IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO. 51765/2017

In the matter between:

THE CITY OF CAPE TOWN	First Applicant
and	
THE NATIONAL ENERGY REGULATOR OF SOUTH AFRICA	First Respondent
THE MINISTER OF ENERGY	Second Respondent
CENTRE FOR ENVIRONMENTAL RIGHTS	to be admitted as *Amicus Curiae*

CENTRE FOR ENVIRONMENTAL RIGHTS:

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INTRODUCTION

> "*Our Constitution, by including environmental rights as fundamental, justiciable human rights, by necessary implication requires that environmental considerations be accorded appropriate recognition and respect in the administrative processes in our country. Together with the change in the ideological climate must also come a change in our legal and administrative approach to environmental concerns*."[1]

1. These heads of argument are filed on behalf of the Centre for Environmental Rights (*CER*), which has applied to be admitted as *amicus curiae*.[2]

2. The applicant (*the City*) and the first respondent (*NERSA*), in their heads of argument, have set out the relevant factual background that has culminated in this application, the CER will not repeat it.

3. The CER's interest in the matter is fully set out in its affidavit and need not be repeated here. The Court is respectfully referred to paragraphs 7 to 12 of the CER's affidavit.[3]

4. The issue for determination in the main application is whether prior ministerial

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1 *Director: Mineral Development, Gauteng Region, and Another v Save The Vaal Environment and Others* 1999 (2) SA 709 (SCA) at 719.

2 The CER applied to be admitted as *amicus curiae* on 14 May 2019. None of the parties have opposed the application and on 22 May 2019, the first respondent filed a notice indicating its intention not to oppose the application and to abide by the decision of this Court. The CER's application has been set down on the unopposed roll of 27 November 2019. However, in the event the main application is heard prior to the CER's application for admission, the CER has requested that its application for admission is heard on the same day as its main submission. None of the parties have objected to this request. The CER will seek further directions at the meeting with the DJP.

3 CER FA p 6 – 8.

determination in terms of section 34 of the Electricity Regulation Act (the *ERA*) is required in order for local government to procure its own electricity capacity.

5. The answer to this question has broader implications not just for the City but for local government as a whole. It also brings into sharp focus other constitutional rights including the right to a safe and healthy environment, not harmful to health or wellbeing, as encapsulated in section 24 of the Constitution. The CER seeks to assist this Court by:

   5.1. Drawing to this Court's attention the harmful impacts to human health, the climate, and the environment more broadly, currently caused by South Africa's electricity generation, predominantly from coal-fired power stations.

   5.2. Highlighting the role of, and opportunities for, local government in the necessary and urgent transition away from fossil fuels.

   5.3. Submitting to this Court that an interpretation that is consistent with the Bill of Rights and the powers and functions of the City is one that enables local government to procure renewable energy.

6. The CER's application is supported by the South African Local Government Association (SALGA)[4] which is an association established in terms of section 2(1) of the Organised Local Government Act.[5] SALGA represents the interests of all local government to

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[4] A confirmatory affidavit deposed to by the Chief Executive Officer of SALGA dated 17 June 2019 is attached p 241 - 243 of the bundle. SALGA confirms the submissions made by the CER.

[5] Act 52 of 1997. SALGA is also a schedule 3A entity in terms of the Public Finance Management Act 1 of 1999.

represent, promote and protect the interests of local government.[6] SALGA confirms the critically important role that local government can play in providing for the energy needs of South Africa and assisting in a transition to renewable electricity generation.

THE RIGHT TO AN ENVIRONMENT THAT IS NOT HARMFUL TO HEALTH OR WELLBEING

7. Section 24 of the Constitution is the starting point with regard to the constitutional protection of environmental rights. It provides that:

> *"Everyone has the right—*
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> *(a) to an environment that is not harmful to their health or wellbeing; and*
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> *(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that—*
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> *(i) prevent pollution and ecological degradation;*
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> *(ii) promote conservation; and*
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> *(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."*

8. The right may be understood in two parts –

8.1. section 24(a) is the fundamental human right to an environment that is not harmful to health and well-being. This part of the right extends health rights beyond section 27(1), which is limited to the provision of health care services.[7]

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6 SALGA confirmatory affidavit para 3 p 241.

7 Muswaka *"An analysis of the legislative framework concerning sustainable mining in South Africa"* Speculum Juris vol 31part 1 p 23.

The right recognises that there is often an inextricable relationship between one's health and well-being and the environment within which one lives.

8.2. section 24(b) is the directive to the State to take legislative and other measures towards the attainment of this right.[8] What is meant by this was expanded on by the Constitutional Court in *Grootboom*, albeit not in an environmental context, when the Court held that:

> *"The State is required to take reasonable legislative and other measures. Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The State is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programs implemented by the Executive. These policies and programs must be reasonable both in their conception and their implementation. The formulation of a program is only the first stage in meeting the State's obligations. The program must also be reasonably implemented. An otherwise reasonable program that is not implemented reasonably will not constitute compliance with the State's obligations."*[9] (Own emphasis)

8.3. Read with section 7(2) of the Constitution, the State, at all levels, bears an obligation to give effect to section 24 of the Constitution. This includes negative obligations to desist from harming the environment and positive obligations to take measures to ensure a healthy environment.

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8 Currie and De Waal The Bill of Rights Handbook 6th ed p 519.

9 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 42.

9. Both aspects of this right are implicated in this case. While the main application pertains to the interpretation of section 34 of the ERA which deals with future electricity generation, in order to understand how this provision should be interpreted, this Court must understand the environmental, social and economic context within which electricity generation currently takes place in order to adopt an interpretation that is consistent with section 39 of the Constitution.

The duty to interpret section 34 of the ERA in a manner consistent with the Constitution

10. Section 34 of the ERA, like all legislation, must be interpreted purposively and in a manner that is consistent with the Constitution, paying due regard to the text and context of the legislation. In *Hyundai Motor Distributors* the Constitutional Court held that:

> *"The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as possible, in conformity with the Constitution."*[10]

11. When interpreting legislation our Courts are duty bound by section 39(2) of the Constitution to promote the purport, spirit and objects of the Bill of Rights in the process of interpreting the provision in question. In *Earthlife Africa* this Court held that:

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[10] 2001 (1) SA 545 (CC) at para 22.

> *"The approach mandated by section 39(2) is activated when the provision being interpreted implicates or affects rights in the Bill of Rights, including the fundamental justiciable environmental right in section 24 of the Constitution."*[11]
>
> . . .
>
> *Section 24 recognises the interrelationship between the environment and development. Environmental considerations are balanced with socio-economic considerations through the ideal of sustainable development. This is apparent from section 24(b)(iii) which provides that the environment will be protected by securing ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."*

The question before this Court is whether the interpretation of section 34 of the ERA that is contended for by the respondents is consistent with a fundamental justiciable environmental right and the constitutional obligations of municipalities. As will be seen below, the interpretation contended for by the Minister and NERSA is in direct conflict with the approach outlined in *Hyundai* and *Earthlife Africa* because it would result in circumstances that do not permit for section 24 of the Constitution to be given effect to. An approach that permits the City to procure renewable energy in order to provide access to electricity to residents of its municipality is necessary in order to observe both the negative and positive obligations that rest on the City in terms of section 24 of the Constitution and section 152 of the Constitution.

12. The right to an environment that is not harmful to health and well-being is compromised

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11 *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others* [2017] 2 All SA 519 (GP) para 80 – 81.

and infringed by Eskom's current electricity generation because:

12.1. The historical choices made to invest in Eskom's fleet[12] of coal-fired power stations have had a detrimental effect on the health of communities surrounding those power stations. The pollutants emitted when burning coal are highly harmful to human health.[13]

12.2. Eskom's power stations are responsible for thousands of deaths each year.[14] The poor air quality in South Africa is causing premature deaths and chronic respiratory and other illness.[15] Children and the elderly are particularly susceptible to harmful air quality.[16] This is confirmed by the National Air Quality Officer (appointed in terms of section 14 of the National Environmental Management: Air Quality Act[17]) who states in her Air Quality report that "*[m]any South Africans may be breathing air that is harmful to their health and well-being particularly in the priority areas*."[18]

12.3. In addition to the detrimental impact on health, coal-fired power generation

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12 CER FA para 30 pp 15 - 16 notes that twelve [Eskom coal fired power stations] are based in the heavily-polluted Mpumalanga Highveld region. One station is in the Vaal Triangle and two are in the Waterberg region of the country, in the Free State and in the Limpopo provinces respectively. See also annexure NL3 p 91.

13 CER FA para 32 p 16.

14 CER FA para 33 p 17 read with annexure NL6 p 108 and Expert affidavit of Dr Holland para 10 p 217. The Holland Report found that coal-fired power generation in South Africa contributes to approximately 12 314 cases of bronchitis and related respiratory diseases in adults and children each year. The health costs of air pollution from these impacts was estimated at about USD2.37 billion. The Holland Report is attached as NL7, see also the expert affidavit of Dr Holland at p 215.

15 CER FA para 32 p 16.

16 CER FA para 32 p 16.

17 39 of 2004.

18 CER FA para 32 p 16 read with annexure NL5.

contributes to 40% of South Africa's total greenhouse gas (*GHG*) emissions.[19] South Africa's Climate Change Response White Paper notes that *"[s]ince coal is the most emissions-intensive energy carrier, South Africa's economy is very emissions-intensive*".[20] The United Nations states that South Africa is facing serious risks to the environment if the global emissions are not substantially curtailed.[21]

13. In order for South Africa to meet its international climate commitments as set out in South Africa's Nationally Determined Contribution (*NDC*) under the Paris Agreement on Climate Change which South Africa has ratified, rapid decarbonisation of the electricity sector is required.[22] This is also in accordance with section 233 of the Constitution, which provides that when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.[23] In turn, in order

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19 CER FA para 36 p 18 read with annexure NL1.

20 CER FA para 36 p 18 read with annexure NL1.

21 CER FA para 38 p 18 read with annexure NL8.

22 CER FA para 38 p 18 read with the annexure NL8 McCall, Burton et al, February 2019 ("ERC Alternative Electricity System Report") and the expert affidavit of Burton p 206.

23 *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) at para 178 fn 28. See also *S v Makwanyane* 1995 (3) SA 391 (CC) para 35. The inserted text is from *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) ("Grootboom") para 26, which endorsed the comments in Makwanyane and tailored the paragraph to the final Constitution.

> "public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which [the Bill of Rights] can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and, in appropriate cases, reports of specialised agencies such as the International Labour Organisation, may provide guidance as to the correct interpretation of particular provisions of [the Bill of Rights]."

for the government to protect the people of South Africa from the worst impacts of climate change, it must begin to take rapid and urgent steps to decarbonise. This inevitably feeds back to the constitutional obligation in section 24(a) and (b) of the Constitution.

14. The current situation is that electricity generation is dominated by Eskom's coal-based power stations which are contributing to poor air quality, premature death, chronic illness, are hindering the achievement of South Africa's climate commitments, and exposing the people of South Africa to great risk from the threats of climate change.

15. In addition, coal-fired power stations are notorious users and polluters of water.[24] Many of South Africa's existing coal-fired power stations are located in areas of high water scarcity, such as the Waterberg, or in areas where water availability is limited due to severe levels of pollution, such as in Mpumalanga - where rivers such as the Olifants and Vaal show dangerous levels of pollution; much of which is linked to harmful coal mining and power generation. [25]

16. This is in breach of section 24(a) of the Constitution. To remedy this, there needs to be a rapid and urgent shift away from fossil-fuel energy to renewable energy. The Climate Change Response Paper talks of the need to transition to a climate resilient, low-carbon economy and society, this is a component of a just transition to a sustainable, liveable future.[26]

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24 CER FA para 42 and 43 p 23

25 CER FA para 42 and 43 p 23

26 Executive summary of annexure NL1 p 33.

17. In *Earthlife Africa*, this Court noted the risk posed by climate change and cautioned that, in accordance with the principle of intergenerational justice, it must be given due consideration, stating:

> *"Climate change poses a substantial risk to sustainable development in South Africa. The effects of climate change, in the form of rising temperatures, greater water scarcity, and the increasing frequency of natural disasters pose substantial risks. Sustainable development is at the same time integrally linked with the principle of intergenerational justice requiring the state to take reasonable measures to protect the environment "for the benefit of present and future generations" and hence adequate consideration of climate change. Short-term needs must be evaluated and weighed against long-term consequences."*[27]

18. It is in response to this urgent need for a just transition that the role, importance and centrality of local government comes into sharp focus through the legislative and other measures envisaged in terms of section 24(b) of the Constitution.

THE ROLE OF LOCAL GOVERNMENT IN THE TRANSITION TO CLEANER RENEWABLE ENERGY

19. A municipality has *"the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution."* [28] The *"national or a provincial government may not compromise or*

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[27] *Earthlife Africa* para 82.

[28] Section 151(3) of the Constitution

impede a municipality's ability or right to exercise its powers or perform its functions." [29]

20. Section 156 sets out the powers and functions of municipalities. Section 156(1) provides that a municipality has executive authority in respect of, and has the right to administer "*(a) the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5*".[30] Electricity and gas reticulation is one of the matters listed in Part B of Schedule 4.[31]

21. Sections 4(1) and 8(2) of the Municipal Systems Act empower municipalities with a degree of general, financial and institutional autonomy to carry out their functions, and section 4(2) places the duty on them to provide for the democratic governance and efficient provision of services to their communities. Section 4(2)(j) of the Municipal Systems Act requires them to:

> *"contribute, together with other organs to state, to the progressive realisation of the fundamental rights contained in sections 24, 25, 26, 27 and 29 of the Constitution."*[32] (Own emphasis)

22. In *Joseph* Skweyiya J stated that although there is no specific provision in the Constitution in respect of the provision of electricity, the latter is an 'important basic

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29 Section 151(4) of the Constitution

30 Section 156(a) of the Constitution

31 The ERA defines reticulation as "means trading or distribution of electricity and includes services associated therewith."

32 See also *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another 2012 (2) SA 104 (CC)* at para 26.

municipal service which local government is ordinarily obliged to provide.'[33]

23. According to SALGA,[34] local government accounts for 40% of electricity consumption and 60% of electricity customers in South Africa.[35] Moreover, electricity is one of the key factors impacting local government service delivery and on the financial sustainability of local government.[36] SALGA has recognised that:

> *"without local government the transition* [to cleaner renewable energy] *cannot be achieved since local government not only accounts for 40% of electricity demand but also has executive authority for electricity distribution in terms of the constitution. Municipalities can and must be part of the solutions"*

24. SALGA has also acknowledged that *"the electricity supply and distribution industry in its current form is no longer viable for local government, national government, state-owned institutions and society as a whole"* and that embracing the transition is no longer a choice. However, power solutions that are being developed are hindered by regulatory barriers.[37]

25. The prevailing regulatory environment is *"inhibiting instead of enabling the transition, where neither the energy transition nor the role of local government are acknowledged*

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33 *Joseph and Others v City of Johannesburg and Others* 2010 (4) SA 55 (CC) para 34.

34 CER FA para 48 read with annexure NL13 and confirmatory affidavit by the Chief Executive Officer of SALGA p 241.

35 CER FA para 48 read with annexure NL13.

36 CER FA para 48 read with annexure NL13.

37 CER FA para 52.5 p 27;

within the current IRP; or Ministerial Determinations for new energy generation".[38] This is not only inconsistent with section 24 of the Constitution but it is also inconsistent with local government's constitutional obligations to:

25.1. Provide services in an environmentally sustainable manner; and

25.2. Provide a safe and healthy environment.

26. It is to these obligations that we turn to next.

Local government's obligation to provide services in an environmentally sustainable manner

27. The Constitution in section 152(1)(b) states that one of the objects of local government is to ensure the provision of services to communities in a sustainable manner. This is further amplified in the Municipal Systems Act[39] which provides in section 4(2)(d) that the council of a municipality, within the municipality's financial and administrative capacity and having regard to practical considerations, *"has the duty to strive to ensure that municipal services are provided to the local communities in a financially and environmentally sustainable manner"*.

28. What is meant by sustainability was considered by the Constitutional Court in the context of discussing sustainable development in *Fuel Retailers Association* where the Court held that:

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38 CER FA para 52 p 26 - 27.

39 32 of 2000.

"*[t]he Constitution recognises the interrelationship between the environment and development; indeed it recognises the need for the protection of the environment while at the same time it recognises the need for social and economic development. It contemplates the integration of environmental protection and socio-economic development. It envisages that environmental considerations will be balanced with socio-economic considerations through the ideal of sustainable development. This is apparent from section 24(b)(iii) which provides that the environment will be protected by securing 'ecologically sustainable development and use of natural resources while promoting justifiable economic and social development'. Sustainable development and sustainable use and exploitation of natural resources are at the core of the protection of the environment*."[40] (Own emphasis)

29. Sustainability is at the heart of the principles established in section 2 of the National Environment Management Act (*NEMA*) which is the legislative measure contemplated in section 24(b) of the Constitution. In *HTF Developers*, the Constitutional Court held that:

"*NEMA envisages the concept of sustainable development which requires that a "risk-averse and cautious approach is applied", whereby "negative impacts on the environment and on people's environmental rights be anticipated and prevented, and where they cannot be altogether prevented, are minimised and remedied." To balance this cautious approach, NEMA insists that decision-making in relation to the environment "must take into account the interests, needs and values of all interested and affected parties*". (Own emphasis) (footnotes omitted)

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40 *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007 (6) SA 4 (CC) at para 45.

30. In addition to the constitutional directive to ensure sustainable development, the following NEMA principles are applicable:

30.1. "*Environmental management must be integrated, acknowledging that all elements of the environment are linked and interrelated, and it must take into account the effects of decisions on all aspects of the environment*" (section 2(4)(b));

30.2. "*Environmental justice must be pursued so that adverse environmental impacts shall not be distributed in such a manner as to unfairly discriminate against any person, particularly vulnerable and disadvantaged persons*" (section 2(4)(c));

30.3. "*The social, economic and environmental impacts of activities, including disadvantages and benefits, must be considered, assessed and evaluated, and decisions must be appropriate in the light of such consideration and assessment*" (section 2(4)(i));

30.4. "*There must be intergovernmental coordination and harmonisation of policies, legislation and actions relating to the environment*" (section 2(4)(l)); and

30.5. "*Global and international responsibilities relating to the environment must be discharged in the national interest*" (section 2(4)(n)).

31. The NEMA principles (together with section 152(b) of the Constitution and section 4(2)(d) of the Municipal Systems Act) must, of necessity, guide any interpretation of the ERA and any decisions taken by any organ of state that could significantly affect the environment; this must include any decisions to be taken by the government in relation

to electricity procurement.

The right to a safe and healthy environment

32. In addition to the constitutional and statutory obligation on local government to provide services in an environmentally sustainable manner, section 152(1)(d) of the Constitution obliges local government to promote a safe and healthy environment. This again is amplified by section 4(2)(i) of the Municipal Systems Act which highlights the duty to promote a safe and healthy environment in the municipality.

33. Section 24 of the Constitution establishes a right or entitlement to a safe and healthy environment, not harmful to well-being, for the individual. Section 152(1)(d) in turn creates a specific duty – obligation – on local government to promote a safe and healthy environment. In this case this means that empowering local government to procure renewable energy would enable them to meet their constitutional obligation to promote a safe and healthy environment.

34. Read together, the constitutional and statutory mandate of local government with regard to the environment is clear – services must be provided in an environmentally sustainable manner and local government has a duty to ensure a safe and healthy environment. It is the CER's submission that the only way that local government's constitutional obligation can be met is if it is empowered to procure renewable energy.

LOCAL GOVERNMENT MUST BE EMPOWERED TO PROCURE RENEWABLE ENERGY – THE CASE FOR RENEWABLE ENERGY

35. The transition to renewable energy is less harmful to health, climate, and the environment more broadly (water and ecosystems) and it is also cost-efficient in relation to the cost of proposed new coal-fired power stations.[41] This is confirmed by Department of Energy in its latest draft of the Integrated Resource Plan for Electricity (*IRP*) of 2018 and independent modelling[42] as confirmed by the expert affidavit of Jesse Burton.[43] A report by Meridian Economics entitled "Eskom's Financial Crisis and the Viability of Coal-fired Power", which relies on modelling by the CSIR, confirms that:

> *"new coal and nuclear plants are simply no longer competitive. When new capacity is required, demand is met at lowest cost primarily from new solar PV (photovoltaic) and wind"*[44] (emphasis added).

36. NERSA argues that at present the average cost of procuring renewable energy from independent power producers (*IPPs*) across the grid is significantly higher than the rate at which Eskom supplies electricity to the City. However, NERSA omits to draw to this Court's attention that this will not be the case in future. This is particularly relevant because a section 34 determination is concerned with future energy generation. Thus,

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41 CER FA para 45 p 23 - 25 read with NL11.

42 Modelling by institutions such as the University of Cape Town's Energy Research Council and the CSIR.

43 Burton expert affidavit p 206.

44 CER FA para 45 p 23 - 25 read with N12. The ERC Report titled "An assessment of new coal plants in South Africa's electricity future: the cost, emissions and supply security implications of the coal IPP [Independent Power Producer] programme" which states that "*[a] key finding of the study is that in all scenarios, neither new coal nor new nuclear is required to meet demand at lowest cost*."

the cost of not investing in renewable energy at this point will continue to lock-in South Africa into patterns of energy generation that undermine the environment, have a high human cost and will increasingly become more expensive as the cost of renewable energy decreases. It is thus a myopic view to consider the cost of new renewable energy against the cost of operating coal-powered energy generation especially when the Department of Energy has acknowledged that renewable energy will be the most cost-efficient in future.

37. The electricity sector worldwide is undergoing fundamental change. Local governments around the world have increasingly taken urgent action to reduce greenhouse gas (*GHG*) emissions in an effort to address climate change and because it is cheaper and more cost-effective to do so. [45] Among other things, more and more local governments have been given the autonomy to procure energy to meet their needs, and this energy has increasingly been from renewable energy sources.[46]

38. As such, SALGA at its Energy Summit agreed that renewable energy must be scaled up and that it would:

> "*adopt and embrace the transition if we want to ensure reliable, clean, environmentally sound, sustainable, affordable, and secure energy for all*";

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45 CER FA para 55 – 56 p 26 - 27; Burton expert affidavit p 206. "Data gathered by the Carbon Disclosure Project (CDP), illustrate that solar and wind energy constitute a growing share of the energy mix for many cities globally. Of the cities reporting data, over fifty (50) power more than 16% of their electricity with solar and wind. Cities in India, Spain, Portugal, Australia, the United States, and Denmark power their electricity with more than 20% renewable energy. Many cities also have ambitious renewable energy targets. Seventeen (17) cities have 100% renewable energy targets by at least the year 2035, with many more having a target of above 50%, including cities in China, South Korea, Brazil, Finland, Portugal, the Netherlands, New Zealand, Australia, Canada, the United Kingdom, and Palestine."

46 CER FA para 55 – 56 p 29

"[n]ow is the time for change. Change must be proactive where the entire electricity value chain needs to be transformed under a new vision for the electricity distribution sector";

and that

"[w]hatever the arrangements of the upstream generation and transition sector, local government must be able to access the most economical, socially and environmentally acceptable bulk electricity supply"

39. The submissions made by SALGA indicate that local government in South Africa recognises and acknowledges its role and necessary obligations in the energy transition to cleaner renewable energy sources, and secondly that it is local government's intention to participate and play a role in the transition and in the procurement of renewable energy sources, in accordance with local government's Constitutional obligations.

40. Viewed in this context, the relief sought by the applicant is clearly not radical or unreasonable and neither does it only serve the narrow interests of the City of Cape Town. It is forward-looking in that it seeks to overcome the regulatory barriers that have side-lined local government from participating fully in electricity generation and by empowering local government to procure renewable energy this Court will be empowering all local government to fulfil its constitutional obligations.

THE DIFFERENCE BETWEEN THE IEP AND IRP AND ITS SIGNIFICANCE FOR THIS CASE

41. The parties appear to have conflated the Integrated Resources Plan (*IRP*) and the Independent Energy Plan (*IEP*).[47] We draw to this Court's attention the following:

41.1. The IEP is intended to be the country's broader energy plan (including electricity, liquid fuels, transport) regulated under the National Energy Act whereas the IRP is intended to be the country's electricity plan and a subset of the IEP – it is regulated under the Electricity Regulation Act.

41.2. Section 6 of the National Energy Act (dealing with the IEP) has never come into force, nor has a final IEP ever been promulgated. The National Energy Act still states that the date of commencement of section 6 is still to be proclaimed.

41.3. The Department of Energy on its website explains the difference between the IEP and IRP as follows:

> *"The IEP is an umbrella plan which, amongst other factors should guide policy development in South Africa, set the framework for regulations and also inform the selection of technologies to meet future energy demand. The IEP in scope therefore covers the entire energy sector and considers all elements of the energy value chain. The Integrated Resource Plan (IRP) can therefore be viewed as a subset of the IEP in that 1) it considers only the future demand and supply of electricity and proposes capacity expansion plan to ensure that the energy demand needs are met in the most effective way. It is indeed correct that the IEP should have been*

[47] City of Cape Town heads para 70.2.

developed before the IRP and, therefore, provided the framework within which the IRP should be developed. However, the electricity supply challenges that the country is experiencing, meant that ensuring security of supply for electricity has to be prioritised. For this reason Cabinet decided to expedite the development of the IRP in order to address immediate electricity supply challenges that the country is still facing."[48]

41.4. Government is currently in the process of revising the IRP. In August 2018, a draft IRP was released for public comment and recent media reports have indicated that the IRP will serve before Cabinet in or about September 2019.

41.5. The draft IRP is relevant in this matter because government has indicated its intention to follow a least cost plan. A least cost plan is explained in the draft IRP and by Burton in her expert affidavit as one that *"that balances supply and demand at lowest cost, while ensuring security of supply."*[49] The draft IRP shows that a least cost plan is one that invests in renewable energy such as wind and solar. In this regard, Burton has noted that the fundamental change that has occurred in reducing the price of renewable energy means that there is no longer a need to choose between cost-effective electricity supply and the environment. Burton states:

"*A rapid and urgent transition from fossil fuels to renewable energy is feasible and aligned with a least-cost electricity plan for South Africa. This is a fundamental change that has occurred in the last decade because of reduced prices of renewable energy. It means that trade-offs between the optimal economic pathway and optimal environmental*

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48 (http://www.energy.gov.za/files/docs/Frequently-asked-questions-IRP-and-IEP.pdf).

49 Burton expert affidavit para 10.3 read with draft IRP p 10 of 75.

pathway no longer exist."[50]

42. As such, investing in renewable energy protects the environment and people's heath while also being cost-effective.

THE ADMISSIBILITY OF EVIDENCE ADDUCED BY AN AMICUS

43. The CER's submissions are supported by the expert reports[51] and affidavits of Jesse Burton[52] and Dr Michael Holland.[53] Together with research and reports produced by government institutions[54] and international bodies.[55]

44. As stated by the Constitutional Court in *Children's Institute* the submissions of an amicus *"will often draw on broader considerations, and thus be premised on facts and evidence not before the court, including statistics and research."*[56] It is also particularly important for this court, as the court of first instance, to consider the evidence adduced by the CER because:

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50 Burton para 10.5

51 Annexure "NL7": Michael Holland Report on the Health Impacts of Coal-fired Power Plants in South Africa, March 2017; Annexure "NL9": Excerpts of ERC Alternative Electricity System Report, 2019; and Annexure "NL13": Excerpts of Meridian Economics Report on Eskom's Financial Crisis and the Viability of Coal-fired Power

52 Burton expert affidavit p 206

53 Holland expert affidavit p 215

54 Annexure "NL4": Excerpts of Highveld Priority Area Air Quality Management Plan; Annexure "NL5": Excerpts of National Air Quality Officer State of the Air Presentation 2018; Annexure "NL6": Eskom Application for Suspension, Alternate Limits/Postponement MES, Summary Report (Health Impact Assessment), November 2018

55 Annexure "NL8": Report by the United Nations Intergovernmental Panel on Climate Change

56 *Children's Institute v Presiding Officer of the Children's Court, District of Krugersdorp and Others* 2013 (2) SA 620 (CC) para 32

> *"In principle, courts of first instance should strive to accommodate the reception of evidence if this would be in the interests of justice. They should not knowingly leave relevant evidence that could have been received by them to be adduced at the appellate level."*[57] (Own emphasis)

45. Furthermore, ordinary litigants often do not have the resources necessary to produce the kind of reports that are relied on by the CER in this case. The CER as an amicus uses its resources on behalf of communities and people to assist the court in coming to an informed decision. As noted by the Constitutional Court:

> *"High Courts often hear vulnerable litigants with limited resources. These litigants are invariably unable to produce the kind of compelling evidence that an expert, like the Children's Institute, may be able to provide. In these instances, the amicus speaks to aid voiceless and penniless people and assists the court in making an informed decision."* (Own emphasis)

46. What determines whether the evidence of an amicus should be admitted is whether it is in the interests of justice to do so. Khampepe J, in *Children's Institute* noted that the cases that amici get involved in are often cases that affect *"children, the vulnerable, the marginalised and the indigent."*[58] As such, a court adjudicating such a constitutional issue *"in particular those relating to vulnerable groups like children, should be slow to refuse to receive evidence that may assist them in arriving at a just outcome*."[59]

47. This is such a case. Air pollution caused by coal-fired power stations disproportionately

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57 *Children's Institute* at para 29

58 *Children's Institute* para 30

59 *Children's Institute para 31*

affects vulnerable groups such as the elderly and children and contributes to pre-mature death. The role of the CER in this case is to advocate for those communities whose basic human rights to health and environment are comprised in order to meet the energy needs of the country. The CER has adduced relevant evidence that will assist the court. A just outcome in this case is one that grapples with this issue to ensure that South Africa's future electricity needs as contemplated in section 34 of the ERA are not met at the expense of the environment or the people.

48. The CER submits that it is patently in the interest of justice for this Court to hear and consider the evidence and issues raised by the CER in its application.

IN CONCLUSION

49. In *Fuel Retailers Association* the Constitutional Court acknowledged the special role that the courts can play in the protection of the environment and the duty to ensure that environment is safeguarded for future generations. The Court held:

> "*[T]he role of the courts is especially important in the context of the protection of the environment and giving effect to the principle of sustainable development. The importance of the protection of the environment cannot be gainsaid. Its protection is vital to the enjoyment of the other rights contained in the Bill of Rights; indeed, it is vital to life itself. It must therefore be protected for the benefit of the present and future generations. The present generation holds the earth in trust for the next generation. This trusteeship position carries with it the responsibility to look after the environment. It is the duty of the Court to ensure that this responsibility is carried out*."[60] (Own emphasis)

[60] *Fuel Retailers Association* para 102.

50. In this matter, this Court can adopt an interpretation of section 34 of the ERA that empowers local government to procure clean renewable energy. This will empower local government but also ensure that local government can fulfil its obligation to the communities it serves and the environment they live in.

51. In the circumstances, the CER supports the relief sought by the applicant in this matter.

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15 July 2019

TABLE OF AUTHORITIES

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2. *Children's Institute v Presiding Officer of the Children's Court, District of Krugersdorp and Others* 2013 (2) SA 620 (CC);

3. *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC);

4. *Director: Mineral Development, Gauteng Region, and Another v Save The Vaal Environment and Others* 1999 (2) SA 709 (SCA);

5. *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others* [2017] 2 All SA 519 (GP);

6. *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007 (6) SA 4 (CC)*;*

7. *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC);

8. *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC); and

9. *Joseph and Others v City of Johannesburg and Others* 2010 (4) SA 55 (CC).

TEXTBOOKS AND JOURNAL ARTICLES

10. Currie and De Waal The Bill of Rights Handbook 6th ed.

11. Muswaka “An analysis of the legislative framework concerning sustainable mining in South Africa” Speculum Juris vol 31part 1 p 23.