

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case No: **32200/20**

In the matter between:

**THE TRUSTEES FOR THE TIME BEING OF
GROUNDWORK TRUST**

Applicant

And

**MINISTER OF MINERAL RESOURCES AND
ENERGY**

First Respondent

**THE NATIONAL ENERGY REGULATOR OF
SOUTH AFRICA**

Second Respondent

SECOND RESPONDENT'S ANSWERING AFFIDAVIT

I, the undersigned,

NHLANHLA GUMEDE

do hereby make oath and state that:

1. I am a full-time member of the applicant, the National Energy Regulator of South Africa ("NERSA") of Kulawula House, 526 Madiba Street, Pretoria, Gauteng Province. I am a metallurgical engineer by training and hold the degrees of Bachelor of Science (BSc Eng.) in Engineering (Extractive Metallurgy)

from the University of the Witwatersrand, Johannesburg; a Management Development Programme qualification from the University of Cape Town and a Master of Business Administration ("MBA") degree from the Wits Business School, Johannesburg. I am duly authorised to depose to this affidavit.

2. The facts contained herein are within my personal knowledge, unless from the context it appears otherwise and are, to the best of my knowledge and belief, both true and correct.
3. I am duly authorised to depose to this affidavit for and on behalf of the second respondent, as is evidenced by the attached delegation of authority, marked "**SR1**".

OVERVIEW

4. In these proceedings the applicant essentially seeks for an order to compel the Minister of Mineral Resources and Energy ("the Minister") and the second respondent to furnish written reasons to the applicant in relation to the development and promulgation of Integrated Resource Plan for Electricity ("IRP").
5. The orders sought against the second respondent are contained in paragraphs 3, 4 and 5 of the Notice of Motion and read as follows:

- “3. *The First and Second Respondents are directed to provide the Applicant, within ten (10) days of this Court’s order, a copy of second Respondent’s comments on the draft IRP;*
4. *The Second Respondent is directed, within 30 (thirty) days of this Court’s order, to furnish written reasons for its decision to make comments that it did on the draft IRP; and*
5. *The written reasons provided by the Second Respondent must include, but are not limited to, reasons dealing with the specific issues set out in the Applicant’s request for reasons dated 5 November.”*

THE SECOND RESPONDENT’S VIEW ON THE LEGAL POSITION

6. The applicant contends that the role assigned to the second respondent in the development of the IRP as set out in Regulation 4(1) of the Electricity Regulations on New Generation Capacity (“the regulation”) is a decision-making role which fits within the framework of the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”).

7. The regulation reads:

“The integrated resource plan shall-

(a) be developed by the Minister after consultation with the Regulator;

and

(b) be published in the Government Gazette by the Minister.”

8. Upon reading of this regulation, it is clearly expressed, without any ambiguity, that the role to develop an IRP is conferred on the Minister. However, the regulation requires the Minister to develop the IRP after it has consulted with the second respondent, and not for the Minister to develop it together with the respondent, but only to consult the second respondent.
9. Further, the regulation empowers only the Minister with the powers to promulgate the IRP and for this action the Minister is not even required to consult the second respondent. It is against this background that the second respondent's answer is founded upon.
10. At the outset, I would like to highlight the strange fact regarding this application being that, on the one hand the applicant seeks for the Minister to provide written reasons to his decision to promulgate the IRP on 18 October 2019 in the form that he did, and on the other seeks for the comments that the second respondent made to the draft IRP. As stated above, the role of the second respondent only pertains to being consulted by the Minister in the development of the IRP. The second respondent plays no role in the promulgation of the IRP.
11. The assertion by the applicant to the effect that the second respondent's involvement in the development of the IRP, which is confined to providing being consulted by the Minister and providing comments, constitutes a decision. The

applicant claims that the comments that would've been made by the second respondent constitute an administrative action and accordingly triggers the application of PAJA.

12. For completion, I provide the definition as to what constitutes an administrative action in terms of section 1 of PAJA:

- 12.1 PAJA defines an administrative action to mean

".....any decision taken, or any failure to take a decision, by an organ of state, when exercising a power in terms of the Constitution or a provincial constitution; or exercising a public power or performing a public function in terms of any legislation; or a decision taken by a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct or external legal effect...."

PAJA

- 12.2 The Oxford dictionary defines the word "consultation" as "to seek advice/information from an expert". The giving of advice/information to the Minister during the consultation is not decision-making. The regulation confines the second respondent's role to giving

advice/information. It remains the prerogative of the Minister to make a judgment call on the advice in relation to the development of the IRP.

12.3 Having regard for the provisions of the regulation together with the ordinary grammatical meaning of the word "consultation"; the nature of the involvement of the second respondent in the development of the IRP is that of an advisory role.

12.4 The second respondent's role is to provide advice/information to the Minister, being the person accorded the powers to develop an IRP, which in the end may or may not be taken into account by the Minister. Put differently, the regulation does not make for a provision that advice/information proffered by the second respondent in the process of the development of the IRP must be automatically adopted into the IRP.

12.5 By its very nature an advice cannot be construed to be a decision as it has no final effect. The recipient of the advice would still need to make a judgment call on the advice received, which is the case with the Minister here.

12.6 The use of the word "draft" by the applicant in reference to the IRP that the second respondent would make comments on, connotes that

the IRP version the second respondent comments on is not a final document and has no external effect.

12.7 Due to the fact that an advice is of no final effect, therefore, a “decision” on the comments made by the second respondent cannot adversely affect the rights of any person and consequently has no direct or external legal effect. Accordingly, the “decision” on the comments does not constitute an administrative action as defined in section 1 of PAJA. Thus, PAJA finds no application in the present circumstances and its invocation is misplaced and has no valid basis in law.

12.8 In conclusion on this issue: the regulation only empowers the Minister to develop an IRP, the involvement of the second respondent in that process is that of an advisory role, any perceived decision on the part of the second respondent cannot legally be construed to constitute an administrative action for purposes of PAJA as the advice/information provided to the Minister is of not final effect and as such has no direct or external legal effect. Therefore, the applicant’s reliance on the application of PAJA in the circumstances is erroneous and a misconception of law.

Principle of Legality

13. In the alternative, the applicant relies on the principle of legality for an order to compel the provision of the reasons to the “decision” of the comments made by the second respondent in the draft IRP.
 - 13.1 The constitutional court in *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 explains and defines the principle of legality as - there is to be no functionary that may exercise power and perform any function that is beyond what is conferred upon it by law.
 - 13.2 The regulatory requirement does not make provision that when the second respondent gives advice to the Minister it undertakes a decision-making process but only that it is to be consulted. The second respondent has confined its involvement in the development of the IRP to that role of giving advice on draft IRP. That is acting within the ambit of the regulation.
 - 13.3 It is therefore inconceivable how the applicant has come to rely on the principle of legality to compel the provision of reasons by the second respondent. Also, there is no information provided support a conclusion for a violation of the principle of legality, bearing in mind the definition of the principle of legality.

- 13.4 To the contrary, when the applicant construes the role of the second respondent in the development of the IRP to that of decision-making, it would result in the second respondent having acted ultra-vires and being breach of the principle of legality.
- 13.5 As with PAJA, the principle of legality finds no application in the present circumstances.
14. It against this backdrop that I conclude; the applicant has failed to make out a case for the second respondent to be legally compelled either through PAJA or the principle of legality to furnish reasons for a “decision” to its comments in the draft IRP. Neither can the applicant rely on the provisions of section 10 of the National Energy Regulator Act 4 of 2000 (“NERA”). The applicant’s basis for this application is not legally sustainable.
15. I therefore hold the view that its inclusion in this application is legally flawed and amounts to a misjoinder.

THE EXPLANATION ON NERSA’S INVOLVEMENT IN THE PROCESS AND THE DECISION OF THE MINISTER ON THE PROMULGATION OF IRP

16. In this section I provide the history of the IRP, its nature and the process that leads to the Minister’s development of the IRP and its promulgation.

17. The IRP is a plan developed from the process of South Africa's National Development Plan. The IRP is an electricity infrastructure development plan based on least-cost electricity supply and demand balance, taking into account security supply and the environment. It sets out the vision of the energy sector.
18. The IRP subject of this application was promulgated on 18 October 2019. It is a plan that approaches energy security in developing adequate generation capacity to meet South Africa's demand for electricity, under economic climates of low-growth and economic improvement at a growth of above 4%.
19. It ventilates plans on a diversified primary energy sources, coal, nuclear, natural gas, renewable energy, hydro on their impact in the provision of electricity currently and into the future, 2030. It also tackles environmental considerations.
20. The Electricity Regulation Act 4 of 2006 ("ERA") defines the IRP as a resource plan by the national sphere of government to give effect to policy. In section 4, ERA enjoins NERSA to, among other things, issue rules designed to implement the national government's electricity policy framework, the IRP.

SERIATIM RESPONSES

Ad Paragraph 1 - 8

21. I note the contents of these paragraphs.

Ad Paragraph 9 -10

22. I admit the contents of these paragraphs.

Ad Paragraph 11

23. Save to state that the applicant does not make out a case for the relief it seeks to compel the second respondent to furnish reasons for their "decision" for its comments in relation to the development of the IRP, I admit the contents of this paragraph.

Ad Paragraph 12

24. I admit the provisions of the law as stated in the legislation referred to in this paragraph.

Ad Paragraph 13

25. Save to state that upon reading of the regulation it is clear that the instructions are directed only to the Minister, I admit the provisions of this paragraph.

Ad Paragraph 14-15

26. I admit the contents of these paragraphs.

Ad Paragraph 16

27. Save to highlight that the conclusions made by the applicant on the direct impact that a type of source for the provision of electricity, proportion used and the period of usage of that source of electricity are not accompanied by any data in support of its conclusion, I note the contents of this paragraph.

Ad Paragraph 17

I admit the contents of this paragraph.

Ad paragraph 18

28. Save to state that the history and record of the activism and litigation by the applicant on environmental issues bears no relevance to these proceedings, I note the contents of this paragraph.

Ad Paragraph 19

29. I note the contents of this paragraph.

Ad paragraph 20

30. Either than to state that the applicant has failed to show the legal basis for the information it requests, I note the contents of this paragraph.

Ad Paragraph 21

31. I note the contents of this paragraph.

Ad Paragraph 22

32. Save to state that, the provisions of regulation 4(1)(b) empowers only the Minister to promulgate the IRP in the Government Gazette and makes no mention/reference to the second respondent for this step. For reference, the relevant portion of the regulation reads:

"The integrated report plan shall:

(a).....

(b) be published in the Government Gazette by the Minister"

29.1 I therefore conclude that the contents of this paragraph are directed to the Minister, as the empowered functionary by the regulation. I have no comments, I accordingly note the contents of this paragraph.

Ad Paragraph 23

33. The contents of this paragraph are directed at the Minister, I have no comments and I accordingly note the contents of this paragraph.

Ad Paragraph 24

34. Again, the regulation accords the powers for the development of the IRP only to the Minister, the information reflected/or not reflected on the IRP is the outcome of a process carried out only by the Minister in developing the IRP. It is on this basis that I conclude that any reasons sought regarding the information reflected or absence of information from being reflected on the IRP is directed to the Minister and I accordingly note the contents of this paragraph.

Ad Paragraph 25

35. I admit that on 05 November 2019, the applicant sent a request for reasons to the second respondent.

25.1 The second respondent is not empowered by any law to make a decision to approve or refuse the IRP. I therefore, deny that the second respondent approved the IRP;

25.2 I deny the contents of this sub-paragraph and the applicant is put to proof of its bald allegations that the second respondent made an "apparent decision to approve the provision for 1 500 of new coal capacity in the IRP"; and

25.3 Save to repeat what I've stated above, in particular that, in the present circumstances PAJA finds no application to the second respondent, I deny that the second respondent is required to follow the processes and

provisions of PAJA. I therefore deny that the second respondent had forego a public consultation process, a requirement of PAJA, which finds no application in this case.

Ad Paragraph 26

36. I note the contents of this paragraph.

Ad Paragraph 27

37. I admit that the applicant required the Minister and the second respondent provide its reasons by no later than 05 December. I note the remainder of the allegations of this paragraph.

Ad Paragraph 28-31

38. I admit the contents of these paragraphs.

Ad Paragraph 32-34

39. The contents of these paragraphs are directed to the Minister, I have no comments and I accordingly note the contents of this paragraph.

Ad Paragraph 35

40. I admit that on 01 May 2020, the second respondent sent a response to the applicant. However, as stated several times above, in the present

circumstances PAJA finds no application, therefore, the second respondent's response is not time bound and PAJA cannot be used to determine if same is timeous or late.

Ad Paragraph 36

41. I admit the contents of this paragraph.

Ad Paragraph 37

42. I note the views expressed by the applicant on the response we gave, in the same breath:

37.1 I deny that the second respondent has a legal obligation to provide the applicant with its comments;

37.2 Save to state that the applicant fails to show the legal basis of the entitlement it refers to, I deny that the applicant is entitled to the second respondent's comments made to the Minister;

37.3 I deny that the applicant has made out a case and has provided a sustainable legal basis for prayer 3 of its Notice of Motion.

Ad paragraph 38

43. To the extent that the second respondent exercised public power, then the nature of the exercise of that public power does not adversely affect the rights

of any person, has no direct, and external legal effect. It consequently does not trigger the application of PAJA. Therefore, the second respondent has no obligation to in engage in public consultation as required by PAJA on administrative actions.

38.1 The remarks expressed by the applicant that “irrespective of whether these amount to an administrative action or not, the applicant is entitled to written reasons in this regard” are misguided and unfortunate. The South African legal principles require that a claimant in court proceedings makes out a legal basis for its claim. Being entitled “irrespective” of a sound legal basis to that entitlement, is a foreign concept. As such I deny that the applicant is entitled to the reasons it seeks “irrespective” of such a request being founded in sustainable legal principles.

38.2 I note the contents of this paragraph.

Ad Paragraph 39

44. Save to state again that the second respondent made no decision in the process of the development of the IRP, I deny that section 10 of the National Energy Regulation Act 4 of 2004 is applicable to the facts at hand.

Ad Paragraph 40

45. I admit that in the second respondent has a responsibility to provide reasons to a party(ies) seeking same but such a claim can only be entertained in instances

where a valid underlying principle of law relied upon for such a request is set out and applicable to prevailing circumstances. I, however, in the present circumstances deny that the second respondent has an obligation to provide reasons for a decision to its comments to the draft IRP.

Ad Paragraph 41

46. I deny that the applicant has made out a case for the relief it seeks against the second respondent, for the reasons set out above.

Ad Paragraph 42

47. Save to state that the Biowatch principle is not unfettered, it comes with requirements that must be satisfied. Those requirements are that the application launched by a litigant acting in public interest and exercise of constitutional rights must not be frivolous or vexatious. I deny that the Biowatch principle should find application in these proceedings.

CONCLUSION

48. The applicant has failed to make out a sustainable case in law to support its contention that it is entitled to compel the second respondent to provide reasons for the comments to the draft IRP.

WHEREFORE the second respondent prays for an order that the applicant's case be dismissed with costs.

DEPONENT

SIGNED and SWORN to before me, at _____ on this the _____ day of November 2020, by the Deponent who has acknowledged that he knows and understands the contents of this Affidavit and he has declared that he has no objection to taking the oath, and he regards the oath as binding on his conscience and he has uttered the following words: - "I swear that the contents of this Affidavit are true, so help me God."

COMMISSIONER OF OATHS

FULL NAMES:-

BUSINESS ADDRESS:-

OCCUPATION:-