explored of forming an energy cooperation forum of the BRICS member countries, caused some speculation on the part of some newspapers simply because of the fact that South Africa had a meeting with its counterparts which included Russia. The mischievous suggestion was made that the diplomatic relationship between South Africa and Russia were linked to the energy plans of this country, a suggestion that is untrue. As I have already explained, the existence or establishment of a diplomatic relationship between South Africa and a potential vendor country is essential (and in fact a condition) for the nuclear programme but our energy plans were not formulated specifically to cater for the diplomatic relationship with Russia nor with a view to specifically obtain Russian technology. We also had a meeting with our Chinese counterparts on the same occasion. This suggestion was addressed in a media statement of 26 July 2013, of which a copy is attached as annexure **'ZM 18'** hereto. At the same time the speculation concerning the alleged political motives for restructuring the National Nuclear Energy Executive Coordination Committee was put to rest.

49. An important media statement, specifically concerning the new nuclear build programme, was released on 31 July 2013 by the Department and a copy thereof is attached as annexure **'ZM 19'** hereto.

49.1 Noting the media interest with regard to the new nuclear build programme issues, the Department recorded that the Government of South Africa

already had a number of bi-lateral international agreements on the peaceful uses of nuclear energy with a number of countries, in pursuit of which the Government will from time to time visit such other countries as well as receive invitations from our international partners.

I interpose to point out that the use of the word "*partner*", "*partnership*" or even "*strategic partnership*" in this international context is a general description of a special and strong diplomatic relationship between two countries and does not convey the commercial or legal meaning of a partnership as understood in the domestic law.

49.2 The Department explained that, amongst our other partners, South Africa had a bi-lateral international agreement with the Russian Federation, dating back to 2004, in terms of which the two countries have committed to work together in the interest of promoting the use of nuclear energy for peaceful purposes. In addition to this agreement, South Africa also had similar bi-lateral international agreements with other countries, including the United States of America, the European Atomic Energy Community (known by its acronym EURATOM), South Korea, China, Argentina and Algeria.

I interpose to point out that these bi-lateral international agreements with other countries were and are *bona fide* international agreements that were on the cards from the outset of the process. They were not thrown

into the mix as some afterthought in order to cover up a *faux pas*.

49.3 The Department disclosed that during the BRICS summit meeting held in Durban in May 2013, South Africa and Russia signed an agreement which aimed to strengthen areas of common interest, including energy.

49.4 The Department again pointed out that the Government had consistently stated its intent to add nuclear energy to the South African energy mix, in line with the approved Integrated Resource Plan (2010-2030) (annexure **'ZM 6'**) which was a 20-year electricity security plan developed through a robust public engagement process. That Integrated Resource Plan (2010-2030) recognized the need for South Africa to utilise diverse energy sources, including nuclear power, to ensure the security of supply and which complements the national commitment on the reduction of emissions from fossil fuel, and will be cost effective in the long run. The Integrated Resource Plan (2010-2030) states that nuclear energy will provide 9.6 GW of energy by 2030 and the media statement conveyed that Government has put in place structures that will take decisions linked to this programme: that is, the National Nuclear Energy Executive Coordination Committee (made up of the President and the Ministers of relevant departments) supported by the Nuclear Energy Technical Team (which consisted of the heads of all the relevant departments).

49.5 The intention of the Government was also stated: Government intended

to continue to interact with the various parties with the requisite capacity to take on a project of this magnitude in order to be able to make the appropriate decisions for the new nuclear build programme (if and when required by the phased approach). The Minister also stated that the Government would make announcements on the way forward once definitive decisions had been taken by the appropriate structures.

49.6 The Minister and the Department stated in conclusion that they would continue to communicate the relevant information on the process as and when they are decided to ensure that the public is kept abreast of the developments.

50. This is the point in the chronology where the 2013 determination fits in. I briefly sketch an overview of the relevant events and will deal with the legal aspects as well as the ground upon which the Applicants seek to review the 2013 determination in **paragraph 123 below**:

50.1 On or about 8 November 2013 officials from the Department prepared a written submission, recommending therein that the Minister then in office approves a determination under section 34(1) of the ERA in respect of the nuclear programme for promulgation in the Government Gazette so that it could be launched (as appears from page 484-490 of the record). I am aware that there was no such promulgation at the time but this was due to a change in the leadership in the Ministry and to conduct some

further work prior to gazetting. I am also not aware of any public participation process that was followed in preparing this submission nor of any requirement that there had to be such a process.

50.2 On or about 11 November 2013 the then Minister approved the recommendation (as appears on page 487 of the record) and signed a formal letter requesting the concurrence of NERSA in the proposed determination (as appears from page 491 of the record). Also with regard to this approval I am not aware of any public participation process that was followed nor of any requirement that there had to be such a process.

50.3 On or about 21 November 2013 the Chairperson of the Electricity Subcommittee of NERSA signed off on a report to the Board of NERSA, recommending that NERSA concurs with the proposed determination (as appears from page 548-550 of the record). There is no indication that, in compiling this report, a public participation process was followed.

50.4 On or about 26 November 2013 a meeting of NERSA was held and the report of the Electricity Subcommittee was tabled (as appears from page 494-498 of the record). According to the certified minutes of that meeting and in considering the report, various queries were raised by members of the board of NERSA:

50.4.1 One of those queries was a concern over overstated

forecasts but I have already dealt with this aspect in **paragraph 33.8 above**. Such an overstatement can only result in a temporary over-investment in capacity but will not endanger the security of supply. From a policy perspective it is better to be cautious and overstate demand forecasts rather than to have regret later because of an understatement thereof.

50.4.2 Another query was the concern that the Integrated Resource Plan (2010-2030) (annexure **'ZM 6'**) was outdated. However, it was in the process of being revised (albeit that nothing yet came from the process) and in any event it was the only approved Integrated Resource Plan for Electricity as contemplated in section 1 of the ERA, which was binding on NERSA and given effect in the way that I have explained in **paragraph 33.1 above**.

50.4.3 Other queries were also raised, including the alleged doubling of the expected costs for the nuclear programme and a comparison between the use of mid merit gas fired power (with a relatively short lead time to procure) against the use of nuclear power (with a lead time of some 15 years to procure).

50.4.4 After having discussed, debated and considered the request from the then Minister, the Board of NERSA formally resolved to concur in terms of section 34(1) of the ERA with the proposed determination of the then Minister.

50.4.5 There is no indication in the minutes that, in taking this resolution, a public participation process was followed.

50.5 On or about 17 December 2013 the Chairperson of the Board of NERSA gave effect to the resolution of NERSA by co-signing the ministerial determination (as appears from page 477-478 of the record).

50.6 On or about 20 December 2013 the Chairperson of the Board of NERSA signed a letter to the then Minister, informing him that NERSA had resolved to concur with the proposed determination and attached a certified copy thereof to the letter (as appears from page 492-500 of the record). This letter was only received by the Department and the then Minister on 6 January 2014.

50.7 On or about 23 January 2014 the then Minister informed Eskom as well as the Department of Public Enterprises of the 2013 determination as concurred to by NERSA, and provided them with a copy thereof (as appears from page 501-502 of the record). At this stage the Department was already designated by the National Nuclear Energy Executive

Coordination Committee as the Procuring Agency for the nuclear programme and Eskom was planned to be the owner-operator of the new nuclear power plants alongside its two Koeberg plants.

50.8 On or about 1 December 2015 officials from the Department prepared a further written submission, recommending therein that the Minister approve (again) the formal publication of the 2013 determination in the Government Gazette and which recommendation was accepted by the Minister on 8 December 2015 (as appears from page 522-525 of the record).

50.9 On or about 21 December 2015 the 2013 determination was published under Government Notice 1268 in the Government Gazette No 39541 of 21 December 2015 (as appears from page 479-480 of the record).

51. A joint statement was issued by the Minister and the Vice Administrator of the Chinese National Energy Administration in Cape Town on 4 March 2014.

51.1 A copy thereof is attached as annexure **'ZM 20'** hereto.

51.2 According to this statement, the parties met on 26 February 2014 to discuss cooperation in the field of peaceful and civil use of nuclear energy. China had expressed interest to participate in the civil nuclear energy projects of South Africa and had proposed an agreement which

was still under consideration by both State Parties.

51.3 The draft agreement included skills development and capacity building, research and development, the new nuclear build programme, supplier development and localisation, joint marketing, supply of nuclear energy projects and infrastructure funding to promote regional nuclear power developments.

51.4 This draft agreement followed on two other agreements that dealt with various aspects of the energy sector. The first intergovernmental agreement referred to was the one signed between South Africa and China in 2006 on cooperation in the peaceful use of atomic energy, which covered the design, construction, operation and modernisation of nuclear reactors, fundamental and applied research and capacity building. The second intergovernmental agreement referred to was the one signed between South Africa and China in 2010, a general co-operation agreement in the field of energy, covering oil and gas, renewable energy, energy efficiency and skills development. Since the signing of these two agreements the two State Parties have continued to exchange information and knowledge. China has in fact started training South Africans in the renewable energy sector and there were plans to expand this to include capacity building in the nuclear energy sector.

51.5 The joint statement also disclosed that on 25 February 2014 a skills

development and training agreement was signed between NECSA and two Chinese state nuclear energy corporations: the China General Nuclear Power Corporation and the State Nuclear Power Technology Corporation. This agreement provided the foundation for further co-operation in skills development and was to be funded up to 95% by these Chinese institutions. The agreement also created opportunities for young South Africans to enrol in Chinese universities so that they can become part of the South African nuclear industry by enhanced specialisation in the nuclear energy value chain.

51.6 Both parties committed themselves to continue engaging on issues of mutual interest in the energy sector, including the nuclear energy industry.

51.7 These discussions did not come as an afterthought but were the product of a longstanding and strong diplomatic interaction, resulting in a strategic partnership on different levels and in different fields between South Africa and China since 1994.

52. On 22 September 2014 the "*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*" (annexure **'PL 24.4'**) was signed by the two State Parties.

52.1 At the outset I wish to make the stance of the President and of the

Minister about the Russian Treaty absolutely clear:

52.1.1 The Russian Treaty was entered into or concluded between two sovereign states and State Parties in the exercise of their respective sovereign authority.

52.1.2 The Russian Treaty is a bi-lateral international agreement of which neither the content nor any dispute arising from it is cognisable, open to interpretation and construction or to enforcement by a domestic court - as an international agreement it deals with the international and diplomatic relationship between two sovereign states within the context of the international law. In the result no aspect of the Russian Treaty is, with respect, justiciable by the Honourable Court. Not only is this result consistent with the doctrine of separation of powers, but it also prevents that a State speaks with two voices on the same matter as far as international relations are concerned.

52.1.3 To the extent that I deal with the content or the proper interpretation and meaning of the Russian Treaty, I thus do so (1) because of the legal advice that, even if an objection such as the non-justiciability thereof is raised *in limine*, a litigant is obliged to plead over on the merits; (2) without

any prejudice to the preliminary objection thus raised; and (3) only as a precaution against the Honourable Court drawing an adverse inference should I fail to do so.

52.1.4 I thus deal with the content or the proper interpretation and meaning of the Russian Treaty solely on the supposition that these aspects are indeed justiciable by the Honourable Court but I do not abandon or waive any rights or objections by the President, the Minister and the State in this regard. I emphasise that the issue of the non-justiciability thereof is supported by the legal principle or rule that in general foreign states enjoy immunity from the jurisdiction of our domestic courts and that, if this and other related issues have to be adjudicated upon by the Honourable Court, the Government of the Russian Federation has such a direct and substantial interest in this application that it becomes a necessary party that should have been joined in the first place. I submit that the legal, practical and other obstacles in the way of such a joinder of a sovereign state in proceedings before a South African court underscores the non-justiciability of the Russian Treaty.

52.1.5 In this regard I respectfully refer the Honourable Court to section 2 of the Foreign States Immunities Act 87 of 1981

and to section 2, 3 and 4 of the Diplomatic Immunities and Privileges Act 37 of 2001 read with the Vienna Convention on Diplomatic Relations (1961) and the Vienna Convention on Consular Relations (1963).

52.2 The Applicants have already provided a copy of the Russian Treaty to the Honourable Court and it is attached as annexure **'PL 24.4'** to the founding affidavit (on page 286-299 of the record).

52.3 I respectfully submit that, on the basis of the supposition stated, the Russian Treaty - having been reduced to writing as contemplated by the Vienna Convention on the Law of Treaties (1969) and as agreed to by the State Parties - is now in general regarded as the exclusive memorial of the transaction and no evidence to prove its terms may be given save the document, or secondary evidence of its contents where permissible, nor may the contents of such document be contradicted, altered, added to or varied by parol evidence. Given that the document itself is available as the best evidence available, I respectfully submit that one should look at the Russian Treaty itself and not some second-hand information or secondary evidence about the contents and effect thereof.

52.4 For the sake of convenience I also quote article 31 and 32 of the Vienna Convention on the Law of Treaties (1969), appearing in the section on the interpretation of treaties:

"***Article 31: General rule of interpretation***

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32: Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm

the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) Leaves the meaning ambiguous or obscure; or

(b) Leads to a result which is manifestly absurd or unreasonable."

52.5 I draw attention to the following aspects of the Russian Treaty:

52.6 From the title page of the Russian Treaty this is described as an 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 - from this description it is clear that this is a bi-lateral international agreement entered into between two sovereign states in the exercise of their sovereign authority.

52.7 I do not wish to repeat the whole preamble of the Russian Treaty in this answering affidavit but refer the Honourable Court thereto (on page 287-288 of the record) and ask that the preamble be regarded as incorporated herein by specific reference. At least three aspects become clear from the preamble: <u>firstly</u>, the international and international law context of the Russian Treaty, specifically in so far as the international law obligations pertaining to nuclear energy are concerned; <u>secondly</u>, the desire by both sovereign States to establish a "*comprehensive strategic partnership*" between the Russian Federation and the Republic of South Africa, a

desire already made public by way of a joint presidential statement on 26 March 2013; and thirdly, the fact that this new agreement is "*based on the principles of equality, non-interference in the internal affairs and respect of the sovereignty of both States*".

52.8 Article 1 (on page 288 of the record) provides that the Russian Treaty creates the foundation for the "*strategic partnership and cooperation*" in the fields of nuclear power and industry for peaceful uses between Parties, aimed at the successful implementation of the national plan for the power sector development in the Republic of South Africa, based on the principles of equality and mutual benefit. I repeat that the use of the word "*partner*", "*partnership*" or even "*strategic partnership*" in this international context is a general description of a special and strong diplomatic relationship between two countries and does not convey the commercial or legal meaning of a partnership as understood in the domestic law.

52.9 Article 2 (on page 288 of the record) provides that cooperation within the framework of the Russian Treaty shall be implemented in compliance with the national legislation of the respective Parties: the contemplation clearly was that whatever future cooperation flows from and needs implementation in South Africa, would be implemented in accordance with our domestic legislation.

52.10 In article 3 of the Russian Treaty (on page 288-290 of the record) the leading sentence thereof makes it very clear that the Parties accept a legal obligation "*to create the conditions for the development of strategic operation and partnership*" in a number of specified and listed areas, which are then enumerated. The emphasis however falls on the creation of conditions for development, which will allow such development to take place but does not create any legal obligation with regard to the development per se.

I wish to add two comments on this article 3. Firstly, the obligation so created is of course a legal obligation but it is an international legal obligation created in the context of international law and it pertains to the international relationship between the two sovereign States. It is not a legal obligation cognisable in our domestic law nor is it enforceable in a domestic court of South Africa. Secondly, the proposition advanced on behalf of the Applicants, to the effect that this article 3 creates a binding, legal and enforceable contractual obligation (in our domestic law) to construct the new nuclear power plant units for 9.6 GW on the basis of the VVER reactor technology of Russia is simply wrong: it is based on secondary evidence about the meaning of this document, it is based on speculation, it ignores the important leading sentence prefacing the rest of that article and it totally disregards the context as well as the actual wording of article 3. To also state the obvious, there is no agreement on design specifications, on timelines and deadlines, on any performance

guarantees, on penalties, on contract price and on the plethora of other detail that one would expect in an actual procurement contract. If this was an ordinary commercial contract, all of those aspects would have been dealt with and addressed.

52.11 Article 4 of the Russian Treaty (on page 290-291 of the record) makes it clear that the collaboration in the areas as outlined in article 3 thereof was a prerequisite for the implementation of priority joint projects of construction of two such nuclear reactors but that the mechanism of implementation of these priority projects will be governed by separate intergovernmental agreements in which the Parties had to agree on aspects such as sites, parameters and installed capacity of the units planned to be constructed. Provision is also made for an obligation to create the required conditions for implementation in accordance with the national legislation of the respective Parties.

Contrary to the impression created by the Applicants, this article also confirms that no obligation for the direct and immediate implementation of any nuclear construction project is contemplated but that what is envisaged is only the creation of the conditions or the establishment of an environment for the implementation thereof. Actual implementation, and thus actual procurement, is envisaged to be the subject of some future decisions and agreements.

52.12 Article 5 and article 6 of the Russian Treaty (on page 291-292 of the record) provides for the designation of Competent Authorities to represent the two State Parties and for the establishment of a Joint Coordination Committee, for the express purpose of implementing the Russian Treaty itself and not for the purpose of carrying out any construction project. I note that consistently with the international law character of the Russian Treaty, any change with regard to the respective Competent Authorities has to be promptly notified to the other Party in writing *through diplomatic channels*.

52.13 Article 7 of the Russian Treaty (on page 292 of the record) demonstrates the nature thereof as a framework agreement: it effectively sketches the outer parameters for cooperation in the areas as outlined in article 3 thereof, which cooperation will then also be covered by separate agreements. The separate agreements envisaged are agreements between the Parties, their Competent Authorities or their authorised organisations. Again it is clear that the Russian Treaty is not an agreement to actually procure new nuclear power plants. This article also contains the following provision:

> "*The Competent Authorities of the Parties can, by mutual consent, involve third countries' organisations for the implementation of particular cooperation areas in the framework of this Agreement.*"

On the false assumption that the Russian Treaty is allegedly a

procurement contract for the construction of new nuclear power plants based on the Russian nuclear technology, the Applicants advance the proposition that this article 7 effectively precludes the involvement of other countries in the construction of new nuclear power plants without the consent of Russia. I repeat that the "*particular cooperation areas*" are areas for which the conditions for the development of strategic cooperation and partnership in those areas are to be created. Creating conditions for contracting is not the same as actual construction itself and this article does not give Russia a veto in who will ultimately participate in the future construction of new nuclear plants in South Africa.

I also repeat that there are international obligations pertaining to the non-proliferation of nuclear weapons. In addition Russia has its own intellectual property in its nuclear technology to protect. Accordingly it is perfectly understandable that, in a setting where an environment for the development of the South African nuclear programme is to be established by the transfer of skills, knowledge and intellectual property derived from Russian technology, the consent of Russia would be required to involve outsiders therein and make them privy to Russian information and technology, which are sensitive and commercially valuable to start with. One must also not forget that each international agreement is the result or outcome of the negotiations that took place between the two States - this was a term negotiated and agreed upon to make clear what is in any event implied in other similar or related international agreements: that the

intellectual property rights of or from the other State Party shall be respected.

52.14 Article 8 of the Russian Treaty (on page 292 of the record) deals with the sources and format of financing of the activities "*within the implementation of cooperation areas*" as outlined in article 3 thereof, which will be agreed on after consultation and fixed by separate agreements between the Parties. Again there is a reinforcement for the basic model that the implementation of "*cooperation areas*" is something different from the creation of conditions that would allow for such implementation, and which is a separate matter for which there has to be a separate funding agreement.

52.15 The Applicants are also misrepresenting the contents of article 9 of the Russian Treaty (on page 292 of the record) : the undertaking is simply to facilitate the provision of a special favourable regime as far as taxation is concerned but it is by no stretch of the imagination an agreement that the Republic of South Africa will afford Russia a favourable tax and financial regime. Again I point out that an international agreement is the outcome or result of the negotiation between the two State Parties involved. Furthermore, if and once we go on to the actual procurement of nuclear power plants with another vendor country, nothing prevents a similar agreement to be explored in that instance.

52.16 Article 10 (on page 293 of the record, which again called for the implementation of the outlined areas of cooperation to be agreed upon), article 11 (on page 293 of the record, which deals with the protection, use and distribution of intellectual property rights in terms of future agreements to be concluded) and article 12 (on page 293-294 of the record, which deals with the use and confidentiality of information exchanged or transferred between the two State Parties) of the Russian Treaty are also not consistent with the construction which the Applicants wish to impose upon the nature, character and scope thereof. It is not a commercial procurement contract, it does not create any contractual obligations in domestic law but it remains a bi-lateral international agreement between two sovereign States.

52.17 Article 13 (on page 294-296 of the record) and article 14 (on page 296 of the record) of the Russian Treaty deals with obligations in connection with the non-proliferation of nuclear weapons. This is not something that one will find in a commercial, domestic or procurement contract but it is typically something dealt with in international law and in the international relations between sovereign States with nuclear capabilities.

52.18 The Applicants also present article 15 of the Russian Treaty (on page 296-297 of the record) completely out of context. The false impression is created that this article creates a special dispensation, in favour of and indemnifying Russia to the detriment or prejudice of the Republic of South

Africa, on civil liability for nuclear damage.

52.18.1 Currently the nuclear sector in South Africa is mainly governed by three statutes: the Nuclear Energy Act 46 of 1999, the National Radioactive Waste Disposal Institute Act 53 of 2008 and the National Nuclear Regulator Act 47 of 1999. All three of these statutes are administered by the Department but it is especially the latter one that is of relevance for this matter.

52.18.2 Act 47 of 1999 must be seen in the context of the involvement of the Republic of South Africa in the IAEA. The IAEA is an international organization that was established as an autonomous organization, independently of the United Nations, through its own international treaty known as the Statute of the International Atomic Energy Agency. The IAEA Statute came into force on 29 July 1957 when the target of 18 required ratifications were met and the Republic of South Africa was one of the founding member states in 1957 (together with some 46 other member states at the time). Today the IAEA has a total membership of 164 member states.

52.18.3 Broadly speaking the IAEA has three main missions:

promoting the peaceful uses of nuclear energy by its member states (peaceful use mission), implementing safeguards to verify that nuclear energy is not used for military purposes (safeguard or non-proliferation mission), and promoting high standards for nuclear safety (nuclear safety and security mission). In practice the IAEA serves as an intergovernmental forum for scientific and technical cooperation in the peaceful use of nuclear technology and nuclear power worldwide; its programmes encourage the development of the peaceful applications of nuclear technology, provide international safeguards against misuse of nuclear technology and nuclear materials, and promote nuclear safety (including radiation protection) and nuclear security standards and their implementation. On an international level the Republic of South Africa, as a founding member state, is actively and continuously involved in the various missions, activities and programmes of the IAEA. Without becoming embroiled in the niceties of international law, the general rule is that the IAEA Statute does not confer any binding force on any of the safety standards adopted by the IAEA; those safety standards reflect a large measure of expert and technical consensus, which make them very influential and which make them serve as important international guidelines for most states

in regulating their nuclear facilities.

52.18.4 Act 47 of 1999 serves as the present legislative instrument (replacing previous legislation) by means of which these international guidelines on safety standards for the peaceful use of nuclear technology are or can be implemented as part of our national law and it establishes a separate regulatory dispensation for nuclear activities in the Republic of South Africa.

52.18.5 According to the long title of Act 47 of 1999, the purposes or objectives thereof are threefold:

- firstly, to provide for the establishment of a National Nuclear Regulator in order to regulate nuclear activities, for its objects and functions, for the manner in which it is to be managed and for its staff matters;
- secondly, to provide for safety standards and regulatory practices for protection of persons, property and the environment against nuclear damage; and
- thirdly, to provide for matters connected therewith.

52.18.6 Without going into any detail or in-depth analysis, I point out

that the main underlying policy or primary rationale of Act 47 of 1999 is to prevent any nuclear damage: the more effective and secure our safety standards and regulatory practices are, the less of a risk there is of nuclear damage. This preventative philosophy of Act 47 of 1999 is the foundation of our regulatory dispensation for nuclear activities in this country but at the same time there is a realisation born from human experience that the possibility of nuclear damage occurring as a result of nuclear activities, regardless of the overall benefits thereof for the public at large, cannot be totally excluded and must be provided for. Act 47 of 1999 thus has an additional underlying policy or secondary rationale, namely to provide for a situation where the preventative measures were not successful and nuclear damage does occur. This is however the point where the problem becomes intricately complex: there are so many variables, permutations, factors and considerations to take into account that it becomes almost impossible for any individual state to find its own solution which is uncontentious or acceptable.

52.18.7 Within this context and as a matter connected with the two main purposes or objectives of Act 47 of 1999, the concept of a strict civil liability dispensation for nuclear damage as

developed in the international law comes into play. Again I do not wish to become embroiled in the niceties of international law nor do I wish to burden this affidavit with a discussion of the various treaties and protocols to which the Republic of South Africa in any event is not a party as yet. For the sake of clarity I will simply state and briefly explain the basic features of the international scheme for civil liability in respect of nuclear damage.

52.18.8 The international scheme accepts that those who suffered nuclear damage must be promptly compensated from available funds but at the same time also accepts that the nuclear industry must be protected from unlimited, unpredictable liability involving a multiplicity of civil suits against, suppliers, builders, designers, carriers, operators and States active in that industry. A balance must be found between the need for protection against the eventuality of nuclear damage and the need for promoting and growing the nuclear industry, which need is especially pressing in a developing country such as ours.

52.18.9 In essence the international scheme is one for loss distribution amongst those who suffered nuclear damage (premised thereon that each victim will not necessarily

receive full compensation but will share fairly and equitably in a pool available for compensation), making the operator of the nuclear facility strictly liable for that compensation of nuclear damage (up to a fixed limit) but reinforced by state-funded compensation schemes.

52.18.10 Under the international scheme civil liability for nuclear damage is firstly absolute or strict in the sense that only a specific causal relationship (that the nuclear damage was caused by or resulted from the relevant nuclear facility) has to be established and neither intent nor negligence is required as a condition for liability.

52.18.11 Under the international scheme, civil liability for nuclear damage is secondly channelled exclusively to the operator of the relevant nuclear facility which caused the nuclear damage. This substantive channelling of civil liability for nuclear damage (also known as the principle of exclusive liability) establishes a clear line of responsibility.

52.18.12 Under the international scheme, civil liability for nuclear damage may thirdly be limited as far as the total amount and the duration of liability is concerned. This principle of limited liability must be seen in conjunction with the

principle of absolute or strict liability as well as the principle of exclusive liability: the limitation of liability (in amount and time) justifies the imposition of absolute or strict liability as well as exclusive liability and in this regard there is a balancing of the interests of those who may suffer nuclear damage and of the interests of those who operate nuclear facilities.

52.18.13 Under the international scheme, civil liability for nuclear damage is fourthly premised upon compulsory financial insurance or security by the operator of the nuclear facility to ensure that funds are available for distribution between those who suffered a loss through nuclear damage. The nature, scope and extent of such compulsory financial insurance or security are obviously informed or influenced by the principle of absolute or strict liability, the principle of exclusive liability and the principle of limited liability (in amount and time). The reason for requiring this compulsory financial insurance or security in respect of a limited but no-fault liability is that the scale of potential damage, that could be caused from a serious nuclear accident, is likely to be well beyond the capacity of individual operators to bear and thus the intent is also to make it easier to obtain insurance.

52.18.14 Under the international scheme, disputes and claims concerning civil liability for nuclear damage is lastly usually resolved by channelling legal proceedings exclusively to a single court having jurisdiction over the area where the damage-causing event took place. Although this approach may in theory cause serious logistical problems and even overwhelm such a single court, there are a number of advantages in the procedural channelling of all claims and disputes concerning civil liability for nuclear damage: so, for example, all disputes and claims are treated uniformly, the available pool of funds is distributed fairly and equitably and forum shopping is prevented.

52.18.15 I have already pointed out that the Republic of South Africa is a founding Member State of the IAEA. One of the agendas of the IAEA is to encourage all States, and especially its Member States, to accede to the various international conventions or treaties creating a special regime for civil liability in respect of nuclear damage. The Republic of South Africa is not currently party to any such convention or treaty, or any of the protocols thereof, but we have made use of especially the Vienna Convention on Civil Liability for Nuclear Damage and its protocols when Act 47 of 1999 was drafted. I respectfully submit that the

national civil liability dispensation for nuclear damage as contained in Act 47 of 1999 corresponds largely to the international scheme set out above and I will highlight some of the aspects thereof.

52.18.16 Act 47 of 1999 is premised upon the principle of the **exclusive liability** of the holder of a nuclear installation licence for nuclear damage. In this regard section 30(1) thereof stipulates that only a holder of a nuclear installation licence is liable for all nuclear damage caused by or resulting from the relevant nuclear installation during the period of responsibility of that holder.

52.18.17 Act 47 of 1999 is premised upon the principle of the **strict liability** of the holder of a nuclear installation licence for nuclear damage. In this regard section 30(1) thereof stipulates that the holder of a nuclear installation licence is liable for nuclear damage whether or not there is intent or negligence on the part of the holder. I pause to point out that, in a technical sense, this is not an absolute liability because in terms of subsection (6) thereof the holder of a nuclear installation licence has a defence against liability for nuclear damage against a claimant:

- to the extent to which such nuclear damage is

attributable to the presence of that claimant or any property of that claimant at or in the nuclear installation or on the site in respect of which the nuclear installation licence has been granted, without the permission of the holder of that licence or of a person acting on behalf of that holder; or

- if that claimant intentionally caused, or intentionally contributed to, such nuclear damage.

52.18.18 Act 47 of 1999 is premised upon the principle of the **limited liability** of the holder of a nuclear installation licence for nuclear damage. In this regard section 30(1) thereof stipulates that the liability of the holder of a nuclear installation licence is:

- in respect of all nuclear damage caused by or resulting from the relevant nuclear installation during the period of responsibility of that holder, constituting a limitation in time (which period is defined in section 1 thereof but, practically and subject to some qualification, runs with the period of the nuclear authorisation); and
- subject to subsection (2) thereof, which provides that the liability for nuclear damage by any holder of a nuclear installation licence is limited, for each

nuclear accident, to the amounts determined in terms of section 29(2) thereof, constituting a limitation of amount.

A further but indirect limitation of liability is also to be found in section 34 of Act 47 of 1999, dealing with the prescription of actions for compensation after the expiration of a period of 30 years.

52.18.19 This scheme is reinforced by what can be termed a **state-funded compensation scheme**, to be found in section 33 of Act 47 of 1999: that section deals with the possibility of claims for compensation in excess of the maximum liability fixed for the holder of a nuclear installation licence and, in essence, provides that after notification to and investigation by the Minister and the Regulator, a report is to be tabled in Parliament on the nuclear damage in question so that Parliament can appropriate funds for rendering financial assistance to the said holder for the amount by which the claims exceed or are likely to exceed the security which is available.

52.18.20 For the purposes of Act 47 of 1999, the concept of "*nuclear damage*" is currently defined in section 1 thereof to mean -

(a) any injury to or the death or any sickness or disease

of a person; or

(b) other damage, including any damage to or any loss of use of property or damage to the environment,

which arises out of, or results from, or is attributable to, the ionizing radiation associated with a nuclear installation, nuclear vessel or action. I may add that this definition is, compared to others in the international arena as well as in the legislation of some other countries, a narrow one that is premised on the constraints of the law of delict (or the law of torts, as it is called generally in international literature) and the concept of civil liability: the general view is that it caters for the "*nuclear damage*" that was suffered by a specific person (excluding a loss of future income) and not for the costs of preventative measures or the reinstatement of the environment in general, although I must admit that this view has not been tested in a court of law. I must also add that the Department is currently in the process of pursuing an amendment of Act 47 of 1999, which will bring this definition more in line with the extended definition of the revised Vienna Convention on Civil Liability for Nuclear Damage so as to, amongst others, cater also for the additional environmental costs.

52.18.21 All that article 15 of the Russian Treaty does, is to provide

for a scheme on civil liability for nuclear damage which is essentially already regarded as standard practice in international law and which has already been enacted as part of the South African domestic law. This is also made clear by the provision in article 15.3 (on page 297 of the record) that, when the Vienna Convention on Civil Liability for Nuclear Damage comes into force in the Republic of South Africa, this liability will be regulated in terms thereof and no longer in terms of this article. Any other party, person or entity that may be procured for the construction of new nuclear power plants in South Africa will be subject to the same scheme or dispensation and it is not correct to suggest that a special exception has now been created for Russia. Ever since the enactment of section 5 of the now repealed Nuclear Installations (Licensing and Security) Act 43 of 1963, it has been trite law that the ordinary rules for delictual liability in civil law based on fault do not apply to nuclear damage and that it is subject to its own specialised dispensation based on strict liability. I am surprised that the Applicants, with their special and dedicated projects or programmes on sustainable energy and climate change, did not disclose these facts to the Honourable Court.

52.19 The Applicants also do not do justice to article 16 of the Russian Treaty

(on page 297 of the record). Firstly, this article provides that the Parties shall settle all disputes arising from the interpretation or implementation of this agreement amicably by means of consultations between the Competent Authorities of the Parties or by means of negotiations through diplomatic channels. By providing for their own dispute resolution procedure, the two State Parties clearly did not contemplate or intended that the Russian Treaty would be subject to domestic law and/or would be either cognisable or enforceable by a domestic court. This aspect of the article the Applicants leave out of account. Secondly, it is in this context of an agreed upon dispute resolution process and against that background that the second part of this article provides that, in the case of any discrepancy between the Russian Treaty and the other contemplated agreements or contracts concluded thereunder, the provisions of the Russian Treaty "*shall*" prevail. There is with respect nothing peculiar about this provision. The principle that subordinate legislation or agreements must be consistent with the empowering or original legislation and the main agreement is well known in domestic law as well as in foreign jurisdictions. That does not make this article a tool to ensure that the Russian Treaty takes precedence over any subsequent agreement but it provides for an interpretative guideline to prevent conflicts between the Russian Treaty and any subsequent agreements concluded under the framework as is provided for in the Russian Treaty. The second part of article 16 of the Russian Treaty is with respect nothing more than a tool for the interpretation for discrepancies in a framework

where subsequent agreements will not necessarily be concluded directly between the two State Parties but may also be concluded between their respective Competent Authorities or their authorised organizations. What is more, the State Parties in article 17.5 of the Russian Treaty (on page 298 of the record) expressly agreed that the Russian Treaty may be amended by mutual consent of the Parties through an exchange of notes between the Parties through diplomatic channels, with such amendments to form an integral part of the Russian Treaty. This is in any event in conformity with Part IV of the Vienna Convention on the Law of Treaties (1969), which in general regulates the amendment and modification of treaties and in which part article 39 thereof contains the general rule of international law regarding the amendment of treaties: "*A treaty may be amended by agreement between the parties.*"

52.20 The Applicants take issue with the savings clause in article 17 of the Russian Treaty (on page 297-298 of the record). Again there is nothing peculiar about this savings clause and it is a standard provision in many international agreements as well as in domestic contracts. Once obligations and rights have vested, they are in general protected by law. The error by the Applicants is to put the cart before the horse: this savings clause does not transform the rights, duties and obligations under the Russian Treaty into a domestic procurement contract but is and remains concerned with the rights, duties and obligations under the Russian Treaty in terms of the international law.

52.21 Lastly and for the sake of completeness I draw attention thereto that by agreement under the Russian Treaty (on page 299 of the record) the English text is the dominant one.

52.22 These articles of the Russian Treaty makes it clear that it is a bi-lateral international agreement providing for cooperation between two sovereign States and that it is not, and never was intended to be, a "*binding agreement in relation to the procurement of new nuclear reactor plants (including in respect of South Africa's liability consequent on such procurement) from a particular country*" in terms of or cognisable by the domestic law of the Republic of South Africa. The only purpose of that co-operation is to create the conditions for or environment in which the establishment of a self-sufficient nuclear programme can be pursued and/or nuclear procurement becomes and option.

53. After the Russian Treaty was concluded, the Department made a media release about this event on 22 September 2014. Given the capital that the Applicants try to make out of this media release, I wish to deal with some aspects thereof:

53.1 A copy of the media release is attached as annexure **'ZM 21'** hereto.

53.2 The media release announced that the Russian Treaty was signed and then provided the following summary thereof (own underlining added for the sake of emphasis):

> "*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 a total installed capacity of up to 9.6 GW (up to 8 NPP units). These will be the first NPP 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 specialist in Russian universities and other areas.*"

It is especially the phrase "*besides the actual joint construction of NPPs*" and the tenor of that paragraph that the Applicants opportunistically seize upon and upon which they rely to claim that the Russian Treaty is already a procurement contract. The main concept - that the Russian Treaty provides a foundation for large-scale nuclear power plants procurement and development programme of South Africa - is swept aside.

53.3 In the first place this media release is inadmissible secondary evidence about the content and meaning of the Russian Treaty. The primary source for determining such content and meaning is before the Honourable Court in the form of the documentary text of the Russian Treaty itself.

53.4 In the second place, as I have already shown in **paragraph 52 above**, the Russian Treaty is not a domestic procurement contract on any proper reading thereof.

53.5 In the last place the paragraph from the media release quoted above is merely the effort of an official of the Department to summarise a complex and intricate bi-lateral international agreements between two sovereign States and I respectfully submit that a comparison of the summary with the actual wording of the Russian Treaty shows beyond any doubt that the summary is not in all respects correct or a true reflection of what is in fact contained in the Russian Treaty.

54. On or about 23 September 2014 the Department made a media statement on the conclusion of the visit of the Minister to Vienna (where the Russian Treaty was signed). Given the preposterous suggestion by the Applicants that the other bi-lateral international agreements with China, South Korea, the Unites States of America and France as well as our vendor parades were some knee-jerk and *mala fide* reactions to cover up a *faux pas* when the Minister and the Department allegedly realised that they have jumped the gun with the Russian Treaty, I must deal with some aspects thereof:

54.1 A copy of the media statement is attached as annexure **'ZM 22'** hereto.

54.2 In this media statement the Russian Treaty was described, more correctly

I may add, as an agreement which initiates the preparatory phase for the procurement of the new nuclear build programme.

54.3 In the same media statement and before there even was any furore over the Russian Treaty, it was already disclosed (the very next day after it was announced) that similar agreements were foreseen with other vendor countries that have expressed an interest in supporting South Africa in this massive programme and that, if chosen, all vendor countries have technologies of their choice that they would want to deploy.

54.4 The media statement mentioned a meeting that the Minister had with a French delegation during her attendance at the 58th Session of the General Conference of the IAEA (which was the same occasion during which the Russian Treaty was signed). During those discussions the parties agree that a South African delegation will visit France, where bi-lateral discussions would culminate with the signing of a cooperation agreement between the two countries to support South Africa's new nuclear build programme. Such a bi-lateral international agreement was in fact concluded in Paris on 14 October 2014 (annexure **'PL 24.1'** to the founding affidavit).

54.5 The media statement also mentioned, that during the 58th Session of the General Conference of the IAEA, senior officials from the Department, NECSA and the National Nuclear Regulator continued to hold meetings

with their counterparts from many other countries to discuss and explore possible areas of cooperation.

54.6 The ongoing discussions with the Chinese Government towards a bi-lateral intergovernmental agreement, also aimed at finding ways of supporting the new build nuclear programme of South Africa, was also recorded in this media statement. The Chinese Treaty was later signed on 7 November 2014 in Beijing (annexure **'PL 24.5'** to the founding affidavit).

54.7 These and other international agreements as well as the vendor parades which followed, were not something that was arranged overnight. We started with the logistical planning months and even years before, and the international negotiations were ongoing for a long time.

55. The next media statement from the Department was on 1 October 2014 and dealt with South Africa's nuclear new build programme. This statement was released about one week after the media was informed about the signing of the Russian Treaty and a copy thereof is attached as annexure **'ZM 23'** hereto.

55.1 Again it was recorded that, in accordance with the Nuclear Energy Policy (2008) as well as the Integrated Resource Plan (2010-2030), the Government was committed to an energy mix that includes nuclear, coal, gas, solar, wind and hydro. Also recorded was that since the

promulgation of the Nuclear Energy Policy (2008) and the Integrated Resource Plan (2010-2030), efforts have been undertaken to hasten the implementation of this energy mix given the energy constraints faced at the time.

55.2 The aim of Government was stated as "*to put the country on a path where we have energy security, reduce greenhouse gas emissions, higher rates of economic growth, job creation and an ability to attract more investors*." These considerations were and are the rationale for the policy-decisions taken and implemented to date: those decisions were thus not irrational, arbitrary or unreasonable.

55.3 The establishment of the Energy Security Subcommittee of the Cabinet, created from the National Nuclear and Energy Executive Coordination Committee, was also made public. The aim of this Subcommittee, chaired by the President and comprising of relevant Ministers, was to focus on the rapid implementation of decisions to achieve the energy mix.

55.4 Government reiterated that, in line with the Integrated Resource Plan (2010-2030), the plan was to add an additional 9,6 GW of power from nuclear energy. To achieve this, Government would commence with the roll-out of the new nuclear build programme, a comprehensive programme which should contribute to the industrialisation of the country, re-development of our nuclear industry, the creation of jobs, development

of skills, and technology transfer. At the centre of the new nuclear build programme would be a concerted localisation plan that will ensure that existing South African industry participates to the maximum extent. Goods, services, and expertise for the construction of new nuclear power plants should be drawn as much as possible from South Africa.

55.5 An important commitment of Government was also stated: to ensure that the new nuclear build programme is undertaken in a fair, competitive and cost-effective manner - future generations of South Africans should not be left indebted due to decisions taken today; instead the new nuclear build programme aims to guarantee the future prosperity of South Africa.

55.6 Mention was again made that during November to December 2013 a delegation led by the Minister visited nuclear vendor countries around the world to begin exploratory talks about their experiences, and the potential support they could give to our new nuclear build programme. This had culminated in the current phase wherein inter-governmental agreements with the various vendor countries were signed. The signing of the Russian Treaty on 22 September 2014 was mentioned as well as the intent to sign similar agreements with other vendor countries as well. All of these intergovernmental agreements set out potential frameworks of cooperation that each country foresees where or how they can participate in South Africa's new nuclear build programme. They also mark the initiation of the preparatory stage for the procurement process that will be

undertaken in line with existing laws and regulations.

55.7 Government also indicated, as before, that no information of relevance to the public would be withheld from the South African population.

56. The media release by the Department on 14 October 2014 dealt with the signing of the "*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*" (annexure **'PL 24.1'** to the founding affidavit). A copy of the media release is attached as annexure **'ZM 24'** hereto. Again it was made clear that the French Treaty (similar to the Russian Treaty and other similar international agreements), initiated the preparatory phase for the possible deployment of French nuclear technology in South Africa.

57. On 18 October 2014 the Department announced, by way of an immediate media release, the start by South Africa of the pre-procurement vendor parade workshops. A copy of the media release is attached as annexure **'ZM 25'** hereto.

57.1 The media was informed that the Government was making significant progress in its engagements with various prospective nuclear vendors as part of the process towards implementation of the expansion in the nuclear new build programme, as per the stated requirement for energy security based on a sustainable energy mix. The premises of the nuclear

new build programme was stated: the Nuclear Energy Policy (2008), the Nuclear Energy Act 46 of 1999 and the Integrated Resource Plan (2010-2030).

57.2 As I have already stated (in **paragraph 39.4.3 above**) and as mentioned in this media release, the National Development Plan (2012) called for thorough investigations on various aspects of the nuclear power generation programme before a procurement decision is taken - the Department disclosed in this media release that these planned vendor parade workshops formed part of the Government technical investigation in preparation for a procurement decision.

57.3 The Department also referred to the recent consultations by Government with a number of nuclear vendor countries, wherein Government engaged with the United States of America, South Korea, Russia, France, Japan and China. These are the countries that have Pressurized Water Reactor nuclear technology, similar to Koeberg which South Africa has been safely using for the past 30 years and more.

57.4 The media release stated that, as part of the pre- procurement phase and preparation for the roll-out of the new nuclear build programme, Government entered into several negotiations with vendor countries and had recently signed Intergovernmental Framework Agreements with the Russian Federation and the French Republic. Also pointed out was that

South Africa had signed agreements with the United States of America and South Korea (which are the international agreements that were tabled in Parliament on 10 June 2015), and that the signing of similar agreements with China as well as Japan was envisaged.

57.5 Mention was made that, parallel to the negotiation and conclusion of these international agreements and as part of the preparatory phase, the Department had planned to hold vendor parade workshops with all the vendor countries that are ready and had accepted the invitation to participate. A vendor parade workshop entailed that vendor countries presented what their nuclear technology had to offer South Africa, by creating a platform to showcase and demonstrate their capabilities on how, if chosen, they plan to meet South Africa's needs. Obviously this did not entail a sharing or transfer of intellectual property, confidential business information or sensitive data but from this experience, as stated, South Africa would be assisted in its procurement decision-making process. The Department announced that the first workshop would be held before end October 2014, starting with the Russian Federation, and that this would be attended by government officials from different departments, including state-owned enterprises related in energy matters, as well as academia involved in nuclear and engineering programs.

58. The next media release followed on 23 October 2014 to announce the outcome of the first nuclear vendor parade workshop, held with the Russian Federation.

A copy of the media release is attached as annexure **'ZM 26'** hereto. That release reported that, speaking to a large contingent of senior officials and academics, the delegation of the Russian Federation sought to showcase and demonstrate their capabilities on how, if chosen, they plan to meet South Africa's needs. Also reported was that Government would hold similar workshops with other nuclear vendor countries such as France, China, South Korea, the United States of America and Japan, depending on their readiness to participate in the vendor parade workshops. All of this was described as being part of the preparatory phase towards the roll-out of the nuclear new build programme.

59. The press release of 7 November 2014 dealt with the signing of the "*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*" (annexure **'PL 24.5'** to the founding affidavit). A copy of the press release is attached as annexure **'ZM 27'** hereto. As stated therein, this international agreement also initiated a preparatory phase, but in this instance for a possible utilisation of Chinese nuclear technology in South Africa by building upon the existing "*comprehensive strategic partnership*" referred to in the preamble of the Chinese Treaty (on page 301 of the record). As was explained in the press release, the thinking behind all of this was for Government to gain more understanding of the nuclear technology that the different countries had to offer. I respectfully submit that the Government, the National Executive and the Department would not have gone to all this trouble, effort and expense if a procurement decision had already been taken.

60. The next media release followed on 14 November 2014 to announce plans for the second nuclear vendor parade workshop, to be held later in November 2014 with China, France, the United States of America and South Korea who had confirmed their readiness to participate therein. A copy of the media release is attached as annexure **'ZM 28'** hereto.

61. Thereafter a media release followed on 26 November 2014 to report that Government had concluded round two of the nuclear vendor parade workshops with delegations from China, France, the United States of America and South Korea. Also reported was that to the date thereof Government had engaged all vendor countries with whom Intergovernmental Framework Agreements have been concluded and that, as previously explained by Government, vendor parade workshops were held with countries who chose to and were ready to engage in this manner having signed the Intergovernmental Framework Agreement as a requirement. The media release also stated that the conclusion of this vendor parade marked a significant milestone in the pre-procurement phase for the roll-out of the nuclear new build programme, and that going forward Government will design and launch a procurement process. A copy of the media release is attached as annexure **'ZM 29'** hereto.

62. The first relevant media release in 2015 was the one of 22 March 2015, of which a copy is attached as annexure **'ZM 30'** hereto. This was the announcement of the vendor parade workshops planned for Canada and Japan, firstly on the assumption that they had the required technology and secondly in the

expectation that they would also enter into an Intergovernmental Framework Agreement with the Republic of South Africa (which to date Japan has not yet done whilst an international agreement with Canada is also under negotiation). Those vendor parade workshops did take place between 21-29 March 2015.

63. On 31 March 2015 the Department issued a media statement to provide an update on the nuclear build programme after the Government had concluded the pre-procurement preparatory phase for that programme with the last vendor parade workshop. In this media statement, of which a copy is attached as annexure **'ZM 31'** hereto, the following was communicated:

63.1 that all these international agreements (including the Russian Treaty) set out potential frameworks of cooperation that each country foresees where or how they can participate in South Africa's new nuclear build programme, and they also marked the initiation of the preparatory stage for the procurement process that would be undertaken in line with the legislation and policies of the country;

63.2 that Government wants to be self-sufficient in exploiting the entire nuclear fuel cycle for peaceful use of nuclear technology to address the socio-economic needs of the country, as a result of which presentations from the potential vendor countries had to address the entire nuclear new build programme value chain focussing on the following key aspects:

- nuclear power plant technology and construction;

- multipurpose research reactor technology and construction;
- financing and commercial matters;
- manufacturing, industrialization and localization;
- human resources and skills development;
- public awareness and information centres;
- safety, liability and licensing;
- nuclear fuel cycle (front and back end);
- nuclear siting and permitting; and
- nuclear non-proliferation matters;

63.3 that the outcome of this pre-procurement phase has demonstrated that each of the vendor countries presented unique proposals or solutions to implement the new nuclear build programme; and

63.4 in going forward, the procurement process will be presented for approval by the Energy Security Cabinet Subcommittee and endorsed by Cabinet, where after the procurement process will be presented for deliberation by Parliament and then Government will launch the procurement process well in time to ensure that South Africa commissions the first nuclear power plant by 2023 and the last one by 2030.

On this last aspect, of taking the proposed procurement process for deliberation to Parliament, I wish to state the following: firstly, it is not a legal requirement for this to happen and the announcement in this regard merely reflected a political

decision; secondly, time is running out; and thirdly, the proposed procurement process has not yet been approved by Cabinet but we are working on a basic model in this regard (as explained in **paragraph 42.6 above**).

64. Our media release of 17 April 2015 (annexure **'ZM 32'** hereto) announced that the first 50 trainees will travel to China to take part in nuclear power plant operations training for a period of four (4) months at two Chinese universities, following a skills development cooperation agreement between NECSA and the State Nuclear Power Technology Company of China. In the second phase of this training, South Africa would also be sending 250 to China to be trained at various levels. The first phase was a trial phase, to be followed by a much intensive training programme that will cover on-the-job-training at nuclear power plant construction sites; bachelor's degrees in all engineering, natural and social sciences; financial and project management programmes; as well as postgraduate courses and research collaboration between South Africa and the major developed countries that will include France, Russia, China, the United States of America, South Korea, Japan, Canada, the United Kingdom and Germany. This initiative also clearly demonstrated that the Government was not preemptively committed to Russian technology.

65. This application was launched on or about 12 October 2015.

66. The media release of 15 October 2015 (annexure **'ZM 33'** hereto) dealt with the Annual Report of the Department presented to the Parliamentary Portfolio

Committee on Energy. With regard to the (by then) much debated 9.6 GW of new nuclear build, the media release stated that the Department was able to report progress made towards the realisation of the programme in terms of the completion of the vendor parades and five (5) intergovernmental agreements with the United States of America, France, China, Russia and South Korea. The Department also updated Parliament on the on-going nuclear skills development and training programme that aimed to grow the necessary local skills required for the nuclear build programme. In this respect the Portfolio Committee got firsthand information on the first 50 students who recently came back from China and have been absorbed into the service of various government departments and entities.

67. On 8 December 2015 the Minister approved that the 2013 determination could be published in the Government Gazette (on page 522-526 of the record), which was then done under Government Notice No 1268 in the Government Gazette No 39541 of 21 December 2015 (on page 479-480 of the record).

68. Speculation in the media resulted in another media statement being issued on 26 December 2015 (annexure **'ZM 34'** hereto). This media statement concerned the progress with the new nuclear build programme and was in response to a number of reports, alleging that the Government and Cabinet in particular has finalised a decision to implement the nuclear year programme.

68.1 The media statement pointed out that the decision to proceed with

developing the nuclear new build programme was taken in principle by Cabinet in June 2015, namely that South Africa should proceed with developing a programme for the procurement of the 9.6 GW of nuclear power plants to realise its self-sufficiency policy objective with due consideration of the financial implications.

68.2 However this decision, as part of the phased approach, was subject to more work being done on (1) the proposed funding model, (2) the risk and mitigation strategies, and (3) the contributions by countries as contained in the various intergovernmental agreements.

68.3 The media statement also stated that in the Cabinet meeting that was held on 9 December 2015, the Energy Security Cabinet Subcommittee reported back on the work being done by the Department and the National Treasury in respect of the funding and financing of the programme. As a result of this meeting, Cabinet also approved:

- that the Department proceed with issuing the Request for Proposals for the nuclear new build programme of 9.6 GW of nuclear power;
- that the final funding model will be informed by the response from the market to that Request for Proposals, with those proposals first to be submitted to the Energy Security Cabinet Subcommittee for a recommendation before being considered by Cabinet.

68.4 The media statement also made it clear that any decision to proceed further with a nuclear new build programme will only be taken after the Request for Proposals process has been completed and a final funding model has been developed, and after that final funding model has been referred back to Cabinet for consideration and approval.

69. On 15 March 2016 the National Nuclear Regulator issued a media release on the receipt of two applications by Eskom for Nuclear Installation Site Licences at two sites, one at Thyspunt in the Eastern Cape and the other at Duynefontein in the Western Cape (which is also where the Koeberg Nuclear Power Plants are situated). A copy thereof is attached as annexure **'ZM 35'** hereto. Both applications mentioned the intention of Eskom to construct and operate multiple nuclear installations (nuclear power reactors) and associated auxiliary nuclear installations of a plant type and technology not yet identified.

70. As at the date of signature hereof no Requests for Proposals have yet been issued although we are in the process of preparing and finalising them.

71. I now return to **paragraph 19 above**. As this history, background and the plethora of media releases show:

- the averment, that the National Executive embarked upon the arbitrary or irrational procurement of a fleet of nuclear power plants, is false;
- the averment, that the National Executive secretly embarked upon the procurement of a fleet of nuclear power plants, is false;

- the averment, that the National Executive without public participation embarked upon the procurement of a fleet of nuclear power plants, is false;
- the averment, that the National Executive precipitously embarked upon the procurement of a fleet of nuclear power plants, is false; and
- the averment, that the National Executive embarked upon the procurement of a fleet of nuclear power plants in a manner that is unconstitutional and unlawful, thereby flouting the constitutional imperatives for an open and transparent government, is also false.

The nuclear procurement programme has been rationally developed over a number of years, step by step and where appropriate with the benefit of public participation, in an open and transparent manner with the precautionary principle uppermost in mind as the foundation for a phased approach, in the proper discharge of the powers and duties given to the Government and/or the National Executive and/or the Cabinet and/or the Minister in terms of section 85(2)(b), section 217 and section 231 of the Constitution as well as section 34 of the ERA.

MATERIAL NON-JOINDER OF NECESSARY PARTIES

72. As I have mentioned in **paragraph 8 above**, I submit that in this review application there has been a material non-joinder of at least the other State Parties to the international agreements at stake in this matter, namely:

72.1 the Government of the Russian Federation;

72.2 the Government for the United States of America; and

72.3 the Government of the Republic of Korea.

Government of the Russian Federation

73. As far as the Government of the Russian Federation is concerned, I draw attention to the following:

73.1 The subject-matter of the relief that is being pursued by the Applicants in prayer 1of the Amended Notice of Motion - **[**page 359-360 of the record**]** - is the Russian Treaty and the relief itself is directly aimed at the Russian Treaty.

73.2 The said prayer 1 of the Amended Notice of Motion seeks an order declaring unconstitutional and unlawful, and reviewing and setting aside

- the decision of 20 September 2014 by the President to authorise the Minister to sign the Russian Treaty;
- the decision of 21 September 2014 by the Minister to sign the Russian Treaty; and
- the decision of 10 June 2015 by the Minister to table the Russian Treaty in Parliament under section 231(3) of the Constitution.

73.3 The Russian Treaty (annexure **'PL 24.4'** to the founding affidavit) is an

international agreement in the sphere of international public law or the law between nations, concluded between the Government of the Republic of South Africa as the one State Party and the Government of the Russian Federation as the other State Party, primarily dealing with "*cooperation in the fields of nuclear power and industry*" between sovereign States. These two State Parties are the only parties to this bi-lateral treaty, which grants and imposes, within the parameters and on the plane of the international public law, certain rights and duties or obligations on the State Parties thereto but which has no legal effect within the domestic law of either the Republic of South Africa or of the Russian Federation.

73.4 **<u>In the first place</u>** the Applicants rely for this relief on what they argue is the proper interpretation and construction of the Russian Treaty, concluding (in paragraph 153 of their founding affidavit) that it records a binding agreement in relation to the procurement of new nuclear reactor plants (including in respect of the liability of the Republic of South Africa consequent on such procurement) from a particular country; in other words, that it is in effect already an unlawful and unconstitutional procurement contract under our domestic law. On that interpretation and construction, as the foundation for their case, the Applicants then rely on various grounds of review. As appear fully from **paragraph 52 above**, the interpretation and construction of the Russian Treaty by the Applicants is disputed on various grounds but, for the moment, the point is that the interpretation and construction of the Russian Treaty is at stake

in the absence of the Government of the Russian Federation as the other State Party thereto and without affording it an opportunity to state its case and views on this important issue.

73.5 In passing I wish to make it clear that, by raising this objection based on a material non-joinder of an essential party, I am not conceding any of the issues to be decided on the merits. My point is simply that in all fairness the other party to the Russian Treaty should also be heard on those issues. More specifically I am not conceding that a domestic court, with respect, has any jurisdiction to engage in the interpretation and construction of an international agreement or treaty - which has not become law in the Republic of South Africa - for the purpose of invalidating it, more specifically where the State Parties in article 16 of the Russian Treaty **[**on page 297 of the record**]** made provision for their own dispute resolution procedure on any dispute arising from either the interpretation or the implementation thereof. Unless the Applicants concede that this Honourable Court has no jurisdiction to interpret and construct the Russian Treaty (or any of the other treaties) for the purpose of effectively invalidating it, I respectfully submit that the Applicants will have to join the Government of the Russian Federation as a necessary party to these proceedings.

73.6 **In the second place** and if the decision of the President and/or the decision of the Minister with regard to the authorisation and signing of the

Russian Treaty is set aside, it must follow that the Russian Treaty is then no longer regarded as a valid and binding international agreement or treaty under our law and by our courts. Again, this issue - affecting the validity and binding nature of the Russian Treaty - is one that should not be dealt with in the absence of the Government of the Russian Federation as the other State Party thereto and without affording it an opportunity to state its case on this important issue.

73.7 **In the third place** the crux of the issue concerning the proper tabling of the Russian Treaty in Parliament is in effect whether or not the Russian Treaty can bind the Republic of South Africa without approval by the National Assembly and the National Council of Provinces. This is also in effect an issue affecting the validity and binding nature of the Russian Treaty; in fact, the Applicants claim that because the wrong tabling procedure was used, therefor the tabling decision must also be set aside and then the binding nature or effect of the Russia Treaty is in limbo.

73.8 I am advised that, in view of the supremacy clause in section 2 of the Constitution, the effect of this relief will be to retrospectively nullify the constitutional authorisation for the negotiation, signing and tabling of the Russian Treaty, thereby nullifying the Russian Treaty itself. Quite patently the rights and interests of the Government of the Russian Federation in terms of the Russian Treaty then would be affected if it is in effect declared or held to be null and void.

73.9 Also, the relief that is being pursued by the Applicants in prayer 3 and 4 of the Amended Notice of Motion **[**page 360-361 of the record**]** will indirectly affect the Russian Treaty. In a nutshell the Applicants seek relief to the effect of declaring or holding that, upon what they claim to be the proper and correct interpretation of section 34 of the ERA, a particular determination has to be made before an agreement such as the one they have portrayed the Russian Treaty to be, can be validly concluded and prior to the commencement of any procurement. In essence this relief is yet another basis upon which the validity or the binding effect of the Russian Treaty (and the other treaties) is being challenged.

73.10 In the result the Government of the Russian Federation is:

- a party who has (or may have) a direct and substantial interest in the subject-matter and outcome of this review application; and
- a party who might be prejudiced if any order pursued in this review application is sustained or put into effect;

so that it is a necessary party to this litigation.

Government for the United States of America

74. As far as the Government for the United States of America is concerned, I draw attention to the following:

74.1 The subject-matter of the relief that is being pursued by the Applicants in

prayer 2(a) of the Amended Notice of Motion - **[**page 360 of the record**]** - is the American Treaty (annexure **'PL 24.3'** to the Founding Affidavit) and the relief itself is directly aimed at the American Treaty.

74.2 The said prayer 2(a) of the Amended Notice of Motion seeks an order declaring unlawful and unconstitutional, and reviewing and setting aside the decision of 10 June 2015 by the Minister to table the American Treaty in Parliament under section 231(3) of the Constitution, essentially on the ground of an unreasonable delay in the tabling thereof in Parliament.

74.3 The American Treaty (annexure **'PL 24.3'** to the founding affidavit) is also an international agreement in the sphere of international public law or the law between nations, concluded between the Government of the Republic of South Africa as the one State Party and the Government for the United States of America as the other State Party, primarily dealing with "*cooperation concerning the peaceful uses of nuclear energy*" between sovereign States. These two State Parties are the only parties to this bi-lateral treaty, which grants and imposes, within the parameters and on the plane of the international public law, certain rights and duties or obligations on the State Parties thereto but which has no legal effect within the domestic law of either the Republic of South Africa or of the United States of America.

74.4 The case for the Applicants seems to be that, if the decision of the

Minister with regard to the tabling in Parliament of the American Treaty is set aside, it should follow that the American Treaty is then no longer regarded as a valid and binding international agreement or treaty under our law and by our courts. This issue - affecting the validity and binding nature of the American Treaty - is one that should not be dealt with in the absence of the Government of the United States of America as the other State Party thereto and without affording it an opportunity to state its case on this important issue.

74.5 For the same reason as stated in **paragraph 73.9 above**, the validity of the American Treaty will, on the case as advanced by the Applicants, also be affected by the relief that is being pursued by the Applicants in prayer 3 and 4 the Amended Notice of Motion - **[**page 360-361 of the record**]** -, to the effect that a determination in terms of section 34(1) of the ERA is allegedly a jurisdictional condition for validly concluding agreements pertaining to nuclear energy and prior to the commencement of any procurement for new nuclear plants.

74.6 In the result the Government for the United States of America is:

- a party who has (or may have) a direct and substantial interest in the subject-matter and outcome of this review application; or
- a party who might be prejudiced if any order pursued in this review application is sustained or put into effect;

so that it is a necessary party to this litigation.

Government of the Republic of Korea

75. As far as the Government of the Republic of Korea is concerned, I draw attention to the following:

75.1 The subject-matter of the relief that is being pursued by the Applicants in prayer 2(b) of the Amended Notice of Motion - **[**page 360 of the record**]** - is the South-Korean Treaty (annexure **'PL 24.2'** to the founding affidavit) and the relief itself is directly aimed at the South-Korean Treaty.

75.2 The said prayer 2(b) of the Amended Notice of Motion seeks an order declaring unlawful and unconstitutional, and reviewing and setting aside the decision of 10 June 2015 by the Minister to table the South-Korean Treaty in Parliament under section 231(3) of the Constitution, essentially on the ground of an unreasonable delay in the tabling thereof in Parliament.

75.3 The South-Korean Treaty (annexure **'PL 24.2'** to the founding affidavit) is also an international agreement in the sphere of international public law or the law between nations, concluded between the Government of the Republic of South Africa as the one State Party and the Government of the Republic of Korea as the other State Party, primarily dealing with "*cooperation concerning the peaceful uses of nuclear energy*" between sovereign States. These two State Parties are the only parties to this

bi-lateral treaty, which grants and imposes, within the parameters and on the plane of the international public law, certain rights and duties or obligations on the State Parties thereto but which has no legal effect within the domestic law of either the Republic of South Africa or of the Republic of Korea

75.4 The case for the Applicants seems to be that, if the decision of the Minister with regard to the tabling in Parliament of the South-Korean Treaty is set aside, it should follow that the South-Korean Treaty is then no longer regarded as a valid and binding international agreement or treaty under our law and by our courts. This issue - affecting the validity and binding nature of the South-Korean Treaty - is one that should not be dealt with in the absence of the Government of South-Korea as the other State Party thereto and without affording it an opportunity to state its case on this important issue.

75.5 For the same reason as stated in **paragraph 73.9 above**, the validity of the South-Korean Treaty will, on the case as advanced by the Applicants, also be affected by the relief that is being pursued by the Applicants in prayer 3 and 4 the Amended Notice of Motion - **[**page 360-361 of the record**]** -, to the effect that a determination in terms of section 34(1) of the ERA is allegedly a jurisdictional condition for validly concluding agreements pertaining to nuclear energy and prior to the commencement of any procurement for new nuclear plants.

75.6 In the result the Government of the Republic of Korea is:

- a party who has (or may have) a direct and substantial interest in the subject-matter and outcome of this review application; or
- a party who might be prejudiced if any order pursued in this review application is sustained or put into effect;

so that it is a necessary party to this litigation.

Concluding remarks

76. The only parties in this review application are, on the one side, the Applicants (being two South African non-governmental organisations not privy to or part of any of the treaties) and, as Respondents, the various organs of the national government of the Republic of South Africa (both executive and legislative) and the National Energy Regulator of South Africa. The other parties to those treaties (the Government of the Russian Federation and/or the Government for the United States of America and/or the Government of the Republic of Korea) are not before court and are not parties to this litigation despite their obvious status as necessary parties.

77. I may also mention that, on the broad basis upon which the case for the Applicants is advanced in respect of section 34(1) of the ERA in so far as it pertains to the jurisdictional conditions for the procurement of new nuclear plants from other countries even by way of international agreements (demonstrated *inter alia* by paragraph 64 and 70 of the founding affidavit) and in view of the

vendor parades involving them (as referred to in paragraph 69 of the founding affidavit and originally implicated by prayer 4 of the Notice of Motion on page 3 of the record), both the Government of the French Republic (being the other State Party to the treaty attached as annexure **'PL 24.1'** to the founding affidavit) and the Government of the People's Republic of China (being the other State Party to the treaty attached as annexure **'PL 24.5'** to the founding affidavit) are necessary parties that should also have been joined in this review application from the outset.

78. I respectfully submit that it is trite law that a party who has (or may have) a direct and substantial interest in the subject-matter or outcome of any litigation and/or who might be prejudiced if any order in the litigation is sustained or put into effect, is a necessary party to that litigation. It is also my submission that, where a necessary party to the litigation has not been joined in the litigation, a court may not deal with the issues therein without the joinder being effected. No question of discretion or conveniences arises.

79. In the result I ask that the plea of material non-joinder be upheld and that the matter be postponed or stayed so that the necessary parties can be joined, and I ask that the Applicants be ordered to pay the costs of such postponement with such costs to include the costs of three counsel.

NATURE OF POLICY-MAKING STEPS AND ACTIONS

80. This review application is directed at the following seven (7) decisions or steps taken by various organs of state, namely:

80.1 the decision of the President in terms of section 231(1) of the Constitution, to authorise the signing of the Russian Treaty;

80.2 the decision of the Minister in terms of section 231(1) of the Constitution, to sign the Russian Treaty;

80.3 the decision of the Minister in terms of section 231(3) of the Constitution, to table the Russian Treaty, the American Treaty and the South Korean Treaty in Parliament;

80.4 the decision of the Minister in terms of section 34(1) of the ERA, to make the 2013 determination;

80.5 the concurrence of NERSA in terms of section 34(1) of the ERA, with the 2013 determination;

80.6 the decision of the Minister (in terms of section 15 of the Interpretation Act 33 of 1957), to publish the 2013 determination in the Government Gazette; and

80.7 the decision of the National Executive and/or the Cabinet that the Minister and the Department must prepare and issue a Request for Proposals as the next step in the phased approach to the nuclear programme.

81. Not one of these decisions is an "*administrative action*" as defined in section 1 of the PAJA and therefor they are not to be reviewed on the grounds as set out in the PAJA. In this regard I draw attention to the following:

81.1 An "*administrative action*" is defined as follows in the relevant part of section 1 of the PAJA:

> "*... 'administrative action' means any decision taken ... by -*
> *(a) an organ of state, when -*
> *(i) exercising a power in terms of the Constitution ...; or*
> *(ii) exercising a public power or performing a public function in terms of any legislation; or*
> *(b) ...,*
> *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 sections 79 (1) and (4), 84(2)(a), (b), (c), (d), (f), (g), (h), (i) and (k), 85(2)(b), (c), (d) and (e), 91(2), (3), (4) and (5), 92(3), 93, 97, 98, 99 and 100 of the Constitution;*
> *(bb) ....*".

81.2 In the **first place** none of these decisions had any actual or potential "*adverse effect*" on the rights or legitimate interests of any person.

81.3 In the **second place** all these decisions fall under the exclusion provided for in paragraph (aa) of that definition, namely decisions taken in the exercise of the executive powers or functions of the National Executive, including the powers or functions referred to in section 85(2)(b), (c), (d) and (e) of the Constitution.

82. Section 85 of the Constitution reads as follows (own underlining added):

> "***85. Executive authority of the Republic.***
> *(1) The executive authority of the Republic is vested in the President.*
> *(2) The President exercises the executive authority, together with the other members of the Cabinet, by -*
> *(a) implementing national legislation except where the Constitution or an Act of Parliament provides otherwise;*
> *(b) developing and implementing national policy;*
> *(c) co-ordinating the functions of state departments and administrations;*
> *(d) preparing and initiating legislation; and*
> *(e) performing any other executive function provided for in the Constitution or in national legislation.*"

Especially section 85(2)(b), (c) and (e) of the Constitution is of relevance in this matter, in that all of the decisions at stake in this matter fall within the provisions of those subsections.

83. **Firstly**, the negotiating or signing of international agreements is the performance of an "*executive function provided for in the Constitution*" as contemplated in section 85(2)(e) of the Constitution, which executive function is provided for in section 231 thereof and of which the text reads as follows (own underlining for the sake of emphasis):

> "***231. International agreements***
> *(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) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.*"

In the result the first three (3) decisions listed in **paragraph 80.1-80.3 above** are the exercise or discharge of an executive power or function of the National

Executive and are expressly excluded from the definition of an "*administrative action*" in section 1 of the PAJA.

84. **Secondly**, I submit that neither a ministerial determination under section 34(1) of the ERA nor the decision to publish it is, over and above what I have stated in **paragraph 81.2 above**, an "*administrative action*" in terms of 1 of the PAJA because such a determination (or its publication) is in substance also the exercise or discharge of a national executive power or function by developing and implementing national policy (in terms of section 85(2)(b) of the Constitution) and/or by co-ordinating the functions of state departments and administrations (in terms of section 85(2)(c) of the Constitution) and/or by performing any other executive function provided for in national legislation (in terms of section 85(2)(e) of the Constitution). As I will show more fully in **paragraph 111-122 below**, a ministerial determination in terms of section 34(1) of the ERA is in substance an encased policy directive which binds NERSA in issuing a generation licence and which ensures that national policy is implemented in the energy supply sector.

In the result the next three (3) decisions listed in **paragraph 80.4-80.6 above** are the exercise or discharge of an executive power or function of the National Executive and are expressly excluded from the definition of an "*administrative action*" in section 1 of the PAJA.

85. **Thirdly** I submit that, although the decision to award a tender (or the failure to take such a decision) constitutes an "*administrative action*" in terms of 1 of the

PAJA, it is trite law that the prior decision to prepare and issue a Request for Proposals (as the next step in the phased approach to the nuclear programme) is not. Such a prior decision is also one which does not have any direct, external legal effect.

86. Accordingly none of these decisions are "*administrative action*" but are in essence "*executive action*" and, to the extent that they are subject to review by the judicial branch of government, only reviewable under the doctrine of legality.

AUTHORISING AND SIGNING OF RUSSIAN TREATY

87. I repeat my objection to the Honourable Court taking cognisance of and interpreting the Russian Treaty, for reasons already stated. In any event the decision to authorise and sign the Russian Treaty:

87.1 was authorised in terms of section 231(1) of the Constitution;

87.2 was rationally taken in pursuit of a self-sufficient and globally-competitive nuclear programme (based on a rationally-selected preference for Pressurised Water Reactor Technology that would secure the supply of electricity by ensuring a flexible mix of sources of supply, that would reduce the emissions of greenhouse gas, and that would grow industry and the economy to eradicate poverty) for which the conditions or an environment, that would allow the establishment thereof in accordance

with international law, first had to be created; and

87.3 did not call for any prior process of public participation or consultation.

88. I repeat what I have stated in **paragraph 11 and 52 above**. The opportunistic meaning, incorrect interpretation and false label that the Applicants wish upon the Russian Treaty are the foundations of their attack and, given the true position in respect thereof, no case for any relief in respect of the decision to authorise and sign the Russian Treaty has been made out.

89. There is thus, with respect, no ground for a legality review in respect thereof.

90. The claim (in paragraph 151 of the founding affidavit) that the terms of the Russian Treaty are more extensive and include far greater commitments that any of the other treaties, is not only an inadmissible opinion or the statement of an inference without any attempt at actually explaining and detailing the comparison but is also factually incorrect. I do not wish to embark on a comprehensive analysis and comparison of the five (5) treaties but in general each provides for cooperation between sovereign States on the peaceful use of nuclear energy and the transfer of nuclear technology as well as its intellectual property to the Republic of South Africa. To the extent that they do differ here and there or go into more detail on some aspects than on others, those differences are the result of the negotiation process itself where each negotiating State has its own agenda and interests to pursue.

91. Article 4 of the Russian Treaty (dealt with in paragraph 152.5 of the founding affidavit) can be compared to article 3(b) of the French Treaty (on page 223 of the record): the cooperation mentioned in article 2 thereof (in the field of peaceful uses of nuclear energy in accordance with the principal needs and priorities of the national nuclear programmes of the respective State Parties) may cover the following areas: use of nuclear energy for electricity generation, including the design, construction, operation and decommissioning of nuclear power plants in the Republic of South Africa, with total installed capacity of about 9.6 GW, and the fabrication of nuclear fuel. There is also article 2.1 of the Chinese Treaty: after taking into account in the preamble (on page 301 of the record) that the Republic of South Africa is planning civil nuclear energy new-builds with a total capacity of 9.6 GW, with the aim of satisfying the increasing power demand, reduce carbon emissions, facilitate localisation for industrialisation, economic and social development, and is also willing to conduct cooperation with the People's Republic of China based on the significant on-going and longstanding cooperation between the two countries (described in the same preamble as the "*comprehensive strategic partnership*" between them), the Chinese Treaty then proceeds in article 2.1 thereof (on page 302 of the record) to state that the State Parties will encourage and facilitate their respective enterprises to cooperate in the civil nuclear energy sector, including but not limited to - the fields of experience exchange, personnel training, site evaluation and selection, localisation, project planning, project management, consultancy, enhance infrastructure development, fundamental research, design and engineering, investment and financing, construction, operation,

maintenance, equipment and fuel supply as well as development of new technology for civil nuclear energy new-builds in the Republic of South Africa and the People's Republic of China, and any other third country. In the final analysis it is the express or implied objective of each treaty to make available and transfer the unique nuclear technology and related knowledge of the vendor country concerned to the Republic of South Africa, and in this regard there is in principle no difference between the specificity or firmness of the commitments by the other State Parties.

92. In passing I wish to point out that section 217 of the Constitution requires, when an organ of state contracts for goods or services, that it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. Section 231 of the Constitution refers to an international agreement. The Constitution seems to draw a distinction between the concept of a commercial *contract* (as used not only in section 217 thereof but also in item 24(1)(a) of Schedule thereof read with item 5 of its annexure D) and the concept of a political or international *agreement* (in section 99(a), 126(a), 156(4) and 231 thereof). I respectfully submit that section 217 of the Constitution is in the main concerned with a procurement system operating with the context of our domestic law and within our national territory where the State procures goods and services from its citizens. Historically the taxing power of the State over its citizens and territory was constrained by revenue laws so as to distribute the financial burden for financing the household of the State equitably and fairly, but in modern times there is a growing realisation that the spending power of the State must also be

constrained by procurement laws in an open and democratic society based on human dignity, formal and especially substantive equality, and freedom. In the premise an international agreement allowing for cooperation between sovereign States is not within the contemplation of section 217 of the Constitution and whatever performance there is of an international agreement, or whatever benefits the Republic of South Africa receives in terms thereof, cannot be regarded as "*goods and services*" for which the State has contracted.

93. The Russian Treaty has been lawfully and constitutionally negotiated, authorised and signed by the National Executive.

TABLING OF RUSSIAN TREATY

94. I repeat my objection to the Honourable Court taking cognisance of and interpreting the Russian Treaty, for reasons already stated. I also repeat what I have stated in **paragraph 12 and 52 above** and more specifically:

94.1 I deny **in the first place** that the Applicants have any standing to claim relief in respect of the tabling of the Russian Treaty in Parliament;

94.2 I respectfully submit **in the second place** that the decision of the Minister to table the Russian Treaty under section 231(3) of the Constitution is not justiciable in a domestic court; and

94.3 if it is found to be, then I respectfully submit **in the third place** that the category, in which the Russian Treaty objectively falls for the purposes of tabling in Parliament, is the one contemplated by section 231(3) of the Constitution.

95. Thus the decision by the Minister to table the Russian Treaty in Parliament in any event:

95.1 was authorised in terms of section 231(3) of the Constitution;

95.2 was rationally taken in view of the nature thereof; and

95.3 did not call for any prior process of public participation or consultation.

96. An analysis of paragraph 161-168 of the founding affidavit (on page 90-92 of the record) and paragraph 40-50 of the supplementary affidavit (on page 387-392 of the record) shows that the case for the Applicants is founded on the following propositions:

96.1 that the tabling of the Russian Treaty under section 231(3) of the Constitution made that international agreement binding upon the Republic of South Africa without Parliamentary approval;

96.2 that the Russian Treaty was the type of international agreement which

required Parliamentary approval under section 231(2) of the Constitution:

96.2.1 because of its content and extent as discussed by the Applicants;

96.2.2 because of the financial commitments being made to Russia therein;

96.2.3 because the Russian Treaty is intended to take precedence over any subsequent agreement;

96.2.4 because the Russian Treaty may preempt the procurement process or at least create a perception of favouritism;

96.2.5 because tabling for Parliamentary approval would have allowed for a debate in Parliament and would have created an opportunity for public participation; and

96.3 that the Minister acted irrationally in ignoring the advice of the State Law Advisor that the Russian Treaty had to be tabled under section 231(2) of the Constitution.

97. As far as **paragraph 96.1 above** (the submission on the legal effect of tabling in Parliament) is concerned, I draw attention to the following:

97.1 Whereas the tabling procedure under section 231(2) of the Constitution is for the purpose of obtaining the approval of Parliament for an international agreement in order to make it binding upon the Republic of South Africa, the tabling procedure under section 231(3) thereof is for the purpose of notification of Parliament of an international agreement entered into by the National Executive and which already binds the Republic of South Africa without requiring the approval of Parliament.

97.2 I note that there are various allegations in the founding affidavit (in paragraph 7 on page 11 of the record, in paragraph 89 on page 43 of the record, in paragraph 112 and 114 on page 57 of the record and in paragraph 177 on page 94-95 of the record) to the effect that the tabling in Parliament under section 231(3) of the Constitution makes an international agreement binding on the Republic of South Africa without parliamentary approval, as if such tabling in Parliament is a formality or prerequisite in law for the category of international agreement that is contemplated by that provision. Those allegations are incorrect and I respectfully submit that the purpose of this tabling procedure is for notification purposes only.

97.3 In this regard it should also be noted that:

- the functional area of international relations with other sovereign States (or "*foreign affairs*" as it was previously referred to) is a functional area over which the National Sphere of Government has

exclusive jurisdiction, by virtue of section 44(1)(a)(ii) of the Constitution read with Schedule 4 and Schedule 5 thereof;

- under the doctrine of separation of powers, section 44(1) of the Constitution vests the national legislative authority in Parliament whilst section 231(1) of the Constitution entrusts the responsibility for the negotiating and signing of all international agreements to the National Executive; and
- section 231(2) and section 232(3) of the Constitution clearly draws a distinction between two categories of international agreements, namely those that require parliamentary approval in order to be binding upon the Republic of South Africa and those that do not require parliamentary approval in order to be binding upon the Republic of South Africa.

97.4 Section 55(1) and section 68 of the Constitution set out the scope for the exercise of the legislative power vested in Parliament, which in my submission does not include the power of parliamentary approval of international agreements; in other words, the approval of an international agreement by Parliament is not done in the exercise of the legislative power of Parliament; such a power is however implicit in section 231(2) of the Constitution and of an *ad hoc* nature. In this context the tabling procedure then serves to bring the proposed international agreement to the attention of Parliament for its consideration and approval (which is not to be done by way of the passing of legislation).

97.5 The tabling procedure under section 231(3) of the Constitution operates in a different context, namely in the context of the mechanisms to be provided by the National Assembly in terms of section 55(2) of the Constitution to ensure that all executive organs of state in the National Sphere of Government are accountable to it and to maintain oversight of the exercise of National Executive Authority, including the implementation of legislation, and of any organ of state. This is where section 92 of the Constitution, dealing with the accountability and responsibilities of the National Executive to Parliament, potentially becomes relevant:

> "***92. Accountability and responsibilities.***
> *(1) The Deputy President and Ministers are responsible for the powers and functions of the executive assigned to them by the President.*
> *(2) Members of the Cabinet are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions.*
> *(3) Members of the Cabinet must -*
> *(a) act in accordance with the Constitution; and*
> *(b) provide Parliament with full and regular reports concerning matters under their control.*"

The tabling procedure under section 231(3) of the Constitution thus operates between the two constitutional pillars of accountability of the National Executive and oversight by Parliament, contributing towards openness and transparency in government.

97.6 The constitutional scheme is that those international agreements that require the approval of Parliament in order to make it binding upon the Republic of South Africa, are tabled in Parliament under section 231(2) of the Constitution for Parliament to exercise its *ad hoc* power of considering and approving that international agreement so as to make it binding; however, those international agreements that do not require the approval of Parliament in order to make them binding upon the Republic of South Africa, are tabled in Parliament under section 231(3) of the Constitution for Parliament to take note thereof but Parliament has no power to intervene and cannot undo such international agreement: its power and remedies in this regard are in the political domain of oversight and accountability.

97.7 The tabling procedure under section 231(3) of the Constitution does not operate to make an international agreement binding without approval of Parliament.

98. As far as **paragraph 96.2 above** (the submission that the Russian Treaty was the type of international agreement which required Parliamentary approval under section 231(2) of the Constitution) is concerned, I draw attention to the following:

98.1 I submit that section 231 of the Constitution is concerned with only two categories or kinds of international agreements, namely the one category of international agreements that require the approval of Parliament in

order to make them binding upon the Republic of South Africa and the other category of international agreements that do not require the approval of Parliament in order to make them binding upon the Republic of South Africa.

98.2 The structure of section 231(2) of the Constitution is to make the first category the general one and the second category a closed one, so that one has to start with delineating the scope and ambit of the second category with all international agreements falling outside of that scope and ambit then resorting under the first category.

98.3 The international agreements contemplated under section 231(3) of the Constitution are:

- an international agreement of a technical, administrative or executive nature; or
- an international agreement which does not require either ratification or accession (which is traditionally required in the case of multi-lateral treaties between a number of States).

There are no further provisions or definitions in the Constitution that can assist to clarify or explain the meaning of these phrases or of the terminology used in the Constitution. We need, however, not go any further with the analysis because the Russian Treaty is in fact (1) an international agreement of a technical, administrative or executive nature (for cooperation between States in the peaceful uses of nuclear energy)

and in any event (2) an international agreement which does not require either ratification or accession (especially given its bi-lateral nature).

98.4 I have already explained that the views of the Applicants on the content and extent of the Russian Treaty is wrong - it is not a procurement contract and the Russian fleet is not at anchor in Cape Town harbour to deliver a new nuclear power plant.

98.5 The Russian Treaty makes no direct financial commitments whatsoever therein to Russia and the reading in of such commitments into the Russian Treaty by the Applicants is absolutely convoluted for reasons already discussed.

98.6 I have already explained that the views of the Applicants on the so-called precedence of the Russian Treaty over "*subsequent agreements*" are misconceived: article 16 thereof is only an ordinary and standard tool of interpretation to ensure consistency between the Russian Treaty and the agreements concluded with the framework thereof to implement cooperation already envisaged by the Russian Treaty. Also this framework character of the Russian Treaty (and the other treaties) is an important feature showing that it was not an international agreement requiring the approval of Parliament to become binding but provided an umbrella or framework for technical, administrative or executive cooperation that may well result in further international agreements to

implement it and that may or may not require the approval of Parliament to become binding.

98.7 The history and background already dealt with herein above show that the Russian Treaty does not preempt or potentially preempt and compromise the future procurement process.

98.8 The fact that in the one instance certain consequences will follow (such as a debate in Parliament or an opportunity for public participation) can surely not be a relevant factor to decide in which category an international agreement falls: it is the nature of the cart that will influence the choice of horses and not the other way round.

98.9 There is with respect nothing in the Russian Treaty itself which directly and immediately calls for any new domestic legislation or which calls for an allocation or budget by Parliament or which has any domestic effect: it is an international agreement of a technical, administrative or executive nature between Governments on the level of the National Executive, allowing cooperation between them in the course of their international relationship and under international law. Once further implementation agreements or even commercial contracts are to be entered into, different considerations may apply.

99. As far as **paragraph 96.3 above** (the submission that the Minister acted

irrationally in ignoring the "*advice*" of the State Law Advisor that the Russian Treaty had to be tabled under section 231(2) of the Constitution) is concerned, I draw attention to the following:

99.1 At the outset I point out that section 231 of the Constitution does not provide for a discretionary power in terms of which the Minister has a subjective choice that she can make between the two tabling procedures: the appropriate tabling procedure is determined solely by the objective nature of the international agreement in question and the category in which it falls. She thus does not "*decide*" but gives "*permission*" for tabling in Parliament (as also appears clearly in her letter of 19 June 2015 on page 216-2-17 of the record).

99.2 The remark by the State Law Advisor was not part of any advice to the Minister but was part of his explanatory memorandum that he prepared for Parliament, in which he made the remark concerning tabling in passing (on page 509 of the record) and without any reason or explanation. The Minister is not a rubber stamp for the unsubstantiated views of the State Law Advisor.

100. In the result I submit that it is completely irrelevant whether or not the decision of the Minister was irrational or arbitrary on any subjective level because the true issue is whether objectively the correct tabling procedure has been followed, but in any event and even on a subjective level there was no flaw in the decision of

the Minister.

TABLING OF AMERICAN TREATY AND SOUTH-KOREAN TREATY

101. As I have mentioned in **paragraph 13 above**, the Applicants in prayer 2 of the Amended Notice of Motion - **[**page 360 of the record**]** - seek an order declaring unconstitutional and unlawful, and reviewing and setting aside, the decision of 10 June 2015 by the Minister to table the American Treaty and the South-Korean Treaty in Parliament in terms of section 231(3) of the Constitution.

102. Section 231(3) of the Constitution provides as follows:

> "*(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.*"

103. The case for the Applicants is not that the wrong tabling procedure was used and that the American Treaty and the South-Korean Treaty should have been tabled in Parliament in terms of the different tabling procedure for approval purposes under section 231(2) of the Constitution. The premise of their case is clearly that the tabling procedure for notification purposes under section 231(3) of the Constitution is applicable but that the ministerial decision to table the two treaties in Parliament was flawed because:

103.1 of an alleged unreasonable delay in the tabling thereof, with the American Treaty having been signed in 1995 and the South-Korean Treaty having been signed in 2010, but with them only being tabled in 2015; and

103.2 of an alleged ulterior purpose with the tabling thereof, namely to serve as window-dressing to undo the alleged damage that was done by revelations regarding the Russian Treaty.

104. In **paragraph 13 above** I have already outlined the case and arguments for the President and the Minister in broad outline but for the sake of clarity I emphasise the following:

104.1 **Firstly**, the Applicants have no standing to claim this particular relief.

104.2 **Secondly**, I deny any allegation of an alleged ulterior purpose with the tabling of either the American Treaty or the South-Korean Treaty and I reject the contention that the tabling thereof was mere window-dressing to allegedly undo the "*damage*" that was done by revelations regarding the Russian Treaty.

104.3 **Thirdly**, I deny the allegation that there was any unreasonable delay with the tabling of either the American Treaty or the South-Korean Treaty.

104.4 **Fourthly** and even if the Honourable Court should find that there was an

unreasonable delay with the tabling of the American Treaty and/or the South-Korean Treaty, I respectfully submit that it is only the unreasonable delay that is unconstitutional and I submit that neither the validity of the two treaties nor the fact of their tabling is affected thereby.

105. I now turn to deal in more detail with the aforesaid propositions:

106. As far as **paragraph 104.1 above** (the submission on standing) is concerned, I draw attention to the following:

106.1 I repeat **paragraph 97.1-97.6 above**.

106.2 I respectfully submit that, within the parameters of this constitutional scheme, any alleged unreasonable delay with the tabling of an international agreement in Parliament for notification purposes under section 231(3) of the Constitution, and for that matter even any alleged ulterior motive for doing so or with the timing thereof, is a matter for Parliament to deal with.

106.3 Accordingly and if there were any such concerns with the tabling of either the American Treaty or the South-Korean Treaty in Parliament, then it was for Parliament to make that call and to take this up with the National Executive or the Minister.

106.4 I respectfully submit that, once there was such a notification tabling in Parliament, no court order can undo the fact of notification to Parliament or delete the subjective knowledge thereof from the individual minds of Members of Parliament; in fact, I cannot think of any practical effect that such a court order will have and the matter is, with respect, moot.

106.5 Accordingly I respectfully submit that the Applicants have no standing to claim this relief.

107. As far as **paragraph 104.2 above** (the submission on ulterior purpose) is concerned, I draw attention to the following:

107.1 The Applicants claim (in paragraph 169 of the founding affidavit on page 93 of the record as well as in paragraph 54 of the supplementary affidavit on page 392 of the record) that the tabling of the various international agreements, including the American Treaty and the South-Korean Treaty, was "*little more than window dressing*" to allegedly undo the "*damage*" that was done by revelations regarding the Russian Treaty and thus for an ulterior purpose. They also insinuate (in paragraph 170 of the founding affidavit on page 93 of the record) that the negotiation and signing of the French Treaty (annexure **'PL 24.1'** to the founding affidavit) as well as the Chinese Treaty (annexure **'PL 24.5'** to the founding affidavit) was a mere "*pretence*".

107.2 I categorically deny both these allegations and I reject the suggestion that the National Executive engaged other sovereign States in bad faith. The only basis for this preposterous accusation is the timing of events (which is explained in **paragraph 54 above**) and the idiosyncratic interpretation and construction that the Applicants improperly and impermissibly put on the Russian Treaty as a procurement contract (which is dealt with in **paragraph 52 above**).

107.3 As I have already pointed out, the Republic of South Africa is a founder member of the International Atomic Energy Agency. The IAEA develops and maintains a database of all reactor types globally in operation and those under construction, called the Power Reactor Information System. This database includes specifications, technical data and performance history data on operational reactors as well as on reactors under construction or in the decommissioning process. Based on an analysis of the information obtained from that database, the National Executive made the policy-decision that the Pressurised Water Reactor technology was the preferred technology of choice as far as the Republic of South Africa is concerned. The two Koeberg Nuclear Reactors are also Pressurised Water Reactors.

107.4 Our initial screening revealed that a very small number of countries could be relied upon to provide that technology: the Republic of Korea, the United States of America, the Russian Federation, the French Republic,

the People's Republic of China, Canada and the Kingdom of Japan. We then decided to approach each of them with an invitation to attend a vendor parade workshop, where each country could present what its nuclear technology had to offer and to demonstrate its capabilities on, if it was chosen, how it planned to meet the need of South Africa for a nuclear new build programme. Each vendor country was requested to address the same list of topics (ranging from nuclear power plant technology and construction to financial matters and to non-proliferation matters). The idea was that we could use all of the information and ideas gathered at these workshops to prepare a procurement plan or strategy on the basis of which we can then take a decision to embark upon a procurement process. This resulted in such workshops to be held in South Africa with these countries, so as to provide us with further information to use in the phased approach for decision-making in the nuclear programme. Negotiations with Canada and Japan are ongoing and we have yet to finalise an international agreement with each of them, which will also be tabled in Parliament as soon as possible thereafter.

107.5 Because of the international obligations of the Republic of South Africa and our membership to the IAEA, operating under a demanding international law regime striving for the peaceful and safe use of nuclear power and nuclear technology, we insisted throughout that, for any country to qualify for any procurement process that may follow, that country has to enter into an acceptable bi-lateral international agreement

for cooperation between the two countries. Even if a company or entity within that country should become the contracted supplier of any new nuclear plant, the flow or transfer of nuclear knowledge and technology from one country to another country was and is a matter that in our view has to be regulated by an international agreement. We already had the American Treaty and the South-Korean Treaty in place and embarked upon also having the other international agreements being negotiated and signed. Those negotiations were conducted seriously and in good faith, as befits international relationships between sovereign States. As a result, three other international agreements were then concluded. We are still in the process of negotiating such an international agreement with the Kingdom of Japan and with Canada.

107.6 This then was the background for tabling all of these treaties together and at the same time in Parliament: this resulted from the policy choice to opt for the Pressurised Water Reactor technology, our investigations into that technology and our attempts to open up the international doors that would assist our country in this endeavour. There was no ulterior motive, pretence or window dressing in this regard and the allegations in this regard are false.

107.7 I repeat that those false and unfounded allegations, amounting to bad faith on the part of the Republic of South Africa in its international relations with two other sovereign States, are irresponsible and damaging

to the international reputation and goodwill of this country.

108. As far as **paragraph 104.3 above** (the submission on the absence of any unreasonable delay) is concerned, I draw attention to the following:

108.1 The case for the Applicants is founded merely upon the period of time that elapsed between the signing of the international agreement in question and the tabling thereof in Parliament: in the case of the American Treaty some 20 years and in the case of the South-Korean Treaty some 5 years.

108.2 I respectfully submit that what is or is not a reasonable period of time for the tabling of an international agreement under section 231(3) of the Constitution is not simply a question of how much time elapsed between the signature and the tabling thereof: the intricacies of international relations, the state of our national economy, the needs of our local industry, the prevailing circumstances and aspects of political expediency are some of the factors to also take into consideration.

108.3 The American Treaty (in 1995) and the South-Korean Treaty (in 2010) were concluded because the circumstances were such that the cooperation between the State Parties, as contemplated therein, did become politically possible with international doors having been opened at an expedient time as far as the peaceful use of nuclear energy was

concerned and at a time when it was opportune to foster international relationships with these two State Parties in general. In this period some of the relevant domestic legislation were:

- the Hazardous Substances Act 15 of 1973 (especially in so far as it pertains to the Group IV hazardous substances);
- the Non-proliferation of Weapons of Mass Destruction Act 87 of 1993;
- the Nuclear Energy Act 131 of 1993;
- the Nuclear Energy Act 46 of 1999;
- the National Nuclear Regulator Act 47 of 1999; and
- the National Radioactive Waste Disposal Institute Act 53 of 2008.

108.4 The period since 1993 was also a period of transition from a previous constitutional dispensation to our present constitutional dispensation and that transition, or the desired transformation of our country and its various institutions, is, in various respects, not yet complete.

108.5 Before 1993 it became an open secret that the South African Apartheid Government had a nuclear weapons programme. In 1988 the South African Apartheid Government expressed its willingness to accede to the Treaty on the Non-Proliferation of Nuclear Weapons if certain conditions were met, primarily that South Africa be allowed to market its uranium subject to IAEA safeguards. During or about 1991 the South African Apartheid Government terminated the nuclear weapons programme and

all nuclear devices were dismantled and destroyed, with the existing strategic nuclear facilities and material being decontaminated and dedicated to non-military and commercial or research purposes.

108.6 From the onset of our new constitutional dispensation in 1993, one of the focuses of the new South African Government was the issue of non-proliferation and South Africa has in fact become a champion of nuclear non-proliferation efforts, not only on a global level but also on the African continent. However, as far as trade and commerce, and the development of industry or scientific and medical research, was concerned, there was very little, if any, practical or immediate need and no particular projects which called for co-operation between the relevant countries on matters concerning the peaceful uses of nuclear energy.

108.7 The true importance and relevance of the American Treaty and the South-Korean Treaty only became apparent when the policy-decision was taken that the Republic of South Africa should in general opt for the Pressurised Water Reactor technology as far as nuclear power plants are concerned and when the prospect of a possible nuclear power procurement started to loom after the promulgation of the Integrated Resource Plan (2010-2030) with firmly allocated some 23% of nuclear power as part of the mix of energy sources for the supply of electricity. The Minister and the Department only realised then, during the course of our preparation and conduct of the various vendor parades, that the

American Treaty and the South-Korean Treaty had not been tabled as far as I and my officials could ascertain.

108.8 In the result there was a rational and valid reason for tabling the two treaties and, under the circumstances, the period taken for doing so was not unreasonable; in any event no blame for that can be attributed to the present holders of office.

109. As far as **paragraph 104.4 above** (the submission on the effect of an unreasonable delay) is concerned, I draw attention to the following:

109.1 I repeat what I have stated in **paragraph 97.7 above**: the tabling in Parliament of an international agreement under section 231(3) of the Constitution is not a formality or prerequisite in law for this category of international agreements, contemplated in this provision, for such international agreements to become, to be or to continue as binding in international law.

109.2 Even if the Honourable Court should therefore conclude that there was an unreasonable delay with the tabling in Parliament of the American Treaty and/or of the South-Korean Treaty, I respectfully submit that it is only the unreasonable delay that is unconstitutional and I submit that such a delay does not affect the validity or effectiveness of the tabling itself nor does it make either of those two treaties invalid or without any

binding or legal effect in the field of international public law or in so far as international relationships between the relevant countries are concerned. The appropriate response to an unreasonable delay is to bring an end to the delay (even if it means applying for a mandamus to court) and, now that there has been a tabling in Parliament, the delay issue is with respect moot.

110. It makes no rhyme or reason to visit the tabling decision of the present Minister and/or the two treaties themselves with invalidity because of a delay in the tabling thereof. That would create a situation where these two treaties were at some stage regarded as binding and then, at some undeterminable and uncertain moment in time when the delay in tabling them in Parliament became unreasonable, became non-binding. This will bring about a degree of uncertainty and capriciousness in international relations that can, with respect, not be allowed or tolerated. It will also imply that the Republic of South Africa as a State Party will be allowed to escape from binding treaty obligations by what amounts to be its own unlawful conduct.

INTERPRETATION OF SECTION 34 OF ERA

111. With reference to the relief pursued in prayer 3(a) and (b) of the Amended Notice of Motion - **[**page 360-361 of the record, seeking a declaratory order on the proper interpretation of section 34 of the ERA**]** - the Applicants appear to advance the following three propositions for the alleged proper interpretation of

section 34 of the ERA, namely:

111.1 that a ministerial determination in terms of section 34(1)(a), (b) and (f) of the ERA must be made in consultation with NERSA and thus (when read with section 10(1)(d) of the National Energy Regulation Act 40 of 2004) in accordance with a procedurally fair and public participation process;

111.2 that a ministerial determination in terms of section 34(1)(f) of the ERA must specify the procurement system for the nuclear new generation capacity; and

111.3 that a ministerial determination in terms of section 34(1) of the ERA is a prerequisite or jurisdictional condition for the ministerial powers provided for in section 34(2) of the ERA, so that they can only be exercised and/or the procurement process (from the moment of bid specification onwards) can only commence after such determinations.

112. Accordingly the proper interpretation of section 34of the ERA is at stake and for that purpose we need to look briefly at the context and history of this provision.

113. As I have stated in **paragraph 27.2 above**, the ERA was enacted in 2006:

- to establish a national regulatory framework for the electricity supply industry;
- to make NERSA the custodian and enforcer of the national electricity

regulatory framework;

- to provide for licences and registration as the manner in which generation, transmission, distribution, reticulation, trading and the import and export of electricity are regulated;
- to regulate the reticulation of electricity by municipalities; and
- to provide for matters connected therewith.

There is no indication in its long title that it had to do with the procurement of electricity by the State and that was not one of the mischiefs addressed at the time. The mischief catered for was, in fact, to prepare a legislative framework for the contentious privatisation of the electricity supply industry.

114. The result was a statute arranged in seven (7) chapters. Chapter 1 dealt with definitions and the objectives of the statute, chapter 2 had four sections on the oversight of the electricity industry, chapter 3 had twenty sections setting out a command-and-control regulatory system for electricity licences and registration, chapter 4 dealt in three sections with the reticulation of electricity by local authorities, chapter 5 provided in two sections for the resolution of disputes and remedies, chapter 6 had on section on investigations whilst chapter 7 contained a number of general provisions (of which section 34 of the ERA is one).

115. ERA as a statute was enacted at a time when a general procurement system, complying with the requirements of section 217 of the Constitution, was already in place under the Public Finance Management Act 1 of 1999 read with the Treasury Regulations published under Government Notice R.225 of 15 March

2005 and the Preferential Procurement Policy Framework Act 5 of 2000: that decentralised procurement system already authorised the procurement of any "*goods and services*" by an organ of state and the auspices of an accounting officer and already provided for the different procurement methods and procurement procedures that were available to any organ of state. In fact, the Republic of South Africa then in 2006 had (and still has) a dual system for procurement: the decentralised one already described and a centralised one established under the State Tender Board Act 86 of 1968.

116. Against this background and in this context section 34 of the ERA was enacted, with this section - a general provision in an over-arching national regulatory framework for the electricity supply industry of which NERSA was the custodian and enforcer - reading as follows (own underlining for the sake of emphasis):

> "***34. New generation capacity.***
> *(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) The Minister has such powers as may be necessary or incidental to any purpose set out in subsection (1), including the power to -

(a) undertake such management and development activities, including entering into contracts, as may be necessary to organise tenders and to facilitate the tendering process for the development, construction, commissioning and operation of such new electricity generation capacity;

(b) purchase, hire or let anything or acquire or grant any right or incur obligations for or on behalf of the State or prospective tenderers for the purpose of transferring such thing or right to a successful tenderer;

(c) apply for and hold such permits, licences, consents, authorisations or exemptions required in terms of the Environmental Conservation Act, 1989 (Act No. 73 of 1989) or the National Environmental Management Act, 1998 (Act No. 107 of 1998), or as may be required by any other law, for or on behalf of the State or prospective tenderers for the purpose of transferring any such permit, licence, consent, authorisation or exemption to a successful tenderer;

(d) undertake such management activities and enter into such contracts as may be necessary or expedient for the effective establishment and operation of a public or privately owned electricity generation business;

(e) subject to the Public Finance Management Act, 1999 (Act No. 1 of 1999), issue any guarantee, indemnity or security or enter into any other transaction that binds the State to any future financial commitment that is necessary or expedient for the development, construction, commissioning or effective operation of a public or privately

owned electricity generation business.

(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.

(4) In exercising the powers under this section the Minister is not bound by the State Tender Board Act, 1968 (Act No. 86 of 1968)."

117. The first remarkable aspect of section 34(1) of the ERA is that the Minister is given a discretionary power: she "*may*" make a determination. If this was the only legal and prescribed route for procuring any new generation capacity in the electricity supply industry (including a nuclear capacity), one would have expected the legislator to say so expressly and to impose a duty on the Minister in this regard, especially in view of already existing procurement systems. The second remarkable aspect of section 34(1) of the ERA is that the Minister need not make a determination in respect of all the subparagraphs thereof; after all, she has a discretion and there is no pressing need or reason why all of the aspects covered in section 34(1)(a)-(e) of the ERA need to be "*determined*" each and every time; private sector participation is not always a realistic and achievable objective. A third remarkable aspect of section 34(1)(e) of the ERA is that it refers to a tender procedure (which is a specific method of procurement) and not to a procurement system. In context and where the Minister requires (if she in her discretion decides so) that a tender procedure has to be followed, the powers in section 34(2)(a)-(c) of the ERA assume such a required tender procedure and are available to the Minister. The fourth remarkable aspect is

that the powers in section 34(2)(d)-(e) of the ERA are not confined to an instance where a tender procedure was required but pertain to various activities in connection with the establishment or operation of a public or privately-owned electricity generation business. The fifth remarkable aspect of section 34(3)(a) of the ERA is that NERSA (and only NERSA) is bound, in issuing a generation licence, by the ministerial determination.

118. I start with the proposition in **paragraph 111.2 above**. The Applicants propose that a ministerial determination in terms of section 34(1)(f) of the ERA must specify the procurement system for the nuclear new generation capacity. That simply does not make sense: dual systems of procurement are already available (albeit that the Minister is, in terms of section 34(4) of the ERA, not bound but in theory still free to follow the State Tender Board Act 86 of 1968), the Minister is expressly entrusted with a discretionary power in this regard, and there is no way in which this provision can now be read as containing a compulsory "*must*" when considering a determination or new generation capacity.

119. The next proposition I deal with is the one in **paragraph 111.3 above**. The Applicants propose that a ministerial determination in terms of section 34(1) of the ERA is a prerequisite or jurisdictional condition for the ministerial powers provided for in section 34(2) of the ERA, so that they can only be exercised and/or the procurement process (from the moment of bid specification onwards) can only commence after such determination. I do not understand why the Minister would be empowered to create a power of procurement for the Minister

herself. The procurement process can be conducted under the already existing procurement systems and there is no sense in making a ministerial determination a prerequisite or jurisdictional condition for the procurement process. In any event the powers in section 34(2) of the ERA are given not as necessary or incidental to any determination made under section 34(1) thereof, but she is given "*such powers as may be necessary or incidental to any purpose set out*" therein.

120. I have already explained in **paragraph 123.2.2 above** why section 10(1)(d) of the NERA is not applicable to the concurrence of NERSA with a ministerial determination as required by section 34(1) of the ERA and why that concurrence is not a decision as contemplated in section 10(1) of the NERA. Such a concurred-in ministerial determination is also not "*administrative action*" as defined in section 1 of the PAJA and there is no practical reason why a process of public participation should be followed in respect of a ministerial determination under section 34(1) of the ERA. The proposition in **paragraph 111.1 above** is thus also without substance.

121. I venture to suggest that a ministerial determination under section 34(1) of the ERA is in substance nothing more than an encased executive policy choice for the electricity supply industry, made binding upon the custodian and enforcer thereof to ensure that NERSA exercises its power to issue a generation licence in a manner consistent with government policy: this is the very situation envisaged by section 85(2)(b) and (e) of the Constitution. That is also why a

ministerial determination under section 34(1) of the ERA can have no actual or potential adverse effect for any other person but only impacts on NERSA, who must concur therewith. That is also why there is no provision for the delegation of this power, which has to be exercised by the Minister personally.

122. Having said all of this, I must not be taken to have abandoned the arguments and objections set out in **paragraph 14 above**, which I repeat.

REVIEW OF 2013 DETERMINATION UNDER SECTION 34(1) OF ERA

123. With reference to the relief pursued in prayer 4(a) of the Amended Notice of Motion - **[**page 361 of the record, seeking a declaratory order that the 2013 determination, which was made with the concurrence of NERSA, is unconstitutional and unlawful, and reviewing and setting it aside**]** - the case and arguments for the President and the Minister are as follows:

Introduction

123.1 **<u>In the first place</u>** I respectfully submit that neither the 2013 determination nor the decision to publish it are, on the one hand, "*administrative action*" as defined in PAJA and, on the other hand, in violation of the principle of legality. I repeat what I have stated in **paragraph 80-86 above**.

Procedure

123.2 **<u>In the second place</u>** I respectfully submit that the Applicants' claim, that the 2013 determination and/or the decision to publish it was procedurally unfair for lack of public participation, is completely misconceived.

123.2.1 This claim assumes that the 2013 determination and/or the decision to publish it somehow affected the rights or interest or legitimate expectations of individuals or the public "*materially and adversely*" but I fail to see how that could be. The only legal effect of a determination is the one provided for in section 34(3)(a) of the ERA, namely that NERSA in issuing a generation licence is bound by any determination made by the Minister. More specifically, the claim that the 2013 determination itself raises issues in relation to the burden of costs on the tax-paying public and issues in relation to the impacts on the environment, is with respect premature: the effect on costs or public expenditure can only be determined once a decision has to be taken on a firm procurement proposal that is on the table whilst the impact on the environment can only be investigated and considered for a specific project once an application for a nuclear installation licence and/or for a generation licence and/or for an environmental authorisation is lodged. The

determination itself has no actual or potential impact or effect on either the costs for procurement or on the environment: in short it is not a "*decision to procure*" new nuclear generation capacity but a "*decision to constrain*" the procurement thereof by binding NERSA in future decisions on the issuing of a generation license.

123.2.2 This claim is further premised on the assumption that section 34(1)(a) of the ERA read with section 10(1)(d) of the NERA requires a public participation process for a ministerial determination to be made. In this regard I submit that the phrase "*every decision*" as used in section 10(1) of the NERA is any decision as contemplated in the context of that provision and not literally "*every decision*" of NERSA. So, for example, it is absurd to insist upon public participation for a decision of NERSA to adjourn its meeting or for a decision to request additional funding from Parliament through the Minister in terms of section 53 of the Public Finance Management Act 1 of 1999. I submit that, in the context of section 10(1) of the NERA, the decision contemplated therein is a decision which constitutes "*administrative action*" as defined in the PAJA, which the decision to concur with the Minister in terms of section 34(1) of the ERA is not and for which there is - other than

NERSA - no affected persons. Furthermore section 10(1) of the NERA is concerned with "*every decision*" of NERSA and not with joint decisions to be taken by the Minister in consultation with NERSA. Also section 34 of the ERA is completely silent on public participation as a requirement for making a determination whilst section 35(5) thereof expressly provides for a process of public participation for the making and promulgation of regulations (which includes regulations on virtually all aspects that may be determined in terms of section 34(1) thereof, such as new generation capacity and private sector participation). Section 35(1) of the ERA goes even further and instructs NERSA to consult with specific persons before making guidelines and publish codes of conduct and practice, or make rules by notice in the Government Gazette. Where the ERA requires consultation and public participation, it says so. Lastly and given the policy character as well as the only legal effect of a determination, to bind NERSA as far as the issuing of a generation licence is concerned, I submit that a process of public participation serves no purpose and can make no contribution to the making of a determination, which explains why such a process is not expressly and clearly stipulated as a requirement by the legislator, which it could easily have done in as many words if that was the intent.

123.2.3 I also point out that a number of determinations have been made in the past under section 34(1) of the ERA. In all of them there has been a concurrence by NERSA and in none of them was there a dedicated process of public participation followed.

123.2.4 This claim is further premised upon the assumption that there was no public participation at all. Whilst it is correct that there was no process of public participation and consultation specifically for or dedicated to the 2013 determination, this is not completely correct. As I will show more fully in the section dealing with the background and context for this review application (in **paragraph 19-71 above**), the 2013 determination is the culmination of a process that started with the Green Paper of 1995, the White Paper of 1998, the Nuclear Energy Policy of 2008 and the Integrated Resource Plan for 2010-2030. In that process there was comprehensive public and stakeholder participation and consultation. The 2013 determination was made with the benefit of all the institutional knowledge gained over time during that process.

123.2.5 I also draw the attention of the Honourable Court to the fact that there is no requirement in the ERA, either in

section 34 thereof or in any other provision, that a draft determination first has to be published in the Government Gazette or elsewhere for comment before it can be made; nor is there a requirement that such publication is a requirement for its validity. To the extent that knowledge of a determination is required for its legal force, section 34(1) of the ERA requires a determination to be made in consultation with NERSA (as the 2013 determination was) and in this process NERSA, which is affected and bound by a determination in issuing a generation licence, will obviously acquire the requisite knowledge. Nothing thus turns on the fact that the 2013 determination was not communicated to the public during the past two years and it does not make the procedure followed for making the 2013 determination unfair.

123.2.6 The accusation that the 2013 determination was hidden or kept from the public is also misconceived: there was no need or reason why it had to be or should have been communicated to the public and the outside world whilst the Department was still in a planning or pre-procurement phase. Any matter involving nuclear energy is by its very nature sensitive and, by virtue also of the international obligations of the Republic of South Africa, has to be dealt

with in a sensible manner and with a measure of discretion. Until the table was set for the next important decision to be taken, in the phased approach adopted for establishing a South African nuclear programme, there was no need to make the 2013 determination public knowledge. In any event there was about this time a change in leadership within the Department with the appointment of a new Minister and in the period 2013-2015 the Department was engaged in a number of further studies, investigations and research projects, called for by the National Development Plan (2012).

123.2.7 In passing I point out that there is no prayer for the review and setting aside of the decision of NERSA to concur in the 2013 determination by the Minister.

123.2.8 In the premises I deny that any of the provisions of the PAJA and/or of section 10 of the NERA were applicable to the 2013 determination and I also deny that the procedure followed in making (or publishing) the 2013 determination was unfair in any respect.

Delay in publication

123.3 **In the third place** I respectfully submit that the Applicants' claim, of an alleged "*unlawful*" delay of some 2 years in the gazetting of the 2013 determination making it unreasonable and/or irrational and/or unlawful, is also completely misconceived.

123.3.1 I have pointed out that the 2013 determination and the decision to publish it are not "*administrative action*" as defined in PAJA and I explained why this is so more fully in **paragraph 80-86 above**. The attack on the "*late*" gazetting of the 2013 determination is thus wholly misconceived and there is no time limit of any kind set for the official publication thereof, either in law or in fact.

123.3.2 I repeat **paragraph 123.2.5 above**: no "*gazetting*" of any nature of a determination under section 34(1) of the ERA is prescribed by law but section 15 of the Interpretation Act 33 of 1957 authorises such notification in the Government Gazette in that, when any act, matter or thing is by any law authorized to be done by any Minister, the notification that such act, matter or thing has been done may, unless a specified instrument or method is by that law prescribed for the notification, be by notice in the Government Gazette.

There is no time limit set for such a notification.

123.3.3 I take note of the views previously taken by the Minister and officials of the Department as far as the need and effect of the publication of a determination under section 34(1) of the ERA in the Government Gazette is concerned, but that is a matter of legal interpretation and how they understood the legal position at the time. The Minister has now been advised (1) that in law no such publication is required for a determination to become valid and binding, (2) that in reaching concurrence on and communicating the determination to NERSA, the 2013 determination in any event became valid and binding in law upon NERSA because of its knowledge thereof, and (3) that in law such a determination is also not a prerequisite for nuclear procurement. I deal with the scope, ambit, purpose and proper meaning of section 34 of the ERA more fully in **paragraph 111-122 below**.

123.3.4 The two stakeholders in existing generation licenses, Eskom and the Department of Public Enterprises, were informed of the 2013 determination as soon as possible after the Department learned of the fact that NERSA concurred therein (at a meeting attended by Eskom, as

appears from page 555 of the record) . There were and are no other stakeholders who qualified as interested and affected parties, and that had to be informed.

123.3.5 The work done after the 2013 determination was the investigations and studies required by the National Development Plan (2012), which I discussed more fully in **paragraph 39.4.2 and 42 above**.

123.3.6 There is with the greatest of respect no requirement in law for NERSA to be consulted and to concur in any decision to publish the 2013 determination.

123.3.7 In the premise of **paragraph 123.1 above** and the foregoing, there is with respect no basis for the accusation that the Minister failed to take into account that relevant and material changes had taken place in the energy sector and the economy during the intervening period before allegedly putting the 2013 determination into effect. In law the publication of the 2013 determination did not put it into effect because it already had legal effect. In any event the changes and uncertainties referred to by the Applicants (including the lower demand forecast for electricity as well as the uncertainties with regard to various cost implications

and the future availability of fuel) had no direct bearing on either the decision to make the 2013 determination or the decision to publish it. On the one hand a rational approach of least regret was followed, in terms whereof the impact of over-estimation (of future demand) is less than that of under-estimation, and on the other hand the uncertainties with regard to aspects such as cost implications or fuel availability would and should be dealt with and investigated when actual procurement decisions are to be taken in future. I repeat that the 2013 determination is not a "*decision to procure*" new nuclear generation capacity but a "*decision to constrain*" the procurement thereof by binding NERSA in future decisions on the issuing of a generation license.

123.3.8 In the result I submit that there was no violation of the "*requirements*" of an open, transparent and accountable government as described in section 1 of the Constitution: there was no reason or need to make the 2013 determination public, of which the substance was in any event already in the public domain as the declared policy of Government, and thus no violation of the founding values set out in that section; those founding values can surely not mean that Government must involve the public in each and

every decision it takes or notify them thereof; and in any event I am advised that these founding values do not give rise to discrete and enforceable rights in themselves or provide a ground for review and setting aside any decision or conduct of an official.

123.3.9 In the result I also submit that there was no violation of the requirement for a transparent procurement system under section 217 of the Constitution: the procurement system of the State was already in place when the 2013 determination was made and it had nothing to do with the system as such.

123.3.10 In the result I further submit that there was no violation of the requirement in section 10(2) of the NERA that all decisions of NERSA be made available to the public: the "*decision*" contemplated there does not include a decision to concur under section 34(1) of the ERA with a determination or the publication thereof and in any event the concurrence of NERSA, for a decision to publish a determination in the Government Gazette, is not required in law; no decision by NERSA is at stake here.

123.3.11 In the result I lastly submit that there was no failure on the

part of the Minister to properly apply her mind to the question whether the 2013 determination was still appropriate in 2015: she was not empowered to revisit the 2013 determination unilaterally and the publication thereof was a general notification of an official act under section 15 of the Interpretation Act 33 of 1957, which is now being opportunistically seized upon.

123.3.12 There was nothing untoward or unlawful with the publication of the 2013 determination.

Separate procurement system

123.4 **In the fourth place** I respectfully submit that the Applicants' claim, that the 2013 determination should have but did not establish a separate and specific system of procurement of nuclear new build capacity in violation of section 34 of the ERA read with section 217 of the Constitution, is also without foundation.

123.4.1 The false premise upon which the Applicants construct this attack is that section 34(1)(e)(i) of the ERA requires that the Minister allegedly "*must*" put a separate and specific system of procurement of nuclear new build capacity in place and that a generic procurement system would not suffice.

123.4.2 The clear wording of section 34(1)(e)(i) of the ERA and the broader context thereof show otherwise.

123.4.3 Firstly, section 34(1) of the ERA starts off with giving the Minister the discretionary power to make a determination: the Minister "*may*", in consultation with NERSA, determine a number of things, which is not to say that each determination must each time deal with all of the listed topics (such as private sector participation under section 34(e)(ii) thereof) or that under certain circumstances there is a legal duty to make a determination.

123.4.4 Secondly, section 34(1)(e)(i) of the ERA clearly contemplates a ministerial determination that require that new generation capacity must be established through a tendering procedure which is fair, equitable, transparent, competitive and cost-effective. In other words, if and when the Minister in the exercise of her discretionary power decides to make a determination on this aspect (which she is not compelled to do), she is in fact empowered to determine that only one of the available procurement methods must be followed. It is no accident that this provision refers to a tender procedure and not to a procurement system. When section 34 of the ERA was

enacted, section 217 of the Constitution was already in place, as was the Public Finance Management Act 1 of 1999 with the Treasury Regulations published under Government Notice R.225 of 15 March 2005 and the Preferential Procurement Policy Framework Act 5 of 2000. That existing procurement system allows for various methods of or procedures for procurement. There is with respect no reason why that existing procurement cannot be used and we are in fact doing so. Instead of commanding the Minister to reinvent the wheel and duplicate the existing procurement system, section 34(1)(e)(i) of the ERA empowers the Minister to narrow the options.

The above necessary implication (that the Minister is not compelled to require that there is a tendering process) is also, it is submitted, a logical implication. The number of suppliers of nuclear technology, services and related supplies in the world (and even less so within South Africa) is extremely limited and this is further limited by the fact that different suppliers may supply different forms of nuclear technology. For the Minister to require, before any investigations have been conducted, that a specified and delimited tender system must be required would, if it transpired (after investigation) that there existed only one

feasible supplier, be ludicrous, counter-productive and not cost-effective.

123.4.5 Thirdly, section 34(1)(e)(i) of the ERA does not state that the Minister must "*determine*" a special procurement system but empowers the Minister to require that new generation capacity must be established in a particular manner; in other words, the focus of her power is on how that new generation capacity must be established and not on what the scope and details of the tendering procedure must be.

123.4.6 Fourthly, the fallacy of the argument as advanced by the Applicants is also revealed by section 34(1)(e)(ii) of the ERA. That section provides that the Minister may, in consultation with the NERSA, require that new generation capacity must provide for private sector participation. Surely this cannot mean that every determination must involve the private sector but must mean that the Minister may decide when it is opportune or technically feasible to open up the electricity supply sector and the national electricity grid, under the auspices and control of Eskom, to private entrepreneurs in a sector which historically has been dominated by the monopoly of one state-controlled

public utility.

123.4.7 In the result no determination under section 34 of the ERA or some duplicated procurement system is required for a nuclear procurement decision, which in any event has not yet been taken.

123.4.8 The appointment of the Department as Procurement Agent in respect of the nuclear programme is also not a licence to ignore the existing law and the existing procurement system. That is simply a formal appointment that makes the Department politically responsible for the nuclear programme and requires it to take the administrative lead on a matter that falls well within the mandate of the Department - as the department responsible for energy affairs. The 2013 determination most definitely does not, as suggested by the Applicant, give the Department a free hand to conduct procurement on an *ad hoc* basis and that notion is with respect farfetched.

123.4.9 There is no merit in this ground of review.

Rationality of determination

123.5 **In the fifth place** I respectfully submit that the Applicants' claim, that the 2013 determination by the Minister was irrational, unreasonable and taken without regard to relevant considerations and with regard to irrelevant considerations, is wrong.

123.5.1 The considerations identified by the Applicants as purportedly relevant (such as affordability of nuclear power, potential negative impact on electricity prices, potential socio-economic and environmental impacts, further studies or research on the full costs of certain technologies and the change in electricity demand forecast) may be relevant considerations for an actual procurement decision or a decision to grant either a generation licence or an environmental authorisation for a particular project but not for a determination in terms of section 34(1) of the ERA which is but a precursor for a potential procurement and, in essence, a form of encased executive policy.

123.5.2 As for Integrated Resource Plan (2010-2030), I discussed this document more fully in **paragraph 33 above**. The Applicants do not seem to appreciate the legal status thereof and it is more than just a mere policy document;

once approved, it is recognised in terms of the ERA with a number of legal consequences flowing from that approval. At the very least, a determination in terms of section 34 of the ERA cannot be repugnant thereto because then NERSA will have to give effect to two conflicting instruments under section 4(a)(iv), section 10(2)(g) and section 34(3) of the ERA. For that reason an unapproved update of such a resource plan would not be of any real significance. What the Minister did was to take steps that would allow for the implementation of the resource plan as was approved at that point in time by Cabinet, without thereby committing finally and irrevocably to a nuclear fleet of 9.6 GW but only creating a legal environment wherein that would become possible once NERSA is in the process of considering an application for a generation licence. The 2013 determination thus was not the exercise of a discretionary power to actually procure a nuclear fleet, as the Applicants seem to assume, nor was it a pre-emptive attempt to do so, and the reliance on the official resource plan was all but unconsidered. Furthermore, any future procurement decision concerning a massive infrastructure build (such as the construction of new nuclear generation capacity) will, of necessity, require an ongoing evaluation of changed circumstances with the benefit of new knowledge

and, to the extent possible or necessary, consequent adaptation.

123.5.3 The Applicants raise a hue and cry because, in making the 2013 determination, no regard was had by the Minister to the contents and information contained in the proposed update of the Integrated Resource Plan (2010-2030). In fact the 2013 determination was already signed by the Minister on 11 November 2013 (as appears from page 480 of the record) whilst the proposed update thereof was only published on the website of the Department on 21 November 2013 in draft form. When making his decision, there was no way that the Minister could have or would have known what the content or information contained therein was, and he did not "*blithely ignored*" that. At best the Minister would have known that there was an update process under way but that is all. Also the proposed update was and remained a draft document for discussion without any legal status and which, to date, has not been approved by Cabinet - it could not therefor signal a material departure from the policy adopted in the approved resource plan as far as the future procurement of a nuclear fleet was concerned. I must also add that the update process has not been abandoned but is still under way and is being

attended to by a section in the Department.

123.5.4 I interpose to point out that the 2013 determination was made against the background and in the context of the development of the energy policy of the Republic of South Africa over a period of some years since 1995. In the Department there was and still is an institutional memory and knowledge about these events, to which the Minister was obviously privy to. Like prior policy decisions on energy by the National Executive, Cabinet or Government, the 2013 determination was also based primarily on the need for a security of supply through a mix of available sources of energy supply, on the need to reduce the CO_2 emissions from our coal-driven plants and meet the target for our international obligations, on the desirability of stimulating a new nuclear industry so as to further industrialize our economy and on the need to provide for growth. The decision behind it was thus rational and informed, and not something rushed into. What is more, in so far as the Applicants allege that the Minister failed to take into account changed, or changing, circumstances, it must be noted that the realities of governance and statecraft are such that very little (if anything) is constant, unmoving or unchanging. That, however, cannot preclude

policy decisions being made by the Government or the National Executive in relation to the directions to be taken in attaining desired or necessary goals. If Government were required, in making such policy determinations, to only make decisions once circumstances had reached a stasis, any progress and also any attempt at sustainable development would be impossible.

123.5.5 I noted the reliance by the Applicants on the principle contained in section 2(4)(a)(vii) of the National Environmental Management Act 107 of 1998 (hereinafter referred to as "*the NEMA*") but I fail to see its relevance or application as far as the 2013 determination is concerned. In the first place section 2(1) of the NEMA provides that the general environmental management principles set out in that section apply throughout the Republic of South Africa to the actions of all organs of state that may significantly affect the environment. A determination in terms of section 34(1) of the ERA itself does not have that potential and it is the further decisions that have to be taken for the actual procurement of or licensing or authorising nuclear plants that are to be informed by these principles. In the second place the principle relied upon by the Applicants (also called the precautionary principle) is in any event but one of

a number of factors required to be considered for sustainable development: section 2(3) of the NEMA states that development must be socially, environmentally and economically sustainable, and section 2(4)(a) thereof then continues to provide that the concept of "*sustainable development*" requires the consideration of all relevant factors including, amongst others, that pollution and degradation of the environment are avoided, or, where they cannot be altogether avoided, are minimised and remedied (as we are trying to do with the reduction of greenhouse gasses), and that a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions. Such a risk-averse and cautious approach is precisely what is followed in the nuclear programme and the phased approach followed for its potential implementation: step by step we explore, we study, we research and we co-operate with other States with nuclear technology until we reach a stage where we can go over to a procurement process - in the course of which we are also free to decide not to proceed because of, for example, cost or financial implications once we have firm or realistic bids or tenders from the market on the table. Contrary to what the Applicants argue, the 2013 determination was a far cry

from that stage. In the third place the precautionary principle does not require that the sovereign right of a State to pursue development can only be exercised under circumstances of absolute knowledge or scientific certainty about the potential impacts and consequences; the injunction is in fact to proceed with caution.

123.5.6 I therefor dispute the conclusion of the Applicants that the 2013 determination violated the PAJA (which does not apply), the principle of legality (because the decision was authorised, rational and taken procedurally correct as well as in good faith) or the precautionary principle (for the reasons stated).

Rational concurrence

123.6 **In the sixth place** I respectfully submit that the Applicants' claim, that the concurrence of NERSA in the 2013 determination was irrational, unreasonable and taken without regard to relevant considerations and with regard to irrelevant considerations, is also wrong.

123.6.1 I have already pointed out that there is no prayer *per se* in the Amended Notice of Motion (page 359-361 of the record) for the review and setting aside of the decision by NERSA

to concur with the Minister.

123.6.2 I repeat **paragraph 123.2.2 above**: section 10 of the NERA does not apply to the concurrence of NERSA in a ministerial determination under section 34 of the ERA but only to "*administrative action*" (as defined in the PAJA) that is taken by NERSA. Section 10 of the NERA is concerned with a unilateral decision of NERSA taken by it in the exercise of its powers and functions as contemplated in section 4 thereof (which by reference only incorporates section 4 of the ERA without any reference to section 34(1) thereof), and is not concerned with a consensual decision of the Minister and NERSA. Thus there is no legal basis for the claim that the concurrence by NERSA need to comply with the formalities and requirements of section 10 of the NERA.

123.6.3 As for the query on the overstated forecasts for electricity demands in the Integrated Resource Plan (2010-2030), I refer the Honourable Court to what is stated in **paragraph 33.8 and 123.3.7 above**. In a nutshell neither the 2013 determination nor the concurrence of NERSA therein is an actual procurement but only a precursor to potential procurement, it is safer to plan and make policy on the

basis of an over-estimation and, when the time comes to take an actual procurement decision, the then current forecasts as well as the potential costs implications and the timing of procurement (including a possible deferment of the commissioning of new nuclear power plant) will be taken into account.

123.6.4 I submit that, when assessing the desirability, or otherwise, of procuring new generation capacity one should, generally, err on the cautious side and rather over-predict the future demand than under-predict it. We have all experienced what has happened in South Africa because of the failure to adequately provide for growth in consumption. The power shortages and consequent load-shedding have affected all South Africans detrimentally and have also had significant effects on business growth and the growth and development of South African society generally. In the premises the concurrence by NERSA, noting the overstated electricity demand forecasts, was prudent. This is especially so when one bears in mind (as stated previously) that this decision was taken with the broader context of a phased approach for the nuclear programme, with future procurement decisions yet to be made.

123.6.5 The question is also not whether there was a "*pressing need for NERSA to make a decision on concurrence*" on the 2013 determination at the time. The initiative for making a determination in terms of section 34(1) of the ERA went out from the Minister and NERSA was not at liberty to merely shelf the request for its concurrence but was obliged to deal with the request within a reasonable time.

123.6.6 I deny that concurrence with the 2013 determination by NERSA was a "*gross irregularity*" or a "*rubber stamping*" thereof simply because it was done with knowledge that the electricity demand forecasts in the Integrated Resource Plan (2010-2030) was overstated. Firstly, I have already explained why, for purposes of energy planning, it is better to rely on an over-estimate than on an under-estimate. One must not forget that this was a forecast - an informed guess as to what the future holds but without the benefit of a crystal ball. Secondly, it is unreasonable of the Applicants to expect of the Minister and NERSA that they must have prophetic foresight. Thirdly, the special report by a subcommittee of NERSA, the debate at the board meeting of NERSA and the queries raised at that board meeting (on page 548-550 and page 555-559 of the record)

- all of this show that NERSA was not merely "*rubber stamping*" the 2013 determination but was seriously considering it on the merits by applying the collective minds of the board members. Lastly, the decision to concur in the 2013 determination was not a decision or a determination to actually procure new nuclear plants regardless of what the demand for electricity was or was foreseen to be.

123.6.7 The Applicants have difficulty (in paragraph 137.4.5 and 137.4.6 of the supplementary affidavit) to understand the reason given by NERSA for concurring in the 2013 determination. On the one hand I must confess that on this aspect the minutes of the board meeting of NERSA (page 555-559 of the record, and in this regard on page 557 thereof) is not a model of clarity or elegantly stated. On the other hand I submit that the difficulty experienced by the Applicants results from their misconception of the nature and purpose of a determination in terms of section 34(1) of the ERA. Such a determination is not already a procurement of new generation capacity but a binding constraint on NERSA under section 34(3)(a) of the ERA in issuing a generation licence. Herein also lies the key to understand the reason proffered by NERSA even if it is badly formulated - later decisions in the supply chain

management system for actual procurement will address the issue of a possible overstatement of the electricity demand forecasts.

123.6.8 It is also not correct to allege that NERSA "*chose deliberately to act inconsistently*" (paragraph 137.4.9 of the supplementary affidavit). The concurrence of NERSA was in fact consistent with the approved Integrated Resource Plan (2010-2030), which had legal status, and the draft update could not be taken into consideration because it was not yet approved and in any event not nearly in a final format. The approved Integrated Resource Plan (2010-2030) had to function in tandem with the 2013 determination in the context of section 4(a)(iv), section 10(2)(g) and section 34(3) of the ERA.

123.6.9 Dubbing the concurrence in the 2013 determination as a go-ahead for nuclear procurement and, on that basis, claiming it to be premature, irrational and unreasonable because the update process for the Integrated Resource Plan (2010-2030) was not yet complete - as the Applicants do - are wrong. I have already explained the nature of such a determination and, whatever concerns or comments NERSA may have had at the time about the update

process, was not rendered meaningless because, as the final authority on licensing new generation capacity, those concerns and comments would continue to be relevant for future decision-making. For this reason NERSA included, in its resolution (on page 558-559 of the record) a reference to a (obviously approved) updated integrated resource plan: not because an update was essential or a precondition for making the determination and/or concurring therein, but because future decisions by NERSA would have to give effect thereto in terms of section 4(a)(iv) and section 10(2)(g) of the ERA and, by allowing for a possible future update in the 2013 determination, inconsistency between determination (constraining the issuing of a generation licence) and integrated resource plan is prevented. Also, the go-ahead for the nuclear programme was contemplated in the White Paper of 1998 and was given already in 2008 with the Nuclear Energy Policy of 2008, albeit that it was later decided to use a phased approach in the implementation thereof.

123.6.10 I am also advised that, contrary to what was stated and accepted by the officials of the Department and in their previous advices to the Ministry to date, a formal determination under section 34(1) of the ERA, and more

specifically the 2013 determination, is not a jurisdictional condition for the nuclear programme or even the only legal route for procuring new nuclear power plants. The procurement system of the State established under section 217 of the Constitution allows any organ of state to contract for any "*goods or services*" in accordance with that procurement system, which already meets the constitutional requirements to be fair, equitable, transparent, competitive and cost-effective. Nuclear power plants are also "*goods or services*" or a combination thereof.

123.6.11 As for the query on the levelised costs of electricity by NERSA, I take note of the factual allegations in this regard but, despite the indication that the overnight capital costs of a nuclear power plant was already almost double than estimated originally, this does not mean that there was any flaw in the concurrence by NERSA. Firstly, at this early stage of planning everyone was working with estimates and not with the benefit of hindsight. Secondly, the theoretical financial implications of such increasing capital costs were noted but the actual financial implications can only be determined once the phase for making an actual procurement decision on a specific bid or tender is reached. Thirdly, the issue is not only a financial one of the potential

impact on the price of electricity for the individual consumer but is about the larger picture of the costs and benefits of a full, comprehensive and globally-competitive nuclear industry for an industrialised South African economy with growth and development.

123.6.12 I repeat **paragraph 123.5.5 above** with necessary changes required by the context, in so far as the Applicants also rely on the precautionary principle of the NEMA to attack the concurrence of NERSA with the 2013 determination.

123.6.13 In the result I deny that the concurrence by NERSA violated the requirements of the PAJA and/or of the principle of legality: that concurrence was not an "*administrative action*" as defined in the PAJA; no irrelevant considerations were taken into account and no relevant considerations were left out of account; there was no unauthorised or unwarranted dictates of any other person or body and the speculation in this regard is with respect unfounded; the concurrence was not unreasonable nor irrational and there is no ground whatsoever of accusing NERSA of bad faith.

Concluding remarks

123.7 **<u>In the last place</u>** I respectfully submit that there is no ground or reason for a declaratory order that the 2013 determination, which was made with the concurrence of NERSA, is unconstitutional and unlawful, and reviewing and setting it aside. The 2013 determination was authorised in terms of section 34(1) of the ERA, the decision to make it and the decision to concur was rational and for the reasons already stated since 2008, and there was no need or requirement for a process of public participation in what is effectively the setting of a policy.

REVIEW OF REQUEST FOR PROPOSALS

124. With reference to the relief pursued in prayer 4(b) of the Amended Notice of Motion - **[**page 361 of the record, seeking an order setting aside any Request for Proposals that were issued by the Department pursuant to the 2013 determination**]** - the case and arguments for the President and the Minister are as follows:

124.1 **<u>In the first place</u>** I submit that this prayer is completely premature: to date the Department has not yet issued any Request for Proposals but is in the process of doing so and has started preparing those documents so that it can be issued and start the procurement process once they are finalised and approved.

124.2 **<u>In the second place</u>** I repeat **paragraph 123.6.11 above**: in this regard and whatever the Department and other functionaries may have believed the legal position to be, the reality is that even without the 2013 determination a Request for Proposals can be issued under the existing procurement system as envisaged by section 217 of the Constitution. The 2013 determination (or, for that matter, any other determination under section 34(1) of the ERA) is not a prerequisite or a jurisdictional condition for a Request for Proposals to be prepared and issued.

124.3 **<u>In the third place</u>** I respectfully submit that the preparation and formulation of a Request for Proposals, with everything that goes with that process, is not a process that is or even ought to be shared with the members of the public in a process of public consultation and participation. To establish and define the needs of an organ of state for goods and services is an internal process. Some aspects thereof are out of necessity confidential or even classified (given that we are dealing with nuclear technology), and it is simply common sense not to compromise your bargaining position even before you sit at the negotiation table. No wonder that there is no requirement in law or in practice that this phase of the process be subjected to public participation and consultation.

124.4 In the premise there is no ground or reason whatsoever to have the not-yet-existing Request for Proposals reviewed and set aside or interdicted. Even if we assume that such a request has already been sent to the five

(5) selected vendor countries with nuclear Pressurised Water Reactor technology, there is no basis for any attack on or challenge to the validity or legality of the Request for Proposals in this regard.

RESPONSE TO REMAINING ALLEGATIONS IN FOUNDING AFFIDAVIT

125. I now turn to deal with the remaining allegations contained in the founding affidavit to the extent that I have not already done so. As a result, any such remaining allegation not pertinently dealt with must be taken as denied to the extent that it is inconsistent with the contents of this answering affidavit.

Ad paragraph 1 of the Founding Affidavit:

125.1 I take note of the allegations contained in this paragraph.

Ad paragraph 2 of the Founding Affidavit:

125.2 Save to deny that all of the allegations contained in the Founding Affidavit fall within the personal knowledge of the deponent or that all of them are true and correct, in those respects and for reasons dealt with elsewhere in this answering affidavit, I take note of the allegations contained in this paragraph.

Ad paragraph 3 of the Founding Affidavit:

125.3 I take note of the allegations contained in this paragraph but do not thereby concede that any of the submissions of law by the deponent are correct.

Ad paragraph 4 of the Founding Affidavit:

125.4 I deny that the Minister and the Government is in "*precipitous*" pursuit of the procurement in question and refer the Honourable Court to what has been stated in **paragraph 19-71 above**. The relevant history started with a Green Paper in 1995 and over the past 21 years, in a carefully structured and phased manner with the best available information to the disposal of the Government at each juncture where policy and legislative decisions had to be made, the Government cautiously embarked upon the road to a nuclear horizon. Along this journey numerous media statements were issued.

125.5 Neither the cost of the nuclear energy procurement nor its funding model is, with respect, yet certain or predictable; that depends on *inter alia* the proposals or offers received, the negotiations, the demand or need established at the time and the actual procurement decision yet to be taken (if it is decided to go ahead at that stage). The cost of the procurement thereof is furthermore an investment in the future of the

Republic of South Africa and the means to achieve a greater industrialisation of this country for its proper development and the establishment of a self-sufficient nuclear industry, the means to secure the supply of electricity by ensuring a flexible mix of sources of supply, and the means that would reduce the emissions of greenhouse gas.

125.6 Save as aforesaid, I take note of the remaining allegations contained in this paragraph.

Ad paragraph 5 *in fin* of the Founding Affidavit:

125.7 The main assumption in this paragraph is false. To date there has been no "*decision to proceed with procuring these nuclear power plans*" by the President, the Cabinet, Government, the Minister or, for that matter, any person or entity with the necessary authority to do so. The plan is to issue and publish a formal Request for Proposals within the near future, under and in terms of the existing procurement system of the Department, and that would be the start of the actual procurement process. As I have explained, there is a difference between a decision to proceed with (the next step or phase for) the nuclear programme and a decision to actually procure a nuclear plant.

125.8 All the relevant nuclear-related decisions that went before, were inherently policy-making decisions, taken by the National Executive or the

Minister, for which neither a determination under section 34 of the ERA nor compliance with section 217 of the Constitution was required. In any event and to the extent that a determination under section 34 of the ERA was required, the 2013 determination was in place at all relevant times.

Ad paragraph 5.1 of the Founding Affidavit:

125.9 The two basic propositions as set out in this paragraph are, with respect, both wrong.

125.10 The first basic proposition is in effect that a determination, made in terms of section 34(1)(a) and (b) of the ERA (and labelled by the Applicants "*the ERA nuclear requirement decision*"), is a jurisdictional condition for the start of any procurement of new nuclear power plants. That is not correct for the following reasons:

125.10.1 **In the first place**, a proper procurement system for the State and the various organs of state is already authorised and in place under a battery of legislation which authorises the procurement of any goods and services, which in principle includes new nuclear power plants. That legislation includes or covers:

- section 217 of the Constitution;
- the State Tender Board Act 86 of 1968, which has

not been repealed;

- the provisions of the Public Finance Management Act 1 of 1999;
- the Amended Treasury Regulations as published in Government Notice R.225 of 15 March 2005 (as amended thereafter by Government Notice R.146 of 20 February 2007 and Government Notice R.874 of 15 November 2013) under section 76 of the PFMA;
- the various National Treasury Practice Notes, Instruction Notes, Directives and Circulars;
- the Preferential Procurement Policy Framework Act 5 of 2000 and its regulations; and
- the policies, procedures and protocols of the Department already in existence.

125.10.2 **In the second place**, I am not aware of any prohibition in law, nor is there one in the existing procurement system with its associated supply chain management framework, on the procurement of new nuclear power plants; more specifically there is no legal provision of which I am aware of, including section 34 of the ERA, that categorically states that the procurement of new nuclear power plants can only and must take place in terms of a prior determination by the Minister. If that was the legislative intent, Parliament could

easily have said so instead of entrusting the Minister with a discretionary power as far as the making of a determination is concerned (she "*may*" do so).

125.10.3 **<u>In the third place</u>**, given that a full and comprehensive procurement system was already in place when the ERA was enacted and that in law the potential procurement of new nuclear power plants was already legally permissible and possible under that existing procurement system, there is simply no reason to read section 34 of the ERA as yet another and duplicating provision that must first put a formal determination in place so as to authorise the procurement of new nuclear power plants whilst it is already permissible under the existing procurement system.

125.10.4 In this regard I also refer the Honourable Court to what I have already stated on the proper interpretation of section 34 of the ERA in **paragraph 111-122 above**.

125.11 The second basic proposition is in effect that such a determination, made in terms of section 34(1)(a) and (b) of the ERA, can only be made after a procedurally fair process of public participation has been followed. That is also not correct, for the following reasons:

125.11.1 The making of a determination in terms of section 34(1) of the ERA does not constitute "*administrative action*" as defined in the PAJA, for reasons I have already explained.

125.11.2 The consensus required from NERSA for the purpose of a ministerial determination in terms of section 34(1) of the ERA is not a "*decision*" as contemplated by section 10(1)(d) of the NERA, for reasons I have already explained.

125.12 In view of the nature, circumstances and purpose of a ministerial determination in terms of section 34(1) of the ERA, the procedure followed involved the stakeholders directly interested (such as Eskom and other organs of state as well as the officials, experts and advisors of the Department) so that a rational decision could be and was taken, and there was no need or reason for a process of public participation in this regard. In other words, there is no factual basis upon which a process of public participation would have contributed to the rationality of the decision in question.

125.13 In the premise I deny the allegations contained in this paragraph.

Ad paragraph 5.2 of the Founding Affidavit:

125.14 There is with respect no sense in duplicating, at great cost and

expense, a separate procurement system when two procurement systems (namely, the centralised one under the State Tender Board Act 86 of 1968 and the decentralised one under the Public Finance Management Act 1 of 1999) were and are already in place. Furthermore neither section 217 of the Constitution nor section 34(1) of the ERA requires that, in order to put a procurement system in place, the decision on the procurement system itself should be subjected to public participation.

Ad paragraph 5.3 of the Founding Affidavit:

125.15 I refer the Honourable Court to what I have already stated in **paragraph 111-122 above** on the powers of the Minister under section 34(2) of the ERA; also the Minister and the Department also have further and additional powers of procurement and contracting under the existing procurement systems.

Ad paragraph 5.4 of the Founding Affidavit:

125.16 I deny these allegations. A determination was made in 2013.

Ad paragraph 5.5 of the Founding Affidavit:

125.17 I deny that the Government was "*less than transparent*" with the

details of the nuclear programme and I refer the Honourable Court to what I have already stated in **paragraph 19-71 above**. I also deny that the process of actually procuring the new nuclear power plants has commenced. The procurement process itself will only commence once we issue the Request for Proposals to the selected vendor countries and we will then make the full details of that procurement process known to the public and to each vendor country so that the procurement process will in all respects be fair, equitable, transparent, competitive and cost-effective - fully in accordance and compliance with the Constitution and national legislation.

Ad paragraph 6 of the Founding Affidavit:

125.18 I take note of the argument advanced in the paragraph, but I respectfully submit that the argument is false and based on wrong or incorrect facts or assumptions.

Ad paragraph 7 *in fin* of the Founding Affidavit:

125.19 I repeat that the tabling of the various treaties in Parliament was lawful and was not for the purpose of making them binding but merely to notify Parliament that those treaties were entered into by the National Executive.

Ad paragraph 7.1 of the Founding Affidavit:

125.20 I have dealt fully with the Russian Treaty and the tabling thereof in **paragraph 52 and 94-100 above**.

Ad paragraph 7.2 of the Founding Affidavit:

125.21 I have dealt fully with the tabling of the American Treaty and the South-Korean Treaty in **paragraph 101-110 above**.

Ad paragraph 8 of the Founding Affidavit:

125.22 I take note of the allegations contained in this paragraph but I deny that there is any reason for dealing with this matter on an expedited basis or even as a semi-urgent matter. The impression created by the Applicants, that so to speak the Russian fleet is at anchor in Cape Town harbour to deliver a new nuclear power plant any moment now, is based upon a complete misunderstanding and misrepresentation of the Russian Treaty as well as of recent events. In any event there is also the issue of non-joinder.

Ad paragraph 9 of the Founding Affidavit:

125.23 I take note of these allegations but I deny that the Applicants have

made out a case for, or are entitled, to any relief in this review application.

Ad paragraph 10 of the Founding Affidavit:

125.24 I repeat what I have stated in **paragraph 125.22 above**. In any event the truncated timeframes unilaterally imposed by the Applicants upon the President and the Minister for filing this answering affidavit were unreasonable. The Applicants themselves explain and rely upon how important the issue of nuclear procurement is. The founding papers and the supplementary papers were more than 600 pages, all of which had to be studied and consulted upon. Given the nature of this case, instructions had to be obtained from senior officials, most of whom were not readily available. To draft and finalise an answering affidavit to such a multi-pronged attack as the one launched by the review application, following a shotgun-approach and then also based on a number of incorrect assumptions or double-barrelled allegations, is not an easy task and took much more time than the Applicants allowed for. This is not an ordinary review application and nuclear procurement is not a matter that can be rushed.

Ad paragraph 11 of the Founding Affidavit:

125.25 I take note of the allegations contained in this paragraph and state that a supplementary affidavit with annexures as well as an Amended Notice of Motion were delivered.

Ad paragraph 12-14 of the Founding Affidavit:

125.26 I repeat that the First Applicant is on record as having a very strong and clear position against nuclear energy: it is an anti-nuclear organisation that believes South Africa should not build any more nuclear power plants.

125.27 Save to point out that the name of the deponent differs from the name of the person authorised to sign legal papers in the resolution (on page 120 of the record in annexure **'PL 1'** to the founding affidavit) and that, in the absence of the constitution of the First Applicant there is no way to verify the validity of the said resolution, I take note of the allegations contained in this paragraph.

Ad paragraph 15-17 of the Founding Affidavit:

125.28 Save to point out that, in the absence of the constitution of the

Second Applicant, there is no way to verify the validity of the resolution referred to (on page 121-123 of the record in annexure **'PL 2'** to the founding affidavit), I take note of the allegations contained in this paragraph.

Ad paragraph 18 of the Founding Affidavit:

125.29 Subject to what I have stated elsewhere in this answering affidavit, I take note of the allegations contained in this paragraph. I record, for the sake of caution, my denial that the Applicants have any legal standing to challenge the tabling of an international agreement in Parliament under section 231 of the Constitution. I also respectfully submit that the Applicants have not shown any special interest or adverse effect on their part, whether directly or indirectly and whether actual or potential, of the decision to authorise and sign the various international agreements - whatever interest they have, is one shared with all the citizens of the Republic of South Africa in general and not peculiar to them. In this regard I deny that section 38 of the Constitution, which deals with standing, finds any application in this matter.

Ad paragraph 19-23 of the Founding Affidavit:

125.30 Subject to what I have stated elsewhere in this answering affidavit

on the merits of this review application, I take note of the allegations contained in this paragraph.

Ad paragraph 24 of the Founding Affidavit:

125.31 I repeat that the procurement of "*nuclear new generation capacity*" is also permissible under the existing procurement systems available to the State, the Department and any organ of state.

Ad paragraph 25-28 of the Founding Affidavit:

125.32 Save to dispute that the powers of the Minister under section 34(2) of the ERA is available only after a determination in terms of section 34(1) thereof, I take note of the legal position as set out in these paragraphs.

Ad paragraph 29-32 of the Founding Affidavit:

125.33 Save to dispute and deny that section 10(1) of the NERA applies to a decision by NERSA to concur with the Minister in terms of section 34(1) of the ERA in making a determination, I take note of

the legal position as set out in these paragraphs.

Ad paragraph 33-34 of the Founding Affidavit:

125.34 I take note of the legal position as set out in these paragraphs but those regulations are not of any relevance for this matter.

Ad paragraph 35-44 of the Founding Affidavit:

125.35 I take note of the allegations contained in these paragraphs in respect of the Integrated Resource Plan (2010-2030) (annexure **'ZM 6'**). That document was based on the information that we then had available (as is the case in all forward planning documents) and it does not purport to be the last word on energy planning.

Ad paragraph 45-48 of the Founding Affidavit:

125.36 I take note of all the allegations thrown about by the Applicants on the draft update of the Integrated Resource Plan (2010-2030), but that document has not been finalised by the Department or the Minister nor has it been considered by the Cabinet. As such the draft update is not and never was an "*integrated resource plan*" as defined in section 1 of the ERA, namely a resource plan

established by the national sphere of government to give effect to national policy. At best the draft document reflected the provisional recommendations of the officials from the Department responsible for the drafting thereof and, before it is approved, cannot be seen as any kind of admission or acknowledgement or guidelines by or on behalf of the Department and/or the Minister and/or the National Executive.

125.37 That is not to say that the information contained therein was simply ignored when later planning and policy decisions were taken. I have already explained the phased approach that is being followed in the nuclear programme. With each phase the uncertainties become less uncertain and less in number, and the Minister was fully aware of the reduced forecasts in electricity demand when the 2013 determination was made. So was NERSA when it concurred in the 2013 determination. One cannot do this kind of forward energy planning with the benefit of full and comprehensive scientific knowledge or absolute certainty in all respects. If that was a requirement for each decision then no decision would ever be taken and society as well as our economy would stagnate. Obviously such a model for policy decisions would favour those who wish the status *quo* to remain and/or who do not wish South Africa to build any more nuclear power plants.

125.38 The question is about what should there be a "*least regret*". In this case the Minister and the Department mainly do not wish to regret a decision that would later cause an interruption of our electricity supply and thus threaten our security of supply. Energy and more specifically electricity supply is the lifeblood of our society and communities. For that reason and conscious of the reduced demand forecasts for electricity, we opted to rather over-invest than under-invest. The demand forecasts for electricity may well be reduced for the moment, but changes in the energy sector from time to time do come quickly and unexpectedly, and the Government remains ever optimistic that there will be an upswing in the economy as well as industry.

125.39 I reiterate that the draft update of the Integrated Resource Plan (2010-2030) is still under way and we have a section in the Department working on it. I am unable to say when the final draft thereof will be submitted to Cabinet and when it will be approved.

Ad paragraph 49 of the Founding Affidavit:

125.40 I take note of the allegations contained in this paragraph but Mr Fikile Majola did not speak on behalf of the Department, the Minister or the Cabinet. His remarks must also be seen in context: during the debate in question it was pointed out that the document

published in 2013 as a draft update was merely a draft that was already in the process of being revised (on stated page 124 of the record), the spokesperson for the Democratic Alliance then accused the African National Congress of rewriting the Government's own energy plans as set out in the published 2013 draft update and the response thereto was that the published 2013 draft update would not see the light of day. The press statement relied upon by the Applicants (annexure **'PL 3'** to the founding affidavit on page 124-125 of the record) makes it clear that the original draft was at stake and it is mischievous to create an impression that there will be no update of the Integrated Resource Plan (2010-2030).

Ad paragraph 50-52 of the Founding Affidavit:

125.41 I take note of the allegations contained in these paragraphs. The misconception here is that future investment or procurement decisions will be solely and exclusively taken on the basis of the Integrated Resource Plan (2010-2030). A perusal of the document in question (annexure **'PL 4'** to the founding affidavit on page 127-128 of the record) shows that it was intended as an input to the public debate around our electricity future and proposes a New Power Plan, itself a work in progress based on various untested assumptions and suggesting that nuclear investments are not

necessary (at least not in the next 15 to 25 years). What is technically and financially recommended or regarded as necessary is not the same as desirable from a policy and socio-political or economic perspective. What is more, the issues pertaining to the new assumptions made in this study (the lower demand, the updated investments costs of renewable and nuclear technologies, and the availability of natural gas) are all issues to be considered and decided upon in the later phases of actual procurement.

Ad paragraph 53 of the Founding Affidavit:

125.42 I take note of the allegations contained in this paragraph. That same press statement (annexure **'PL 5'** to the founding affidavit on page 129-130 of the record) also explained that the affordability study and funding model for the nuclear procurement would be shared with the Portfolio Committee of Parliament but would be tabled as classified, and thus closed to the public and media, until procurement was complete so as to protect sensitive commercial information.

Ad paragraph 54-58 of the Founding Affidavit:

125.43 I have already dealt with most of these allegations and also with the legal status of the Integrated Resource Plan (2010-2030)

under the ERA. The only approval for the procuring of nuclear power plants to date was an approval-in-principle or a policy approval by the National Executive, and nothing more. Neither the Minister nor the President suggested otherwise.

Ad paragraph 59-61 of the Founding Affidavit:

125.44 I refer the Honourable Court to what I have stated with regard to the National Development Plan (2012) in **paragraph 39-40 above**. That document is also in substance a policy document for the contemplated development of South Africa and confirms that the approval for the procuring of nuclear power plants up to the date thereof was only an approval-in-principle.

125.45 I also repeat what I have stated in **paragraph 42 above**: in the period between 2012 and 2015 the Department did undertake the investigation on the implications of nuclear energy, including its costs, safety, environmental benefits, localisation and employment opportunities, uranium enrichment, fuel fabrication, and the dangers of weapons proliferation, as called for by the National Development Plan (2012)

125.46 If the Republic of South Africa wishes to commission a nuclear power plant by 2023, then the actual procurement thereof has to

start very soon because the lead times for the construction thereof are very long.

125.47 Save as aforesaid, I take note of the allegations contained in these paragraphs.

Ad paragraph 62 of the Founding Affidavit:

125.48 I take note of the allegations contained in this paragraph. What the Applicants did not note, however, is that the powers and functions of NECSA under section 13 and section 14 of the Nuclear Energy Act 46 of 1999 are wide enough and empower NECSA, if it so decides, to embark upon the procurement of commercial nuclear power plants and related technology. Also of importance is section 21 of the National Nuclear Regulator Act 47 of 1999, which prescribes a process of public participation for every application for a nuclear installation licence (which is required for any person wishing to site, construct, operate, decontaminate or decommission a nuclear installation).

Ad paragraph 63 of the Founding Affidavit:

125.49 I deny that the statutory and policy framework as set out by the Applicants is the "*proper context*" to deal with this matter and with

the decisions to enter into intergovernmental agreements. I again emphasise the fundamental distinction between the policy-making power of the National Executive and the procurement power of the State. The Applicants fail to appreciate that in the context of the policy-making power of the National Executive there was an approval for the procuring of nuclear power plants but that approval was and is an approval-in-principle or a policy approval by the National Executive, and nothing more; there was to date no decision or step taken in the context of the procurement power of the State to actually procure new nuclear power plants.

Ad paragraph 64 of the Founding Affidavit:

125.50 I deny most of the allegations contained in this paragraph. The statements made public by Government are taken out of context, there was no lack of transparency, Russia was not engaged by the Republic of South Africa in a manner materially different from any other State, and the engagement with Russia as well as with any of the other countries had nothing to do with the actual and immediate procurement of nuclear energy but took place in the lawful exercise of the power entrusted to the National Executive by section 231(1) of the Constitution.

125.51 The Government is intent on finalising the procurement process for

new nuclear power plants as soon as is practically possible but is committed, and on record as so committed, to do so in accordance with the Constitution, the national legislation of the Republic of South Africa and its obligations under international law. There against the Applicants are clearly intent on preventing South Africa building any more nuclear power plants.

Ad paragraph 65-67 of the Founding Affidavit:

125.52 I have dealt with the media statement of 22 September 2014 (annexure **'ZM 21'**) in **paragraph 53 above**. I repeat that this statement as an expression of the "*joint understanding*" of the Russian Treaty is inadmissible for purposes of its interpretation.

125.53 I point out that what the Applicants highlight or emphasise in that media statement puts the focus on what suits their case and misrepresents the actual tenor of the media statement - that the Russian Treaty was all about laying a foundation for the future and creating an environment for the growth and development of a South African nuclear industry that is self-sufficient, globally competitive and wealth-creating.

Ad paragraph 67 of the Founding Affidavit:

125.54 The President, the Minister, the Department and the State cannot accept responsibility for what Rosatom reportedly said (if the news report is accepted as a true version of events, which I do not admit). The unreliability and sensationalist nature of this news report (annexure **'PL 7'** to the founding affidavit on page 133-134 of the record) is revealed in the very first sentence thereof: the allegation that South Africa has signed a deal for the construction of nuclear power plants with the atomic energy corporation of the Russian Government is simply false and incorrect - no such deal was signed and the Russian Treaty is for sure not such a construction deal, as I have shown in **paragraph 52 above**.

Ad paragraph 68 of the Founding Affidavit:

125.55 I take note of the allegations contained in this paragraph and the position, as summarised therein, indeed reflects the correct position. The Russian Treaty was not a procurement deal. In addition that news report (annexure **'PL 8'** to the founding affidavit on page 135-137 of the record) also reported that an agreement with South Korea was already signed, that these framework agreements would not need to be ratified by Parliament and that the start of the actual procurement stage was still in contemplation.

Ad paragraph 69 of the Founding Affidavit:

125.56 I take note of the allegations contained in this paragraph. These vendor parades involved, *inter alia*, discussions between representatives of South Africa and the potential suppliers or contractors regarding various aspects (including technical specifications, development histories, safety records, safety features and the like but excluding prices) of their products and services. These vendor parades and consequent discussions were conducted, primarily, in order to refine aspects of the description of the subject matter of the procurement and to formulate any future request for proposals or tender invitations with the requisite detail.

Ad paragraph 70-84 of the Founding Affidavit:

125.57 I take note of the allegations contained in this paragraph without thereby admitting that any of the allegations and arguments, contained in the correspondence, are true or correct. As for the lack of response on the part of the Minister and the Department, the normal procedure is for a junior official to prepare a draft response and submit that to senior management for consideration and recommendation to the Minister. I do not know why this did not happen in this instance but I must add that for a while now the

Department has been seriously understaffed. I also submit that this correspondence was not *bona fide* but clearly part of a preconceived plan and strategy to build a case for litigation through correspondence. The parties were also so far apart that litigation was inevitable from the outset. This correspondence was in any event written on the false premise that the actual procurement process had started and on the, to say the least, opportunistic construction imposed upon the Russian Treaty.

Ad paragraph 85 of the Founding Affidavit:

125.58 I repeat what I have stated in **paragraph 125.57 above** and I deny that information was only "*trickling*" into the public domain.

Ad paragraph 86-88 of the Founding Affidavit:

125.59 I take note of the allegations contained in these paragraphs. I respectfully point out that some of the news reports relied upon by the Applicants are typical of the irresponsible speculation and sensationalism of some parts or sectors in the media and that those news reports are nothing more than uninformed and unreliable hearsay evidence.

Ad paragraph 89 of the Founding Affidavit:

125.60 I have already dealt fully with the tabling of the Russian Treaty in Parliament and I refer the Honourable Court in this regard to **paragraph 94-100 above**. The allegations contained in this paragraph are denied.

Ad paragraph 90 of the Founding Affidavit:

125.61 I take note of the allegations contained in this paragraph. The "*binding agreements*" referred to in the context of this statement by Dr Wolsey Barnard was not a reference to any treaties or international agreements but was a reference to the actual procurement contracts, which have not yet been concluded with any party. In fact, on 18 February 2015 and at the Energy Indaba at Sandton (held amidst acute load-shedding) it was explained to the media and people present that the deadline of 2023 for the commissioning of nuclear power plants had to be revised as there had been a delay in making the procurement decision itself, with the timeline for the delivery of nuclear power also depending on the technology and the vendor selected (as appears from the news report, annexure **'PL 18'** to the founding affidavit on page 203-204 of the record).

Ad paragraph 91 of the Founding Affidavit:

125.62 I take note of the allegations contained in this paragraph and I confirm that I indeed made the statement attributed to me.

Ad paragraph 92 of the Founding Affidavit:

125.63 I take note of what the newspaper report (annexure **'PL 20'** to the founding affidavit on page 209 of the record) claims the Deputy Energy Minister said but that report cannot be correct or the statement was taken out of context. The statement that (by or at 25 February 2015) "*South Africa has agreed already to build up to six 'mini-nuclear' power plants to help supplement*" the power supply by Eskom is not factually correct; there was and is no such agreement or agreements, either on the date of that report or to date, and I have no idea what a so-called "*mini-nuclear power plant*" is. Had there been such an agreement or agreements, I as the Deputy Director-General: Nuclear in the Department would have known about it.

125.64 Save as aforesaid, I take note of the remaining allegations contained in this paragraph.

Ad paragraph 93-96 of the Founding Affidavit:

125.65 I take note of the allegations contained in these paragraphs.

Ad paragraph 97 of the Founding Affidavit:

125.66 I take note of the allegations contained in this paragraph.

Ad paragraph 98-99 of the Founding Affidavit:

125.67 I take note of the allegations contained in these paragraphs.

Ad paragraph 100 of the Founding Affidavit:

125.68 I am not aware of any requirement that the President's Minutes had to accompany the letter in which the Minister gave permission to the Parliamentary Liaison Officer permission to table the international agreements in question and there is with respect nothing "*curious*" about it. The gratuitous remark by the Applicants in this regard is uncalled for.

125.69 There is one further aspect to note, namely an explanation by the Minister in her letter of 13 July 2015 (annexure **'PL 25'** to the founding affidavit on page 313-315 of the record) as to why the

application, for access to a feasibility study conducted by the Department with regard to the procurement of nuclear power, was refused and which explanation was never challenged by any of the Applicants:

> "*Having regard to your wide request for "A copy of any affordability feasibility study conducted by the Department of Energy with regard to the procurement of nuclear power", I am of the opinion that any feasibility studies conducted relating to the procurement of nuclear power for the energy security of the country falls squarely within the ambit of section 42(1) and (3)(b) and (c) of the Act. Given the nature of such studies, the records contain financial, commercial, scientific and technical information, the disclosure of which would likely cause harm to the commercial and financial interests of the State, and put it at a disadvantage in contractual or other negotiations.*
>
> *The release of such reports will impact on any procurement process to be undertaken and any future negotiations with the nuclear vendors. If the information were to be released, then the procurement process would be compromised and State financial and economic interests will be jeopardised. The State stands to lose, amongst others, any competitive advantage it would have during the procurement process and negotiations.*"

In this regard I refer the Honourable Court back to what I have

stated in **paragraph 42.4 above**. What is also illuminating is the response of the Minister, in her letter of 13 July 2015, to the request for the record of decision by the Government to procure the 9.6 GW of nuclear energy power as part of the energy supply: she expressly referred to the White Paper (1998), the Integrated Resource Plan (2010-2030) and the Nuclear Energy Policy (2008) as documents already in the public domain and as representing the record of that decision - which we know was only a policy decision or an approval-in-principle (which was taken in the context of the constitutional policy-making power of the National Executive and not the context of the procurement power of the State to actually procure new nuclear power plants).

125.70 Save as aforesaid, I take note of the remaining allegations contained in this paragraph.

Ad paragraph 101-103 of the Founding Affidavit:

125.71 I take note of the allegations contained in these paragraphs. The events referred to were part of our overall communication efforts in which we were open, transparent and responsive about what was going on in the nuclear programme.

Ad paragraph 104 of the Founding Affidavit:

125.72 I take note of the allegations contained in this paragraph but the Applicants are incorrect where they state that the procurement process has already began. In my respectful submission the internal preparations by the Department (such as designing a procurement strategy, formulating bid specifications and bid evaluation criteria or even finalising a Request for Proposals) are not yet the start of a procurement process, which starts only when the Request for Proposals (or perhaps a tender) is issued to the potential bidders. In any event and even if that preparatory work is regarded as already being the start of a procurement process, there is no prohibition against such steps or actions and they are authorised under the existing procurement systems.

Ad paragraph 105 of the Founding Affidavit:

125.73 The media release of 18 October 2014 (annexure **'ZM 25'** hereto) already referred to the possibility of an international agreement with Japan and the vendor parade with both Canada and Japan was mentioned already in the media release of 22 March 2015 (annexure **'ZM 30'** hereto), which were well before the dates mentioned by the Applicants (14 July 2015 and July 2015). The main allegations contained in this paragraph are therefor factually

incorrect and I deny them. I also deny that any procurement process has commenced but, in any event, the Republic of South Africa cannot be held at ransom by the other countries and we need not, nor can we afford, to wait until someone someday decides that the time is now ripe to enter into an international agreement with the Republic of South Africa. That decision is out of our hands, but both Canada and Japan are aware that, if such international agreements are not timeously in place, the nuclear programme of the Republic of South Africa will have to proceed without them.

125.74 In any event the assumptions upon which these wrong allegations are based, are also astonishing. All that I wish to say is that international relations and sensitive negotiations about nuclear matters between sovereign States are not normally conducted in public and the accusation of an alleged lack of transparency is, with respect, totally unrealistic and mischievous.

125.75 I have also dealt with the remaining allegations and arguments elsewhere in this answering affidavit.

Ad paragraph 106-107 of the Founding Affidavit:

125.76 Subject to what I have stated elsewhere in this answering affidavit,

I take note of the allegations contained in these paragraphs.

Ad paragraph 108-114 of the Founding Affidavit:

125.77 I take note of the allegations contained in these paragraphs.

125.78 Notwithstanding the foregoing it is noteworthy that Applicants fail to pertinently draw to the attention of the Honourable Court that the Portfolio Committee subsequently, in their media statement dated 1 September 2015 (annexure **'PL 37'** to the founding affidavit on page 347-348 of the record), records that the Portfolio Committee "... *having considered the five (5) inter-governmental nuclear agreements, tabled in terms of section 231(3) of the Constitution, 1996, note and accept the Department of Energy report on the agreements*" (own underlining added for the sake of emphasis).

125.79 Given the foregoing it must, it is submitted, be accepted that Parliament accepted the tabling of the Russian Treaty (and the other treaties) in terms of section 231(3) of the Constitution and was, accordingly, satisfied that it was (and that the others were) treaties of a technical, administrative or executive nature and, further, had no financial consequences and did not affect or had an impact upon domestic law, nor required either ratification or

accession and/or the approval of Parliament to be binding.

Ad paragraph 115 of the Founding Affidavit:

125.80 We cannot table something in Parliament which is not yet finalised and approved by the Cabinet. It is also opportunistic in the extreme to now claim that a "*promise*" was made in this regard in that advertorial (annexure **'PL 28'** to the founding affidavit on page 324-325 of the record): what was reported was an administrative plan or intent at the time for future procedure and there was no suggestion of any undertaking or promise to the Applicants (or anyone else) in this regard.

Ad paragraph 116-129 of the Founding Affidavit:

125.81 I repeat what I have stated in **paragraph 125.57 above**.

Ad paragraph 130-135 of the Founding Affidavit:

125.82 I take note of the allegations contained in these paragraphs.

Ad paragraph 136 the Founding Affidavit:

125.83 The inference sought to be drawn by the Applicants is wrong and

I deny the allegations as well as the argument contained in this paragraph. I also repeat what I have stated in **paragraph 50 above**.

Ad paragraph 137-138 the Founding Affidavit:

125.84 I point out that it took the Applicants some three (3) months to prepare their founding papers.

125.85 I deny that these newspaper reports and/or press statements in any way "*compound the lack of transparency inherent in the process to date*" for reasons that I have already dealt with. I repeat the fundamental distinction between the policy-making power of the National Executive and the procurement power of the State: the Applicants fail to appreciate that in the context of the policy-making power of the National Executive there was an approval for the procuring of nuclear power plants but that approval was and is an approval-in-principle or a policy approval by the National Executive, and nothing more; there was to date no decision or step taken in the context of the procurement power of the State to actually procure new nuclear power plants.

Ad paragraph 139 the Founding Affidavit:

125.86 There is and was no reappraisal by the Minister and I deny that the speculation by the Applicants in this paragraph is correct.

Ad paragraph 140 the Founding Affidavit:

125.87 I repeat what I have stated in **paragraph 50 above**.

125.88 I deny that there is any kind of "*ongoing lack of transparency and accountability*", either as alleged or at all, and refer the Honourable Court to what I have stated in **paragraph 19-71 above**.

Ad paragraph 141-147 the Founding Affidavit:

125.89 Under the facts and circumstances of this matter none of the policy-decisions by the National Executive, including the decision for the 2013 determination, and none of the decisions regarding the conclusion or signing or tabling of the international agreements were taken by way of an irrational procedure and also did not call for any "*interested persons*" to be heard on these matters - the doctrine of legality was not breached in any respect, for reasons I have already dealt with.

125.90 Those decisions were not "*administrative action*" as defined in the PAJA.

125.91 The "*principle of openness and accountability*" was not breached by any of those decisions or the manner in which they were taken, but in any event that principle does not afford a self-standing ground for review or raise an issue which is justiciable by the Honourable Court.

125.92 Ordinary government or administrative policy is one thing, but a national policy with a legal status recognised by national legislation (such as an "*integrated resource plan*" referred to in section 1 of the ERA, given effect under section 4(a)(iv) and section 10(2)(g) thereof) is something else.

125.93 There is already a dual procurement system in place, both complying with section 217 of the Constitution.

125.94 As for section 2(4)(a)(vii) of the NEMA, I refer back to what I have stated in **paragraph 123.5.5 above**: that general environmental management principle is not yet applicable at this early stage of the phased nuclear programme; it is in any event but one of a number of factors required to be considered for sustainable development; it is in any event precisely what is followed in the

nuclear programme and the phased approach followed for its potential implementation; and it does not require that the sovereign right of a State to pursue development can only be exercised under circumstances of absolute knowledge or scientific certainty about the potential impacts and consequences - the injunction is to proceed with caution.

Ad paragraph 148-150 the Founding Affidavit:

125.95 I take note of the allegations, arguments, conclusions and inferences contained in these paragraphs but I deny that any proper ground for relief has been made out by the Applicants. I have already explained the reasons for this denial.

Ad paragraph 151-153 the Founding Affidavit:

125.96 Russia is not a party to these proceedings.

125.97 The Russian Treaty is an international agreement of which the content is not cognisable, open to interpretation and construction or to enforcement by a domestic court; also and consistent with the doctrine of separation of powers and as far as international relations are concerned, a State should not speak with two voices on the same matter.

125.98 The Russian Treaty is in any event not a procurement contract.

125.99 I repeat what I have stated in **paragraph 52 above** and I deny any allegation by the Applicants on the scope or meaning of the Russian Treaty that is inconsistent with this answering affidavit.

Ad paragraph 154-155 the Founding Affidavit:

125.100 I have already dealt with these allegations and I deny that the Russian Treaty was in any sense a procurement contract: the Russian Treaty was and is precisely a typical binding and international framework agreement, on the plane of the international law of treaties under the Vienna Convention on the Law of Treaties (1969), and not a domestic construction or procurement contract. The Applicants misread or misrepresent the true meaning and legal effect of article 3 of the Russian Treaty.

Ad paragraph 156-159 the Founding Affidavit:

125.101 I take note of the allegations contained in these paragraphs.

Ad paragraph 160 the Founding Affidavit:

125.102 I repeat what I have stated in **paragraph 11, 52 and 87-93 above**,

and accordingly deny that this is a matter justiciable by the Honourable Court, given that we are dealing here with the meaning and interpretation of an international agreement in the absence of the other State Party. In any event I also deny that the Presidential authorisation for and the Ministerial signing of the Russian Treaty was in any way unlawful or unconstitutional.

125.103 Not a single one of the other vendor countries involved (or any of their agencies) have raised the speculative concerns about the future procurement process with the Republic of South Africa.

125.104 Save as aforesaid, the allegations contained in this paragraph are denied.

Ad paragraph 161-168 the Founding Affidavit:

125.105 I repeat what I have stated in **paragraph 12, 52 and 94-100 above** on the decision to table the Russian Treaty in Parliament.

125.106 I also draw the attention of the Honourable Court to the guidelines contained in the internal handbook of the Department of International Relations (annexure **'PL 40'** to the founding affidavit on page 352 of the record). The guidelines to determine whether an international agreement falls within the ambit of section 231(3)

of the Constitution are:

- agreements that do not require parliamentary approval for ratification or accession (which the Russian Treaty does not require, contemplate or foresee);
- agreements that have no extra-budgetary financial implications (which the Russian Treaty *per se* does not have and without Parliament having to budget anything for the framework agreement itself); and
- agreements that do not have legislative implications (which the Russian Treaty does not have).

The Portfolio Committee would have raised any issue concerning ratification or accession, extra-budgetary financial implications or legislative implications if there were any but they did not. There were and are none. That same document also sets out the guidelines to determine whether an international agreement falls within the ambit of section 231(2) of the Constitution, namely agreements that:

- require ratification or accession (usually multilateral agreements, which the Russian Treaty is not);
- have financial implications that require an additional budgetary allocation from Parliament (which the Russian Treaty *per se* does not require); and
- have legislative or domestic implications (for example, require new legislation or legislative amendments, which

the Russian Treaty does not).

As for the remaining allegations and arguments and speculation, I have already dealt therewith elsewhere in this answering affidavit.

125.107 Save as aforesaid, the allegations contained in this paragraph is denied.

Ad paragraph 169-177 the Founding Affidavit:

125.108 I categorically deny that the purpose behind the tabling of the American Treaty and the South-Korean Treaty was any kind of window dressing. This irresponsible statement is more than mischievous: it is clearly calculated to damage the international relationship between the Republic of South Africa and some of the countries that can provide nuclear technology and material for the national nuclear programme.

125.109 I repeat what I have stated in **paragraph 13 and 101-110 above** on the decision to table the American Treaty and the South-Korean Treaty in Parliament.

Ad paragraph 178-193 the Founding Affidavit:

125.110 In view thereof that the 2013 determination has been made in

terms of section 34(1) of the ERA, the allegations and arguments in these paragraphs are now academic and do not call for any response.

125.111 I repeat that any allegation in the founding affidavit not specifically dealt with, but which is not consistent with this answering affidavit, must not be taken as admitted but as denied. In any event I am advised that in law, contrary to what the officials of the Department believed and advised the Minister, if the Government wishes to procure new nuclear generation capacity, it need not first follow the procedure set out in section 34(1) of the ERA but can do so directly under the existing procurement systems. If the Government elects to do so, then the result is simply that there is no determination to bind NERSA under section 34(3)(a) of the ERA in issuing a generation licence but the nuclear procurement in terms of any one of the existing procurement systems would be valid and constitutional.

125.112 I also need to point out that a determination under section 34(1) of the ERA is not a procurement itself: the claim of the Applicants, of what the considerations are that should be taken into account, is incorrect.

125.113 I further need to point out that a determination under section 34(1)

of the ERA is not a requirement for entering into any international agreement or conducting international relations by having vendor parades with countries offering nuclear technology for peaceful uses, nor is it a requirement to designate the Department as the Procuring Agency or to take any other steps in preparation of the actual procurement process itself.

Ad paragraph 194-206 the Founding Affidavit:

125.114 I repeat what I have stated in **paragraph 14, 111-122 and especially 118 above** on the decision to table the American Treaty and the South-Korean Treaty in Parliament.

125.115 I deny that section 34 of the ERA is the only legal route to a lawful and constitutional procurement for the nuclear programme or for new nuclear power plants by an organ of state.

Ad paragraph 207-211 the Founding Affidavit:

125.116 I take note of the allegations, submissions and arguments as contained in these paragraphs but I deny that the Applicants are entitled to any relief or that a proper case for any relief has been made out by the Applicants.

Ad paragraph 212-214 the Founding Affidavit:

125.117 I deny that the Applicants are entitled to this relief or that a proper case for this relief has been made out by the Applicants.

125.118 I repeat what I have stated in **paragraph 11, 12, 52, 87-93 and 94-100 above** on the decisions to authorise and sign the Russian Treaty, and the decision to table the Russian Treaty in Parliament.

Ad paragraph 215-218 the Founding Affidavit:

125.119 I deny that the Applicants are entitled to this relief or that a proper case for this relief has been made out by the Applicants.

125.120 I repeat what I have stated in **paragraph 13 and 101-110 above** on the decision to table the American Treaty as well as the South-Korean Treaty in Parliament.

Ad paragraph 219-223 the Founding Affidavit:

125.121 I deny that the Applicants are entitled to this relief or that a proper case for this relief has been made out by the Applicants, which is in any event superfluous.

125.122 I repeat what I have stated in **paragraph 14 and 111-122 above** on the proper interpretation of section 34 of the ERA.

Ad paragraph 224-226 the Founding Affidavit:

125.123 I repeat what I have stated in **paragraph 125.110-125.113 above**. The basis for this relief fell away and I therefor deny that the Applicants are entitled to this relief or that a proper case for this relief has been made out by the Applicants.

Ad paragraph 227 the Founding Affidavit:

125.124 I take note of the legal submissions contained in this paragraph. I am advised that the basic rule is that costs in litigation is a matter for the discretion of the Honourable Court and that the principle, as set out by the Applicants, is an important guideline for the exercise of that discretion but not an immutable rule. The issue of costs will ultimately depend on the facts and circumstances of a particular case, also with due regard for the manner in which a party litigated (whether reasonable or reckless with no respect or appreciation for the international reputation of the country and simply to advance an own agenda) and the good faith of a party (or the absence thereof).

Ad paragraph 228-235 the Founding Affidavit:

125.125 There is and was no urgency in this matter to start with and, whatever perceptions of urgency there were, were created by the skewed manner in which the Applicants presented their case.

Ad paragraph 236 the Founding Affidavit:

125.126 I deny that the Applicants are entitled to any relief or that a proper case for any relief has been made out by the Applicants.

126. To the extent that any of the information or allegations contained in any of the annexures to the founding affidavit are inconsistent with this answering affidavit, they are also formally denied.

RESPONSE TO REMAINING ALLEGATIONS IN SUPPLEMENTARY AFFIDAVIT

127. I shall now move on to deal *seriatim* with the remaining allegations contained in the supplementary affidavit to the extent that I have not already done so. I reiterate that, should I not deal pertinently with any such remaining allegation, such remaining allegation must be taken as denied in the context of this answering affidavit and to the extent that it is inconsistent with the contents thereof.

Ad paragraph 1 and 2 of the Supplementary Affidavit:

127.1 I take note of the allegations contained in these paragraphs.

Ad paragraph 3 of the Supplementary Affidavit:

127.2 Save to deny that all of the allegations contained in the supplementary affidavit fall within the personal knowledge of the deponent or that all of them are true and correct, in those respects and for reasons dealt with elsewhere in this answering affidavit, I take note of the allegations contained in this paragraph.

Ad paragraph 4 of the Supplementary Affidavit:

127.3 I take note of the allegations contained in this paragraph.

Ad paragraph 5-8 of the Supplementary Affidavit:

127.4 At the outset I wish that point out that none of the decisions in question are the result of a process or proceedings in respect of which it is a legal requirement to keep a record. Those decisions are and were also influenced by aspects such as institutional knowledge and memory of past events, discussions and debates in workshops or departmental meetings, and even by discussions in the Cabinet.

127.5 The attorney for the Applicants knew full well why the State Attorney had logistical problems with providing the record. All of this was explained in correspondence. Originally the matter was dealt with by the Office of the State Attorney in Cape Town but, for logistical reasons and because the main office of the Department is in Pretoria, the matter was reallocated to Attorney Eben Snyman from the Office of the State Attorney in Pretoria. By the time that he received a copy of the review application in Pretoria, it was already late November 2015. He proceeded to brief counsel for this matter on or about 27 November 2015 and then started in earnest, with counsel and the help of the legal section of the Department, to prepare a record. By that time some people were already on leave for the traditional Christmas holiday but, in view of the threats by the attorney for the Applicants to take legal steps, the State Attorney asked counsel to look at what was available (which counsel then did whilst in Cape Town on 23 December 2015), and, as a result, had a record delivered on the same date whilst knowing that the record was incomplete. The supplementary record was filed on 16 February 2016.

127.6 The delay in delivering a record was mainly caused by logistical problems (resulting from the distance between Pretoria and Cape Town, problems with communications between the two offices of the State Attorney and the fact that not all of the documents were available in either Pretoria or Cape Town in one location or in one office or even with one Department), by the intervening and traditional holiday season over December and

January each year (making it difficult to reach and consult with counsel, and to reach the relevant officials), by the nature of the decisions in question (which did not call for a record to be kept in the process or proceedings resulting therein) and by the sheer magnitude or scope of this review application which seeks to review and set aside or challenge the seven (7) different decisions listed in **paragraph 80 above** (in founding and supplementary papers of more than 600 pages).

127.7 At all relevant times the Applicants, to the knowledge of their attorney, had the remedy available to bring an application to compel the production and delivery of the record. The fact that they did not do so but kept such a step in abeyance, demonstrates that the explanations for the delay by Attorney Eben Snyman was accepted and that the delay was accepted to be reasonable in the circumstances. To now do a *volte face* and complain is with respect disingenuous.

127.8 In the premise I deny that a punitive cost order is warranted.

Ad paragraph 9 of the Supplementary Affidavit:

127.9 I deny that the 2013 determination was kept secret: its existence was immediately communicated to the stakeholders directly affected thereby (such as Eskom and the Department of Public Enterprises) in letters that were not classified at all (annexure **'PL 43.4-43.5'** to the supplementary

affidavit on page 501-502 of the record). I repeat that there was no need at the time to publish this determination and, as I have stated, there was not only some additional work to do on the nuclear programme but there was also a change in the leadership within the Department and the Ministry during the period between November 2013 and December 2015.

127.10 The publication of the 2013 determination would have taken place with or without this review application. I deny that there was any "*opacity*" in this regard, and moreover I also deny that there was any ulterior purpose or any failure of transparency that has beset the decision-making of the Government in respect of the nuclear programme. In this regard I again refer the Honourable Court to the history and background set out in **paragraph 19-71 above**. I also repeat that, to date, there was no decision or step taken in the context of the procurement power of the State to actually procure new nuclear power plants.

Ad paragraph 10-11 of the Supplementary Affidavit:

127.11 I take note of the allegations and arguments contained in these paragraphs but I do not thereby admit the truth or correctness of any of those allegations or arguments, already dealt with elsewhere in and/or inconsistent with this answering affidavit.

Ad paragraph 12-18 of the Supplementary Affidavit:

127.12 I take note of the allegations contained in these paragraphs.

Ad paragraph 19-25 of the Supplementary Affidavit:

127.13 I deny that there was any decision, either by the Minister or by the Department and also by NERSA, that the 2013 determination be withheld from the public.

127.14 I take note of the factual allegations contained in these paragraphs and will not dispute them for the purposes of this review application but I do not thereby admit the unwarranted comments by the Applicants throwing aspersions around (such as the comment that NERSA was apparently reckoning that it could no longer avoid providing documents). It seems as if the Applicants regularly conclude that any delay whatsoever in responding to their demands or correspondence, or any procedural delay in these proceedings, was deliberate, malicious, underhand or in bad faith.

Ad paragraph 26 of the Supplementary Affidavit:

127.15 I deny that the record provides any support for the challenges by the Applicants to the various decisions or support their case on

when nuclear procurement may commence.

Ad paragraph 27-31 of the Supplementary Affidavit:

127.16 I have already dealt with paragraph 160 of the founding affidavit in **paragraph 125.102-125.104 above**. I deny that the authorisation by the President for, and the signature by the Minister of, the Russian Treaty were in any respect unlawful or unconstitutional.

127.17 Of course the Russian Treaty was and is intended to be a binding agreement but the point missed by the Applicants is:

127.17.1 that it was and is intended to be binding as an international agreement within the scope and ambit of the international law and the international relationship between two sovereign states; and/or

127.17.2 that it was and is not intended to be a binding procurement agreement but to be a binding agreement for creating an environment for future nuclear procurement; and/or

127.17.3 that it was and is without any legal effect and without any legal implications for our domestic law.

127.18 Save as aforesaid and subject to what has already been stated elsewhere in this answering affidavit, I take note of the remaining allegations contained in these paragraphs.

Ad paragraph 32 of the Supplementary Affidavit:

127.19 I have already dealt with paragraph 152, and paragraph 151, of the founding affidavit in **paragraph 125.96-125.99 above** and I also repeat the contents of **paragraph 52 and 90-91 above**.

127.20 The opportunistic and selective label attached to the Russian Treaty, as creating a so-called "*strategic partnership between the parties in relation to the procurement of nuclear power plants*" (own underlining added) is incorrect:

- the preamble of the Russian Treaty (on page 287 of the record) refers to a Joint Presidential System on establishment of a comprehensive strategic partnership;
- the preamble of the Russian Treaty (on page 288 of the record) records the conviction of the State Parties that legal fixation of the strategic partnership in the fields of nuclear power and industry will contribute to the development of cooperation in other areas between them;
- article 1 of the Russian Treaty (on page 288 of the record) in effect states as the aim thereof to create the foundation

for the strategic partnership in the fields of nuclear power and industry for peaceful uses; and

- article 3 of the Russian Treaty (on page 288-290 of the record) creates an obligation to create the conditions for the development of strategic cooperation and partnership in fifteen (15) listed areas as specified in the subsections thereof.

The Russian Treaty firstly, creates a strategic partnership as understood in international relationships or in international law but not as understood in domestic or common law, and secondly, creates one for cooperation in the wider fields of nuclear power and industry and in respect of numerous nuclear-related areas. There is no *fait accompli* in the Russian Treaty as far as the actual procurement of new nuclear power plants is concerned and the alleged appearance of the Russian Treaty as such was either a spectre of the imagination or unconscionable propaganda.

127.21 Save as aforesaid and subject to what has already been stated elsewhere in this answering affidavit, I take note of the remaining allegations contained in these paragraphs.

Ad paragraph 33-36 of the Supplementary Affidavit:

127.22 The Explanatory Memorandum (annexure **'PL 43.11'** to the

supplementary affidavit on page 509 of the record) does not, with the greatest of respect, allegedly makes it clear that the Russian Treaty was indeed intended and understood as creating a firm commitment that the Russian Federation or its agency would construct the required nuclear power plants in South Africa. I do not deny that the Russian Treaty makes a future procurement of Russian nuclear technology possible as an option, but that is in effect all that was achieved: the State Parties are to "*collaborate in areas as outlined ... which are needed ... for implementation*", thereby first and foremost creating the desired environment or conditions, and only thereafter with separate implementation agreements and proper funding venture cautiously and carefully into the implementation of projects and/or the actual procurement of new nuclear power plants. In any event any activity arising out of these areas of cooperation will be done, as expressly agreed in the Russian Treaty, in accordance with the national legislation of the respective State Parties.

127.23 Far from supporting their case on the scope, nature and meaning of the Russian Treaty, the Explanatory Memorandum destroys it.

127.24 The paraphrasing of the Russian Treaty in paragraph 35 of the supplementary affidavit, that by signing the Russian Treaty there was allegedly an agreement by South Africa that Russia could veto

the involvement of any country in the construction of the proposed nuclear power plants, is wrong. In this regard I repeat what I have stated in **paragraph 52.13 above**: creating conditions for entering into a potential construction contracting is not the same as actual construction itself and article 7 of the Russian Treaty does not give Russia a veto in who will ultimately participate in the future construction of new nuclear plants in South Africa.

127.25 Save as aforesaid and subject to what has already been stated elsewhere in this answering affidavit, I take note of the remaining allegations contained in these paragraphs.

Ad paragraph 37 of the Supplementary Affidavit:

127.26 I deny that any of the arguments contained in this paragraph are correct and I deny all of the underlying assumptions upon which those arguments are constructed.

Ad paragraph 38 of the Supplementary Affidavit:

127.27 The view expressed by the State Law Advisor was and is wrong. In this regard I repeat what I have stated in **paragraph 12.3, 99 and 125.106 above**.

Ad paragraph 39 of the Supplementary Affidavit:

127.28 I deny that any of the arguments or inferences contained in this paragraph are correct and I deny all of the underlying assumptions upon which those arguments or inferences are constructed.

127.29 I repeat what I have stated in **paragraph 52 and especially 52.3 above**.

Ad paragraph 40 of the Supplementary Affidavit:

127.30 I repeat what I have stated in **paragraph 13.3, 54, 104.2, 107 and 125.108 above**. I reject the arguments and speculation advanced in this paragraph as false and also as absolutely unfounded.

Ad paragraph 41 of the Supplementary Affidavit:

127.31 I have already dealt with all of the allegations and arguments as advanced in this paragraph. I deny each and every allegation contained therein and I dispute that any of the arguments or conclusions as set out therein are correct.

Ad paragraph 42-50 of the Supplementary Affidavit:

127.32 I deny that the decision of the Minister, to table the Russian Treaty in Parliament, was unconstitutional and unlawful and that it falls to be set aside. I also point out that the tabling thereof can only be challenged by Parliament if indeed there is any legal challenge to be mounted; it is only Parliament which should make that call and not the Applicants. There is also no room, scope, reason or prescript for public participation on the political and/or international law issue as to whether an international agreement falls under section 231(2) or section 231(3) of the Constitution.

127.33 I further repeat what I have stated in **paragraph 12, 52, 94-100 and 125.105-125.113 above**.

127.34 In the result I deny each and every allegation contained in these paragraphs and I further dispute that any of the arguments or conclusions as set out therein are correct.

Ad paragraph 51-54 of the Supplementary Affidavit:

127.35 I deny that the tabling in Parliament of the American Treaty and the South-Korean Treaty was in violation of section 231(3) of the Constitution, and that this decision is unconstitutional or unlawful.

127.36 I repeat what I have stated in **paragraph 13, 101-110 and 125.108-125.109 above**.

127.37 In the result I deny each and every allegation contained in these paragraphs and I further dispute that any of the arguments or conclusions as set out therein are correct.

Ad paragraph 55-59 of the Supplementary Affidavit:

127.38 I submit that the question, whether or not a determination in terms of section 34(1) of the ERA is a legal prerequisite for the procurement of new nuclear power plants and/or for the commencement of the nuclear programme for developing an nuclear industry in South Africa, is a question concerning the objective interpretation and meaning of the relevant legislation and not a subjective question on a state of mind and how the Minister and the Department viewed the legal position.

127.39 I repeat what I have stated in **paragraph 14, 111-122 and 125.110-125.113 above**.

127.40 In the result I deny each allegation contained in these paragraphs and inconsistent with this answering affidavit. I further dispute that any of the arguments or conclusions as set out therein are correct.

Ad paragraph 60-62 of the Supplementary Affidavit:

127.41 I have already dealt with these allegations and with the false perception that somehow the decision, to publish a determination made in terms of section 34(1) of the ERA in the Government Gazette, is part of the so-called multi-stage decision-making process (which it is not).

127.42 In the result I deny that the 2013 determination was unlawful or unconstitutional and I deny that it stands to be reviewed and set aside.

Ad paragraph 63-75 of the Supplementary Affidavit:

127.43 I have already dealt with the jumble of allegations, assumptions, inferences, aspersions, opinions and arguments contained in these paragraphs elsewhere in this answering affidavit.

127.44 In the result I deny each allegation contained in these paragraphs and inconsistent with this answering affidavit. I further dispute that any of those assumptions, inferences, aspersions, opinions and arguments as set out therein are correct.

Ad paragraph 76 of the Supplementary Affidavit:

127.45 I deny the allegations and argument contained in this paragraph for reasons already dealt with elsewhere in this answering affidavit.

Ad paragraph 76-89 of the Supplementary Affidavit:

127.46 I have already dealt with the contents of these paragraphs elsewhere in this answering affidavit.

127.47 I repeat what I have stated in **paragraph 15 and 123 above**.

127.48 In the result I deny that there is any basis to set aside either the 2013 determination itself, the decision of the Minister to make such a determination and/or the concurrence of NERSA in the 2013 determination.

Ad paragraph 90-107 of the Supplementary Affidavit:

127.49 I have already dealt with the contents of these paragraphs elsewhere in this answering affidavit.

127.50 I repeat what I have stated in **paragraph 15 and 123 above** to the extent that it pertains to the publication of the 2013 determination

in the Government Gazette.

127.51 In the result I deny that there is any basis to set aside either the decision to publish the 2013 determination, the publication of the 2013 determination and/or the 2013 determination itself.

Ad paragraph 108-120 of the Supplementary Affidavit:

127.52 The contention that the Minister and/or the Government and/or the National Executive has taken any decision or action or step to commence and proceed with the procurement of nuclear energy is with respect totally misconceived and more importantly presented totally out of context. As I have explained, there is a distinction which is fundamental to this whole review application - namely, the distinction between the policy-making power of the National Executive and the procurement power of the State. Accordingly there is an important difference between a decision, action or step on nuclear matters taken in the exercise of the constitutional policy-making power of the National Executive and a decision, action or step on nuclear matters taken during the exercise of a procurement power. There is thus a clear divide between an approval for the procuring of nuclear power plants but one that is an approval-in-principle or a policy approval by the National Executive in the context of the policy-making power of the

National Executive, on the one hand, and a decision or step taken in the context of the procurement power of the State to actually procure new nuclear power plants on the other hand.

127.53 I repeat what I have stated in **paragraph 15 and 123 above** to the extent that it pertains to procurement systems and the alleged requirement of section 34(1) and (2) of the ERA that the Minister must duplicate existing procurement systems.

127.54 In the result I deny that there is any basis to set aside either the 2013 determination itself, the decision of the Minister to make such a determination and/or the concurrence of NERSA in the 2013 determination.

Ad paragraph 121-139 of the Supplementary Affidavit:

127.55 I repeat what I have stated in **paragraph 15 and 123 above**.

127.56 In the result I deny that the 2013 determination is in any way defective, either as alleged or at all, and I deny that it was irrational or unreasonable, or failed to take relevant considerations into account, or took irrelevant considerations into account.

Ad paragraph 140-146 of the Supplementary Affidavit:

127.57 The proper constitutional framework does not include only those provisions, principles and values that the Applicants have selected. It includes the doctrine of separation of powers and the constitutional vesting in the National Executive of the power to develop and implement national policy, the power to coordinate the functions of state departments and administrations, and the power to perform any other executive function provided for in the Constitution or in national legislation. Also included is the rule that the founding values under section 1 of the Constitution, and that the constitutional guidelines for public administration contained in section 195 thereof, do not give rise to discrete and enforceable rights in themselves or provide a ground for review and setting aside any decision or conduct of an official.

127.58 In any event I persist with the denial that there was any failure to be accountable, open or transparent by the President, the Minister, the Department or NERSA as far as the nuclear programme (in all of its related aspects) is concerned and refer again to what is set out in **paragraph 19 to 71 above**.

127.59 As for the remaining allegations, speculation and arguments contained in these paragraphs, I have dealt with them elsewhere

in this answering affidavit.

Ad paragraph 147-150 of the Supplementary Affidavit:

127.60 I have already dealt with the nature of the decisions at stake in this matter (as not requiring any record to be kept for the process or the proceedings resulting therein), with the difficulty of assembling a record from various locations, departments and functionaries where everything is not available in one location and with the role of non-documentary information (such as institutional knowledge or memory and even oral discussions in Cabinet).

127.61 Save as aforesaid and subject to this answering affidavit, I take note of the allegations contained in these paragraphs.

Ad paragraph 151-153 of the Supplementary Affidavit:

127.62 There is no basis in law or in fact for the relief in prayer 1 of the Amended Notice of Motion in relation to the Russian Treaty, especially not in view of its status as an international agreement and in the absence of the Government of the Russian Federation.

Ad paragraph 154-156 of the Supplementary Affidavit:

127.63 There is also no basis in law or in fact for the relief in prayer 2 of the Amended Notice of Motion in relation to the tabling of the American Treaty and/or the South-Korean Treaty, especially not in view of their status as an international agreement and in the absence of those two Governments.

Ad paragraph 157-158 of the Supplementary Affidavit:

127.64 There is no need for the declaratory relief in prayer 3 of the Amended Notice of Motion in relation to the interpretation of section 34 of the ERA, and in any event the propositions advanced by the Applicants in respect thereof are incorrect.

Ad paragraph 159-168 of the Supplementary Affidavit:

127.65 There is with respect also no basis in law or in fact for any of the relief in prayer 4 of the Amended Notice of Motion in relation to the 2013 determination, its publication in the Government Gazette and the Request for Proposals which the Department is internally in the process of formulating and preparing so that it can be issued.

Ad paragraph 169-171 of the Supplementary Affidavit:

127.66 I repeat that the costs of this litigation is a matter for the discretion of the Honourable Court.

Ad paragraph 172-178 of the Supplementary Affidavit:

127.67 I deny that there is any urgency or semi-urgency in this matter or that there is any reason for this review application to be rushed on an expedited basis. The Request for Proposals will take some time to finalise, and once issued it will take more time for the vendor countries and their consortiums to prepare, formulate and submit their proposals to the Republic of South Africa. Then those proposals will have to be studied and considered by the Department, after which a recommendation to the Cabinet has to be prepared. We are still a long way off from any actual procurement decision.

127.68 In any event and most importantly, I submit that this review application (even on an issue such as what should be contained in the record before court) cannot be dealt with or adjudicated upon, without all the essential and necessary parties being joined in these proceedings. I repeat that those parties are all five (5) the other State Parties to the various international agreements at

stake in this matter and attached as annexure **'PL 24'** to the founding affidavit.

Ad paragraph 179-186 of the Supplementary Affidavit:

127.69 I repeat that there is no requirement in law nor did the Department in practice keep a full and complete record for the decisions listed in **paragraph 80 above** at one location, in one office or even in one department. The record that was filed by the State Attorney in this review application was assembled to the best of our ability. It was not a question of simply going to a cabinet, pulling out a drawer and start making copies from a single file or record.

127.70 To demonstrate our practical difficulty, I mention a few aspects. I am the Deputy Director-General: Nuclear in the Department of Energy and all matters pertaining to nuclear energy in the Department are my responsibility. Each and every file in every office, section or division in the Department falling under me, both in Pretoria and in Cape Town, pertains to nuclear energy. All of those files are directly or indirectly linked to the nuclear programme (in the wide sense). Even in other parts of the Department, for example the part falling under the Deputy Director-General: Policy, Planning and Clean Energy, there are reams of documents and many files in, for example, the section

dealing with the draft update of the Integrated Resource Plan (2010-2030), of which one of the elements is the policy-approved procurement of new nuclear plants. Then there are the files of the Department of International Relations and Cooperation, pertaining to international or intergovernmental agreements and treaties as well as international relations and the negotiations in respect thereof. The Office of the State Law Advisor is also involved in international or intergovernmental agreements and treaties as well as international relations, with its own files and records. There is simply no end to all the files and records that deal, directly or indirectly, with nuclear matters in this country since 1944.

127.71 Aside from the sheer volume of the files and records that I have mentioned, the complicating factor is to decide which files or records should be identified for the purposes of this review application. In general some files and records are classified as top secret, secret or confidential: they cannot simply be released into the public domain. In general various other documents, notes, memorandums, communiques and correspondence are sensitive, especially those received from or sent to other sovereign States, and have to be handled with the utmost of discretion if the Republic of South Africa wish to maintain its goodwill, reputation and trust in the international arena. In general some of those documents (such as documents used at the highest levels of

government, for example minutes of the meetings of Cabinet) are also privileged. In general and in the absence of a specific record resulting in specific decisions, it will not assist the Honourable Court or be in the interest of justice to dump loads of files and records on the Applicants as the other parties to this review application: had we done that, we would no doubt have been accused of some or other underhand tactic. A judgement call on whether such a record or file is relevant, has to be made and that call the State Attorney could not make on his own.

127.72 There were some problems with compiling the record and, given the circumstances and history of this matter, I am truly hesitant to claim that it was complete. Nevertheless, it is with respect harsh and opportunistic of the Applicants to now try and make capital of these logistical problems, of which they should have been aware in the first place as a potential problem for all public administrations the world over and of which they were kept informed by the State Attorney.

127.73 In the final analysis the Applicants started a strategy with correspondence to prepare the foundation of their case and then rushed of to court, behind the back of necessary parties and without joining them in the review application, without caring that their reckless allegations will damage the international relations

between sovereign States and by constructing their case on a total misrepresentation of the true nature, scope, ambit and meaning of the Russian Treaty as well as the various nuclear-related policy decisions and steps taken by the National Executive - all of this in the name of pursuing their own agenda.

127.74 I repeat that the issue of costs is in the discretion of the Honourable Court and I also state that any attempt to obtain a punitive cost order against the President and/or the Minister will be opposed.

Ad paragraph 187 of the Supplementary Affidavit:

127.75 I deny that the Applicants are entitled to, or have made out a proper case for, any of the relief pursued in the Amended Notice of Motion.

128. To the extent that any of the information or allegations contained in any of the annexures to the supplementary affidavit are inconsistent with this answering affidavit, they are also formally denied.

CONCLUDING REMARKS

129. The nuclear programme of the Republic of South Africa has the vision to create

and establish a self-sufficient nuclear industry in South Africa that will move this uranium-rich country forward to greater industrialisation and development in order to alleviate poverty through growth in the economy, making it globally competitive and also putting it in a position to play an important role on the African continent where developing countries are also in a race for the security of energy supply. It is in the best interest of the Republic of South Africa to be able to assist these developing countries in their quest for sustainable development, finding a balance between social, economic and environmental factors for the planning, implementation and decision-making of development so as to ensure that such development serves present and future generations.

130. The nuclear power programme is an important part if not the platform or foundation of the overall nuclear programme, with is own vision to provide for the energy and/or electricity needs of South Africa by a mix of supply sources which include nuclear power plants, to provide a stimulus for a nuclear industry, and also to promote and effect the reduction of CO_2 emissions in line with the international obligations of the Republic of South Africa. Keeping in mind the distinction between the policy-making power of the National Executive and the procurement power of the State, essentially all the relevant steps and actions, taken by the National Executive and/or the Government to the date hereof, were duly, lawfully and rationally taken within the confines of its policy-making powers and, up to the date hereof, there was no exercise of any of the procurement powers of the State - albeit that some preparatory or pre-procurement steps or actions for a nuclear energy procurement process were taken and are under

way.

131. As for the various international agreements at stake in this matter, I respectfully submit that the Applicants are not entitled to claim any relief in respect thereof and that, with respect, a domestic court cannot and should not interfere in the international relations of the Republic of South Africa with other sovereign States and State Parties to treaties with it. In any event there is no ground or basis to interfere with the negotiation, signature and tabling of the said international agreements and a court of law (as part of the Judicial Branch of Government) should with respect also refrain from doing so in view of the large margin of appreciation afforded to the National Executive (as part of the Executive Branch of Government) in so far as international relations are concerned.

132. In support and corroboration of the foregoing and the contents of this answering affidavit for the President and the Minister, I refer the Honourable Court to the following:

132.1 the confirmatory affidavit of Minister Tina Joemat-Pettersson, attached as annexure **'ZM 36'** hereto; and

132.2 the confirmatory affidavit of Senior Assistant State Attorney Christoffel Ebenhaezer Snyman (known to us as Mr Eben Snyman), attached as annexure **'ZM 37'** hereto.

133. I draw the attention of the Honourable Court to the fact that three (3) counsel were employed by the President and the Minister, through the Office of the State Attorney, in this matter. Given the scope, complexity and importance of this matter, I respectfully submit that this precaution was justified and that any cost order in favour of the State should include the costs of three (3) counsel.

134. In the premise the President and the Minister will seek a postponement so that the necessary parties can be joined, alternatively a dismissal of this review application with costs, in both instances with such costs to include the costs of three counsel.

Deponent: ZS Mbambo

Signed and sworn before me at Pretoria this day of May 2016 after the Deponent declared that he is familiar with the contents of this statement and regards the prescribed oath as binding on his conscience and has no objection against taking said prescribed oath. There has been compliance with the requirements of the Regulations contained in Government Gazette R1258, dated 21 July 1972 (as amended).

COMMISSIONER OF OATHS:
FULL NAMES:
CAPACITY:
ADDRESS: