IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No: 56907/2021

In the matter between:

AFRICAN CLIMATE ALLIANCE	**First Applicant**
VUKANI ENVIRONMENTAL JUSTICE MOVEMENT IN ACTION	**Second Applicant**
THE TRUSTEES FOR THE TIME BEING OF GROUNDWORK TRUST	**Third Applicant**

and

THE MINISTER OF MINERAL RESOURCES AND ENERGY	**First Respondent**
THE NATIONAL ENERGY REGULATOR OF SOUTH AFRICA	**Second Respondent**
THE MINISTER OF FORESTRY, FISHERIES AND THE ENVIRONMENT	**Third Respondent**
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	**Fourth Respondent**

ANSWERING AFFIDAVIT

I the undersigned,

SAANDHRI NAIDOO

state under oath as follows:

A. DEPONENT

1.

1.1 I am a major female Director: Legal Services of the Department of Mineral Resources and Energy (the "*Department*"), under the first respondent (the "*Minister*"). I am stationed at Trevenna Campus, Building B, Corner Meintjes and Francis Baard Streets, Sunnyside, Pretoria.

1.2 I am the officer responsible for litigation in the Department and thus responsible for the above matter its management, including liaising with the State Attorney, the appointment of Counsel and the facilitation of obtaining necessary instructions from the various line function sections of the Department and the Minister.

1.3 The content of this affidavit falls within my personal knowledge or appears from documents to which I have access by virtue of my office, unless the contrary appears from the context, and is true and correct.

1.4 I am duly authorised to depose to this affidavit and to oppose this application on behalf of the Minister.

1.5 Submissions of a legal nature are made with the advice of the legal representatives of the applicants, which advice I accept as correct.

B. INTRODUCTION

2. In the main application, the applicants seek declaratory relief in terms of which it is ordered that the following "*decisions*" are declared to be inconsistent with the Constitution and thus unlawful and invalid:

   2.1 the Minister's determination of 25 September 2020, published in GN 1015, Government Gazette 43734, in which the Minister determined that 1500mw electricity would be generated by coal-fired power;

   2.2 NERSA's concurrence with such determination in its decision of 29 July 2020 and published on 25 September 2020; and

   2.3 the Integrated Resource Plan published by the Minister on 18 October 2019 ("*2019 IRP*") under GN 1360/2019 in Government Gazette 42784, to the extent that it makes provision for 1500mw of new coal-fired power.

3. The applicants also seek an order that the "*decisions*", to the extent that they make provision for 1500mw of new coal-fired power, are set aside.

4. According to the applicants, the application is brought:[1]

   4.1 first, as a constitutional challenge to the impugned decisions, as these decisions unjustifiably limit basic constitutional rights;

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[1] p.15, para 24

4.2 second, as a review application, based on the Promotion of Administrative Justice Act, 3 of 2000 ("*PAJA*"), alternatively, the principle of legality.

5. The applicants, curiously do not expressly seek any specific relief to review and set aside the said "decisions"

6. I submit in this regard that:

6.1 An order to declare a "*decision*" unconstitutional, invalid and unlawful, is not a review;

6.2 Similarly, an order for the setting aside of a "*decision*" does not, of necessity, follow a review; and

6.3 Consequently, the request in the notice of motion for a Record in terms of Rule 53(4) does not make an application, which is otherwise not found in review, to be a review.

7. The remedies of a review in terms of section 8 of PAJA are circumscribed and the declaration of constitutional unlawfulness and invalidity is not one of them. Such relief is found in terms of section 21 of the Superior Court Act 10 of 2013, read with sections 33 and 172 of the Constitution.

8. Furthermore, and most significantly, the 2019 IRP is not a decision or conduct capable of being reviewed.

9. This being the case, in the Notice of Motion, the applicants called upon the Minister, in terms of Rule 53(1)(b), to file a record of the proceedings sought to be set aside, within 15 days of receipt of the notice of motion.

10. The Record was filed on behalf of the Minister on 20 January 2022.

11. I have considered the application in terms of Rule 30A filed by the applicant and hereby oppose the application on the basis that:

11.1 the Record filed on behalf of the Minister on 20 January 2022 in terms of Rule 53 of the Uniform Rules, is complete;

11.2 the documents sought as listed in paragraph 6 of annexure "**TL8**" to the supporting affidavit, relate to the 2019 IRP, which is not a "*decision*" and thus capable of being reviewed; and

11.3 the documents are therefore irrelevant to the decision sought to be reviewed.

12. I therefore submit that there are no justifiable reason for the Minister to be compelled to produce the documentation requested, and the application must be dismissed with costs.

C. FACTUAL CONTEXT

13. In the main application, the applicants preface the basis for the application by stating that:

13.1 climate change and its catastrophic consequences are a reality, and continue to escalate given the rising global temperatures.[2]

13.2 coal fired power is the single most significant contributor to global warming accounting for at least a third of global temperature increases experienced to date. For these reasons the UN Secretary General has urged states to cancel all global coal projects in the pipeline. Coal-fired power has an impact on human health through air pollution, which subsequently causes deaths.[3]

13.3 South Africa has the opportunity to move away from its reliance on polluting fossil fuels and to protect constitutional rights. It has been shown that renewable energy provides feasible and affordable replacement alternatives for coal power for a far lesser cost. Renewable energy as opposed to coal, is no longer merely an environmental and human imperative, but an economic imperative too.[4]

13.4 However, the Minister and NERSA have turned their face against their own economic modelling and their constitutional obligations and instead endorsed the procurement of 1500mw of new coal-fired power over the next decade, in circumstances where there is no reasonable

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2 p.12, para 11
3 *Ibid.*, at paras 12-14
4 pp.13-14, paras 17-18

MJ

and justifiable basis for the limitation of constitutional rights resulting from this.[5]

14. The IRP is not founded in legislation.

15. The IRP is a government planning document for the provision of electricity, taking into account the various sources of energy. It is dynamic and subject to regular reviews and updates. In its inaugural publication of 6 May 2011, the IRP is defined as an "*over-arching coordinated energy plan combining the constraints and capabilities of alternative energy carriers to meet the country's energy needs*".

16. The Minister's power to determine new generation capacity and the types of energy sources from whence to derive such capacity, is provided for in terms of section 34 and not the IRP. However, as a government planning document, the Minister's options are informed by, and aligned to, the IRP and the energy sources identified in the IRP.

17. Although, the IRP is revised from time to time, it is not the first step for the implementation of the Minister's powers in terms of section 34, as suggested in the founding affidavit.[6]

18. The 2018 IRP determined new coal-fired generation capacity at 1000MW. After a public participation review process, the new coal-fired generation capacity was revised to 1500MW.

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[5] p.15, paras 20-21
[6] p.32, para 63

19. It is not the applicant's case that the revision in itself is reviewable. In other words, that the applicant would have been happy with the Minister maintaining the 1000MW. This case is simply not made at all.

20. The applicant argues, wrongly I submit, that a position was taken in the 2018 IRP that no new coal-fired generation capacity will be employed by the government going forward and that the 2019 IRP seems to be going back on that position. The applicant's attempts in this interlocutory application, to introduce further bases for complaints by stating that the 1500MW is over and above the 1000MW determined in the 2018 IRP are opportunistic and ought to be rejected.

21. In any event, to the extent that that such revision as published by the Minister constitutes a reviewable decision or conduct, if at all, the time within which such challenge ought to have been brought in terms of PAJA lapsed in April 2020, in terms of section 7 of that Act.

22. In so far as the applicants seek to rely on the principle of legality, it is further submitted that a period of two years from the date of the publication of the 2019 IRP in October 2019 to November 2021 when the main application was launched constitutes an undue delay.

23. It is in any event untenable to seek to review the IRP, at least on the facts as appear in the founding affidavit.

24. As stated in paragraph 68 of the founding affidavit, from its inception in 2010, the IRP included coal-fired generation capacity at 6300MW, as an energy resource option. The determination that was made by the Minister following the 2011 IRP publication were for 2500MW new coal generation capacity, which was never implemented as the two planned coal fired power stations (i.e Thabametsi and Khanyisa) were abandoned after several litigation.[7]

25. The IRP was not revised for many years, meaning the status *quo* as above remained. In 2018 a revision process which led to the publication of the 2019 IRP commenced.

26. In this regard, it is not correct that the 2018 IRP made the decision that "*no new coal power plants will be built in future*". A proviso was included in the relevant sentence that "*unless affordable cleaner forms of coal to power are available.*"[8]

27. The applicant suggests that the modelling that preceded the publication of the 2019 IRP was intentionally manipulated in order to achieve the desired result of forcing in 1500MW of new coal power generation capacity.[9]

28. The reason for the provision of the 1500MW of new coal power generation capacity, formed the subject matter of an application by the third applicant, represented by the CER, which was withdrawn in February 2021.[10]

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7 p.35, paras 68-69
8 Record p.09/238, 2018 IRP at p.34
9 p.41, paras 84-85
10 pp.43-44, paras 90-97

MJ

29. The fact is, coal was included in the IRP since its inception. The 2018 IRP provided for coal at 1000MW, the 2019 IRP revised this quantity to 1500MW. The determination seeks to implement this particular provision, a power which, as stated above, the Minister exercises in terms of section 34(1) of the ERA.

30. This being the case, as demonstrated below, the issue for the applicant is not the increase of the new coal power generation capacity from 1000MW to 1500MW, but new coal power generation, as an energy resource, at all.

31. The following appear, among others, from the founding affidavit:

31.1 An entire 10-paragraph segment on allegations that coal is the single most significant contributor to climate change;[11]

31.2 In this regard reference is made to the Climate Analytics, a multidisciplinary team of climate science experts, stating among other things, that:

31.2.1 "*to keep the door open for staying in the 1.5°C limit, countries will need to plan to retire a large number of existing coal power plants early, reduce the capacity factor of those that remain, and refrain from building new coal capacity*"; and

31.2.2 "*there is a an urgent need to cancel the expansion plans for the coal fleet.*"

[11] pp.59-63, paras 147-157

31.3 In paragraph 157, the applicant states that South Africa's plans to procure 1500MW of new coal-fired power stands directly at odds with these global calls for action, despite the country's vulnerability to climate change impacts.

31.4 The applicant then attaches the expert report of Professors Robert Scholes and Francois Engelbrecht from the Wits University Global Change Institute, supported by Professor Nicholas King, to support its argument regarding South Africa's *"Vulnerability to Climate Change Impacts"*.[12]

31.5 In heading "E", the applicant dedicates its argument to "*the myth of clean coal technologies*", which the Minister has claimed would be employed in the new generation capacity.

31.6 In other words, the applicant seeks to show that coal cannot be used at all as there is no such thing as "clean coal" as contemplated in the IRP.

31.7 The applicant has attached the expert report of DR Sahu in this regard.[13]

31.8 Then the applicant argues that "new coal will all but guarantee the climate crisis" under heading "**F**".

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[12] pp.64-85, paras 158-230
[13] pp.86-95, paras 231-243

32. It is clear that what the applicant seeks to achieve in relation to the IRP, is that it be declared that the use of coal is unconstitutional, and not that its increased provision from 1000MW to 1500MW has resulted in a reviewable administrative action, or a decision reviewable in terms of the principle of legality.[14]

33. The founding affidavit cannot even sustain a proper case for such causes and it will not, whether or not a record, further than what has been provided, is furnished.

34. It is on the basis of the above that it is denied, firstly, that the record that was furnished is incomplete, and secondly, that any record has to be furnished in respect of any process relating to the IRP.

D. THE MINISTER HAS COMPLIED WITH RULE 53

35. Rule 53 of the Uniform Rules provides the following regarding the filing of the record:

> *"(1) […] all proceedings to bring under review the decision or proceedings of any […] administrative functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the […] to the officer, as the case may be, and to all other parties affected —*
>
> *(a) calling upon such persons to show cause why such decision or proceedings should not be reviewed and corrected or set aside, and*
>
> *(b) calling upon the […] officer, as the case may be, to despatch, within fifteen days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside, together*

[14] At pp.156-157, paras 417-418

with such reasons as he or she is by law required or desires to give or make, and to notify the applicant that he or she has done so." [Emphasis added]

36. The purpose of Rule 53 and thus, the requirement to file a record, is to facilitate and regulate applications for review.

37. The Constitutional Court in the *Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (CC) stated the current position in our law as to the content of the record as all information relevant to the impugned decision or proceedings to enable the applicant and the Court fully and properly to assess the lawfulness of the decision-making process.[15]

38. The operative words here being "*relevance*" and the "*decision making process*".

39. As stated above, the documents listed in paragraph 6 of annexure "**LT8**" all relate to the revised 2019 IRP, which is not a decision, and in respect of which the applicants seek declaratory relief, which may only be granted in terms of section 21 of the Superior Court Act and sections 33 and 172 of the Constitution.

40. The essence of the applicants' Constitutional attack on the IRP, is the inclusion of coal - in general - as an energy resource option in the IRP. In light of the fact that Coal has been part of the IRP as an energy resource option

[15] At para [13]

since the IRP was first gazetted in 2010, the documentation sought is irrelevant for the determination of the issues before Court.

41. It is therefore submitted that, the applicant's relief cannot be one found in review and its characterisation as such does not make it one and it certainly does not make the IRP a reviewable action, either in terms of PAJA or the principle of legality.

42. The Minister has filed a complete record of all documentation before him when the determination sought to be set aside.

43. The remainder of the documents and/or information sought to be compelled in this application is not of the kind as contemplated in terms Rule 53 and the authority cited above, and the Minister may not be reasonably required to furnish such documentation.

44. The application therefore falls to be dismissed with costs.

E. ***SERIATIM*** RESPONSE

45. I now turn to the specific allegations contained in the founding affidavit deposed to by Mr TIMOTHY HENDRE LLOYD on behalf of the applicants, and is so doing I will not repeat what I have stated above.

46. My responses are to be read with and against the background of my evidence.

MJ

47. Insofar as I do not deal expressly with each and every allegation contained in the founding affidavit, such allegations should be taken as denied, unless they accord with what is stated in the preceding paragraphs.

48. Ad paragraphs 1, 2 and 3

Save to deny that the entire content of the affidavit of Mr Lloyd is true and correct, the remainder of the content of these paragraphs is admitted.

49. Ad paragraphs 4 to 6

Save to state that the applicants are not entitled to the relief they seek, the remainder of the content of these paragraphs is noted.

50. Ad paragraphs 7 to 9

50.1 I admit the filing of documents and the exchange of correspondences as set out in these paragraphs and maintain the position as communicated to the applicants on behalf of the Minister in this regard.

50.2 As state above, the Minister has fully complied with Rule 53(1)(b) as required by the applicants.

50.3 I deny that the applicants are entitled to any further documentation in this regard.

51. Ad paragraphs 10

MJ

The content of this paragraph is noted.

52. Ad paragraphs 11 to 21

52.1 I admit the filing of documents and the exchange of correspondences as set out in these paragraphs and maintain the position as communicated to the applicants on behalf of the Minister in this regard.

52.2 As state above, the Minister has fully complied with Rule 53(1)(b) as required by the applicants.

52.3 I deny that the applicants are entitled to any further documentation in this regard.

52.4 I refer to my averments above.

53. Ad paragraphs 22 to 24

53.1 The content of these paragraphs is denied.

53.2 I refer to my averments in paragraphs 13 to 34, and paragraphs 35 to 44 above.

53.3 The Thabametsi and Khanyisa Projects were aborted and therefore have never taken off the ground due to litigation as stated in the applicants' main application and discussed above. Therefore, the 1000MW new coal capacity was never implemented.

53.4 The revision increased the quantity from 1000MW to 1500MW and not "*over and above the initially planned 1000MW of committed/already contracted capacity*".

53.5 This is not even the applicants' case in the main application.

53.6 The applicants' general complaint is the use of coal as a resource.

53.7 Legal argument will be submitted on behalf of the Minister in this regard.

54. Ad paragraphs 26 and 27

54.1 First, this is not the applicants' case in the main application.

54.2 Second, the IRP is a plan, which is dynamic and revised from time to time.

54.3 It is the adoption of the plan by the Minister by way of the determination in terms of section 34(5), that is the exercise of public power subject to review in terms of PAJA.

54.4 Third, there is nowhere in the founding affidavit that the applicants seek to review the publication of the 2019 IRP. The applicants seek a declaratory order of constitutional invalidity. Once this is established, the IRP will be set aside as sought in the notice of motion.

54.5 The remedies in review are circumscribed, and none are foreshadowed by any allegation in the main application.

54.6 The content of these paragraphs is consequently denied.

54.7 Legal argument will be submitted on behalf of the Minister in this regard.

55. Ad paragraphs 28 and 29

55.1 Both the 2018 and 2019 IRPs, which were before Minister when the determinations were made state the position that the consideration of new coal-fired generation capacity must be based on high efficiency, low emission technologies and other cleaner coal technologies.

55.2 It is the process of the procurement of the new coal-fired power which will inform the applicants and the public at large whether the Minister has taken into account the impact of such coal-fired power generation on human rights.

55.3 In fact, the applicants appreciate this dynamic hence the broader declaratory order sought and the supporting evidence by experts to show that there is no such thing such as clean coal.

55.4 The content of these paragraphs is consequently denied.

56. Ad paragraphs 30 to 35

56.1 The content of these paragraphs is denied.

56.2 I refer to my averments in paragraphs 13 to 34, and paragraphs 35 to 44 above.

F. CONCLUSION

57. In light of the above, I submit that the applicants have failed to make out a proper for the relief sought in the notice of motion.

58. In the premises, I ask the above honourable Court to dismiss the application in terms of Rule 30A with costs, including costs of two Counsel.

DEPONENT

I certify that the Deponent acknowledged that he knows and understands the contents of this affidavit, that she has no objection to the making of the prescribed oath and that she considers this oath to be binding on her conscience. I also certify that this affidavit was signed in my presence at PRETORIA on this 26TH day of MAY 2022 and that the Regulations contained in Government Notice R1258 of 21 July 1972, as amended by Government Notice R1648 of 19 August 1977, have been complied with.

COMMISSIONER OF OATHS

Commissioner of Oaths
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Title: SENIOR LEGAL ADMIN OFFICER
Department of Tourism
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Date: 26 MAY 2022