

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

CASE NO : **42887/2017**

In the matter between:

<b>THE COAL TRANSPORTERS FORUM</b>	Applicant
and	
<b>ESKOM HOLDINGS LIMITED</b>	First Respondent
<b>NATIONAL ENERGY REGULATOR OF SOUTH AFRICA</b>	Second Respondent
<b>MINISTER OF ENERGY</b>	Third Respondent
<b>MAIN STREET 957 (RF) (PTY) LTD</b>	Fourth Respondent
<b>RAMIZONE (RF) (PTY) LTD</b>	Fifth Respondent
<b>ROGGEVELD WIND POWER (PTY) LTD</b>	Sixth Respondent
<b>NGODWANA ENERGY (RF) (PTY) LTD</b>	Seventh Respondent
<b>ACED RENEWABLES HIDDEN VALLEY (PTY) LTD</b>	Eighth Respondent
<b>NXUBA WIND FARM (RF) (PTY) LTD</b>	Ninth Respondent
<b>AMSTILITE (RF) (PTY) LTD</b>	Tenth Respondent
<b>OYSTER BAY WIND FARM (PTY) LTD</b>	Eleventh Respondent
<b>SIRIUS SOLAR PV PROJECT ONE (PTY) LTD</b>	Twelfth Respondent
<b>DROOGFONTEIN 2 SOLAR (PTY) LTD</b>	Thirteenth Respondent
<b>RE CAPITAL 3C (PTY) LTD</b>	Fourteenth Respondent
<b>ZEVOBUZZ (PTY) LTD</b>	Fifteenth Respondent
<b>SOETWATER WIND FARM (PTY) LTD</b>	Sixteenth Respondent
<b>SOUTH AFRICA MAINSTREAM RENEWABLE POWER RIVERBANK WIND POWER (RF) (PTY) LTD</b>	Seventeenth Respondent
<b>AMSTILINX (RF) (PTY) LTD</b>	Eighteenth Respondent
<b>COPPERTON WIND FARM (PTY) LTD</b>	Nineteenth Respondent
<b>GAROB WIND FARM (PTY) LTD</b>	Twentieth Respondent



SOLAR CAPITAL ORANGE (PTY) LTD	Twenty-First Respondent
ZOLOGRAPH INVESTMENTS (RF) (PTY) LTD	Twenty-Second Respondent
BOKAMOSO ENERGY (PTY) LTD	Twenty-Third Respondent
RE CAPITAL 2 (PTY) LTD	Twenty-Fourth Respondent
GREEFSpan PV POWER PLANT NO 2 (RF) (PTY) LTD	Twenty-Fifth Respondent
DPS79 SOLAR ENERGY (PTY) LTD	Twenty-Sixth Respondent
ADAMS SOLAR PV PROJECT (RF) (PTY) LTD	Twenty-Seventh Respondent
BELL-ATRIX SOLAR PV PROJECT (PTY) LTD	Twenty-Eighth Respondent
GEORGE BIOMASS ENERGY (PTY) LTD	Twenty-Ninth Respondent
BUSBY POWER (RF) (PTY) LTD	Thirtieth Respondent
DU PLESSIS SOLAR PV4 (PTY) LTD	Thirty-First Respondent
VENDIWELL (PTY) LTD	Thirty-Second Respondent
UMOYA ENERGY (RF) (PTY) LTD	Thirty-Third Respondent
STEYNSRUS PVI (PTY) LTD	Thirty-Fourth Respondent
STEYNSRUS PV2 (PTY) LTD	Thirty-Fifth Respondent
HEUNINGSSPRUIT PVI (PTY) LTD	Thirty-Sixth Respondent
TUGELA ENERGY (PTY) LTD	Thirty-Seventh Respondent
ACWA POWER SOLAR RESERVE REDSTONE SOLAR THERMAL PLANT (RF) (PTY) LTD	Thirty-Eighth Respondent

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**FIRST RESPONDENT'S ANSWERING AFFIDAVIT**

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I, the undersigned,

**MNINAWWE COLUMBUS XALUVA**



do hereby make oath and say the following:

A. **INTRODUCTION**

1.

1.1 I am an adult male, Corporate Legal Specialist employed as such in the Legal and Compliance Department at the first respondent.

1.2 I am duly authorized to make this affidavit on behalf of the First Respondent as per the delegation of authority attached hereto marked "MCX1" The facts I make in this affidavit fall within my personal knowledge unless I state otherwise or the context of what I say indicates the contrary. I confirm that these facts are true and correct, to my knowledge and belief.

1.3 To the extent necessary, I rely on documents at my disposal and information made available to me in order to describe the bases and facts upon which Eskom relies in support of its opposition to the application. I believe that such information and documents are true and correct.

1.4 Insofar as I deal with legal submissions in this affidavit I do so on the advice of Eskom's legal representatives, which I accept as correct.

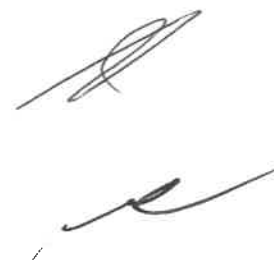
1.5 I confirm that I have read the notice of motion, founding and supporting affidavits of **MPHO STEPHEN MOKWANA** and **MARTINS SEBUENG** filed on behalf of the Applicant. Their import has been explained to me. I respond to the contents of those affidavits more fully below.



- 1.6 To the extent that I do not deal expressly with an averment it is not to be taken as an admission as to the correctness thereof. Each and every averment is to be taken as denied save and unless I admit it.
2. For ease of reference, I refer to the first respondent as Eskom, the second respondent as NERSA, the third respondent is the MoE and the fourth to the thirty eighth respondents as the IPP's.
3. I have been advised that the relief sought is odd and bad in law because it is designed to circumvent the legislative ambit within which Eskom operates by seeking an order in contravention of the statutory prerequisites and the existing section 34(1) Ministerial determinations of 1 August 2011, 19 December 2012 and 18 August 2015. Moreover, it attempts to belatedly and through the backdoor review decisions by NERSA and the applicable Minister without any legal basis for such a review and without instituting proceedings to review binding decisions. Furthermore, the Applicant's averments, as I will demonstrate in the course of this affidavit, consist largely of unsubstantiated statements and conjectures. The Applicant also fails to disclose full and true facts to the Court, such as that its members 'contracts, forming the basis of the present application, will come to an end in March 2018.
4. Before dealing in a line-by-line fashion with the averments, it is necessary for me to expand on the aspects on which Eskom opposes the relief sought in the notice of motion. Thereafter, I shall:
- 4.1 Raise three points *in limine*, to highlight the fundamental flaws in this application that:



- 4.1.1 the Applicant does not have standing in law in terms of section 38(e) of the Constitution of the Republic of South Africa, 1996 ("the Constitution") as it does not have any right that is infringed or threatened;
- 4.1.2 the application is abstract, academic and at best anticipatory as there is no live controversy between the Applicant and any of the Respondents; and
- 4.1.3 the Minister of Public Enterprises has not been cited in the proceedings.
- 4.2 Give a brief overview of the legislative context within which this application arises;
- 4.3 Demonstrate that the Applicant's claims of prejudice are self-serving and misplaced, its reliance on irreparable harm is unfounded, the claim of lack of an alternative remedy is similarly mistaken and that the requirements for final interdictory relief have not been met and the Applicant is not entitled to the relief sought;
- 4.4 Lastly, I respond to the allegations made in the individual paragraphs of the founding affidavit but I do so *ex abundanti cautela* in the event that none of the points *in limine* alluded to are sustained.




**B. SUMMARY OF RESPONDENT'S OPPOSITION**

5. I wish to make it clear at the very outset that Eskom opposes this application for an interdict preventing the signature of the PPA's pending a decision by NERSA on principally the following grounds:

5.1 The Applicant lacks understanding and appreciation for the purpose, nature and operation of the National Energy Act 34 of 2008 ("NEA"), the Electricity Regulation Act 4 of 2006 ("ERA") and the National Energy Regulator Act 40 of 2004 ("NERA") and the purpose of the section 34 determinations;

5.2 The Independent Power Procurement Programme ("the IPP Programme") is administered and executed by the Department of Energy ("the DoE") pursuant to statutory directives issued by the Minister of Energy in terms of section 34(1) of the ERA and the Regulations made in terms thereof published in Government Notice R.399, Government Gazette No. 34262 of 4 May 2011, as amended by Government Notice R.1366, in Government Gazette No. 40401 of 4 April 2016 ("the Regulations");

5.3 The Minister of Energy pursuant to the provisions of section 35(4) (j) of the ERA promulgated the Regulations. The overarching purpose of the Regulations is to provide a framework for the implementation of ministerial directives issued in terms of section 34(1) of the ERA. They set out the role and responsibilities of various actors in the new generation capacity, including the role of the DoE as the "procurer", the


rights and obligations of an Independent Power Producer ("the IPP") and the role and responsibility of Eskom as "*the buyer*".

- 5.4 Once the MoE has made a section 34(1) determination that Eskom as "buyer" must purchase the electricity and provided that all statutory and contractual conditions are fulfilled, Eskom cannot refuse to sign the PPA once there has been proper compliance with all the statutory provisions.
- 5.5 The reason for the above is that the legislature has empowered NERSA as the custodian and enforcer of the National Electricity Regulatory Policy Framework to facilitate the conclusion of Power Purchase Agreements and to licence entities to generate and trade in electricity.
- 5.6 The Minister of Energy has the powers conferred upon her in terms of Section 34 of ERA *inter alia* to determine that the electricity may be produced by certain producers and be sold to entities such as Eskom. These matters of policy are dictated by Government and implemented by NERSA and the Minister of Energy in terms of the relevant legislation.
- 5.7 Not only is there no express provision made for Eskom to refuse to become a buyer of electricity produced by independent power producers, but being a party to the relevant agreements. The agreements contractually oblige Eskom to co-operate with the DoE in this context. The effect thereof is that Eskom will be a participant in implementing procurement programs for power from independent power producers.



- 5.8 Therefore, contrary to the Applicant's averments in terms of the legislation, Eskom does not have a choice whether or not to enter into a PPA with an IPP provided that all the statutory and related provisions have been met.
- 5.9 Once the statutory and contractual conditions are fulfilled, Eskom is bound in terms of Regulation 6(5) by the Section 34(1) determination and must purchase the energy.
- 5.10 A refusal to sign the PPA by Eskom will constitute a contravention of the NEA, the ERA and the Regulations. The Applicant conveniently ignores this fact;
- 5.11 The Applicant relies on unsubstantiated suppositions and disregard the Minister's executive power, legislative determinations and Eskom's duty to comply with statutory provisions;
- 5.12 The nature of the relief sought is in essence a review of the section 34(1) determinations taken by the MoE in consultation with NERSA on 1 August 2011, 19 December 2012 and 18 August 2015 without basis for review. The Applicant has formulated the relief in disregard of the statutory framework and cannot properly substantiate a challenge to the governmental decision.
6. Once these material facts are taken into account the legal incompetence of the application speaks for itself, I am advised.





7. I am unable to appreciate the relief sought in prayers 3 and 4 of the notice of motion that Eskom should pay the costs. Insofar as this relief suggests or implies that Eskom should disregard its statutory obligations and not oppose the application so as to avoid the burden of costs or that the Applicant has made out a case for the prayers sought in the notice of motion, then I oppose the relief or the implications arising therefrom.

C. LOCUS STANDI

8. A successful challenge in litigation is only possible if the right person in the right proceedings seeks the right remedy. It is further trite law that absent standing, a litigant is not entitled to have the merits of the application heard by a Court.
9. The Applicant is an association acting in the interests of its members as coal truck owners currently contracted to Eskom for the transportation of coal. The Applicant's contracts with Eskom terminate in March 2018. Apart from the fact that the Applicant has failed to disclose this crucial fact to the Court, the Applicant's members do not have a right to a new contract with Eskom. They also cannot rely on a legitimate expectation in relation to possible renewals of their respective agreements, as there are no facts to support any such expectation. It is plain, therefore, that the Applicant has brought this application without having a right that is infringed.
10. Section 38(e) requires an association acting in the interest of its members to allege that "*a right in the Bill of Rights has been infringed or threatened.*" In the reading of the entire application, the Applicant does not invoke any express right or interest which they seek to vindicate beyond stating that "*a Constitutional right*



*has been infringed or threatened"* and that *"the Applicant and its members are affected by all NERSA's decisions"*. This, I am advised, is not sufficient to found *locus standi* for the Applicant.

11. Other than the aforementioned vague averments, the Applicant fails to indicate the nature of the right allegedly infringed or threatened. This is because it is patent that the Applicant does not have a right, which is infringed or threatened by Eskom's signature of the PPA's.
12. For this reason alone I am advised, and it will be argued at the hearing of this application, that the Applicant does not have any standing to bring these proceedings and to seek the relief cited in the notice of motion.
13. The application therefore stands to be dismissed with costs for want of standing, as Courts do not entertain merits in instances where the Applicant is unable to establish standing.

**D. NO LIVE CONTROVERSY: ABSTRACT, ACADEMIC AND ANTICIPATORY**

14. The Constitutional Court has repeatedly stated that the business of the Courts is generally retrospective, as they deal with situations or problems that have already crystallised, and not with prospective or hypothetical ones, and consequently, that it is necessary for a party seeking relief to first establish a factual predicate upon which the relief sought is based for the determination of such dispute.
15. The Applicant has not given any factual predicate affecting their rights to assist



in the determination of the legal issues that they want answered in these proceedings. Absent such a factual matrix against which the legal issues that arise must be determined, the Court is disabled from determining the issues.

16. There is no live controversy between the Applicant and Eskom. In various parts of the founding papers the Applicant goes to lengths in showing that the application is inspired by their desire to make submissions to NERSA before NERSA can make any decision relating to the IPP's. NERSA has already made a determination.
17. The MoE in consultation with NERSA on 1 August 2011, 19 December 2012 and 18 August 2015 made the section 34(1) determinations that Eskom "must" purchase electricity as "buyer".
18. I am advised that it is also a settled principle of law that Courts are there to determine concrete disputes presented to them. There is nothing concrete in this application calling for determination of any dispute.
19. To the extent that the application anticipates a dispute, absent a factual matrix against which the legal issues that arise must be determined, the Court is disabled from determining the issues.
20. For reasons stated under this heading I am advised, and so will it be argued at the hearing of this application, that on this ground alone the application stands to be dismissed with costs.
21. Eskom's executive authority is the Minister of Public Enterprises, not the Minister

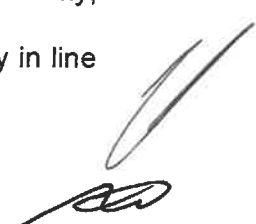


of Energy. The legal basis for this is to be found in section 6 of the Eskom Conversion Act, 13 of 2001 as well as the Treasury Regulations for Departments, Trading Entities, Constitutional Institutions and Public Entities GNR225 in GG27388 of 15 March 2005.

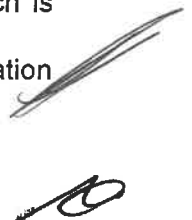
22. The Minister responsible for implementing the ERA, and accordingly the Minister responsible for NERSA, is the Minister of Energy. There is an overlap between the two ministries in the electricity sector.
23. Eskom's rights and interests may adversely be affected by the outcome of this application and the MoPE who has a direct and substantial interest in Eskom has not been cited in these proceedings.
24. For reasons stated under this heading I am advised, and so will it be argued at the hearing of this application, that this renders the application defective.

**F. THE STATUTORY FRAMEWORK**

25. I am advised that it might help to briefly explain the legislative context within which Eskom operates in relation to the IPP's. It is also necessary to understand the factual background relevant to the IPP's.
26. The Renewable Energy IPP Programme ("**REIPP Programme**") was conceived as a means to add additional capacity from various energy sources in order to fulfil and promote the Republic's obligations to decarbonize our economy, promote an energy mix which accommodated different sources of energy in line with the 2010 Integrated Resources Plan and ensure security of supply.



27. The REIPP Programme was introduced by the Minister of Energy pursuant to statutory directives she made in terms of section 34(1) of the ERA and the Regulations.
28. On 16 April 2015 and 7 June 2015 the Department of Energy ("DoE") announced the 26 Preferred Bidders for the fourth bid submission round of the REIPPP Programme. These announcements included 12 wind projects that were awarded as preferred bidders.
29. The RFP issued on or about May 2014 by the DoE relevant thereto reserved the right to amend, modify or withdraw the RFP or any part of it, or to terminate or amend any of the procedures, procurement processes or requirements detailed in the RFP during the conduct of the REIPPP Program, at any time, without prior notice and without liability to compensate or reimburse any person pursuant to such amendment, modification, withdrawal or termination.
30. The DoE also reserved the right to terminate or amend the REIPPP Program at any time, without prior notice and without liability to compensate or reimburse any person pursuant to such termination or amendment.
31. However, circumstances have fundamentally changed since the 2010 Integrated Resources Plan, mainly because of a decrease in demand and an increase in capacity due to various IPPs having reached commercial operations and several of the units of Eskom's power stations, including Khusile, Medupi and Ingula coming on stream. The result is that there is excess capacity which is likely to continue for a considerable period of time and the new generation capacity from the IPPs will result in excess capacity in the hands of Eskom.



32. As a result of the over-capacity Eskom could be forced to decommission or mothball some of its power stations and would not be able to recover the costs of operating the affected power stations from its pricing tariff scheme approved by NERSA.
33. In addition, the impact on Eskom's financial position could be that it would have to provide for impairment of some of its assets in a manner that will negatively affect its ability to generate adequate cash flow to meet its existing debt commitments. This may affect Eskom's sovereign ratings and sovereign debt which could trigger negative clauses for the payment of its sovereign debt.
34. As a consequence of the above, Eskom, as a responsible organ of State, as defined in Section 239 of the Constitution, in exercising its fiduciary duties and on the basis of prudence, set a process in motion to query with government stakeholders the need for the new generation capacity at this juncture.
35. Section 6 of NEA provides that the Minister must develop and on an annual basis review and publish an Integrated Energy Plan ("IEP"). The IEP is a feasibility study, which accounts *inter alia* for economically available energy resources<sup>1</sup>, affordability,<sup>2</sup> international commitments taking into account the balance between supply and demand<sup>3</sup> and economic viability.
36. The IEP deals with electricity separately in an Integrated Resource Plan. The current IRP was published in 2010 and deals exclusively with electricity ("2010

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<sup>1</sup> S6(2)(b) NEA

<sup>2</sup> S6(2)(c) NEA



IRP"). The 2010 IRP states that it is a living plan that is to be continuously revised. The 2010 IRP is a long-term feasibility study relating to supply and demand of electricity.

37. The IPP Programmes were introduced by the MoE pursuant to the statutory directives she made in terms of section 34(1) of the ERA and the Regulations. The IPP Programmes were conceived as a means to add additional capacity from various energy sources in order to fulfil and promote the Republic's obligations to decarbonize our economy, promote an energy mix which accommodates different sources of energy in line with the 2010 Integrated Energy Plan and ensure security of supply.
38. Regulation 6(2) provides that once the MoE has made a determination that new generation capacity be established by an IPP, the MoE shall also determine the identity of the buyer and the procurer. Regulation 6(3) provides that a ministerial determination is binding on the buyer and the procurer.
39. On August 2011, 19 December 2012 and 18 August 2015, the MoE in consultation with NERSA acting under section 34(1) of the ERA and the Regulations determined that renewable energy generation needs to be procured and designated Eskom as the buyer and the DoE as the procurer.
40. Regulation 9(1)(a) read with Regulation 9(2)(a) empower either Eskom, as a buyer, or the DoE, as the procurer, to ensure that a PPA represents value for

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<sup>3</sup> S6(4)(c) NEA



money before it is executed by Eskom.

41. Regulations 7(1) and (2) confer upon the DoE as the designated procurer the exclusive powers to execute procurement for new generation capacity by selecting preferred bidders. To that extent, the DoE is empowered to specify the form of procurement programme qualification and evaluation criteria applicable to a procurement programme initiated by it.<sup>4</sup>
42. Regulation 7(2) provides that the DoE shall specify the evaluation and qualification criteria. The section 34(1) Ministerial determinations set out the DoE's role as procurer to inter alia undertake feasibility studies.
43. The power of the DoE in that regard is reinforced by Regulation 7(3) which makes it clear that for as long as Eskom is designated by the MoE as the buyer, it shall not and is in fact precluded from conducting any procurement process itself. Regulation 9(2)(a) requires the buyer or the procurer to ensure that the PPA satisfies the requirement of value for money for the buyer or Government.
44. In several of the procurement documents issued by the DoE, in the course of the various bid window procurement processes, the DoE has provided for the need to ensure that bidders' proposals represent value for money. Both the ERA and the Regulations on New Generation Capacity define the meaning of value for money as a net benefit to Eskom or to Government.
45. The RFP requires bidders to specify the price to be paid by Eskom, which does

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<sup>4</sup> Regulation 7(1)(2) of the Electricity Regulations on New Generation Capacity.





not exceed the price cap set by the DoE. The DoE then scores and ranks the price offers. NERSA approves the price when awarding generation and distribution licences and MW capacity to successful IPP bidders in line with the PPA.

46. When all the legislative and contractual prerequisites are satisfied, Eskom "must" in terms of the section 34(1) determination, purchase the electricity and sign the PPA.
47. It is evident from aforesaid that once a section 34(1) Ministerial determination has been made, Eskom is bound to comply once all the statutory and contractual obligations have been complied with as is envisaged in the relevant legislation.

**G. NON COMPLIANCE WITH REQUIREMENTS FOR A FINAL INTERDICT**

48. The test for a final interdict is well established in our law. I am advised that an Applicant must establish a clear right, a reasonable apprehension of immediate harm if the relief sought is not granted, and a lack of a suitable alternative remedy. The availability of an alternative remedy is a factor that may be taken into account in considering whether and to what extent the restraint should be enforced.
49. The Applicant does not satisfy the requirements for a final interdict. I say this because the Applicant, apart from making bold allegations have not shown that the rights of its members are being breached or threatened. Not a shred of evidence has been provided.



50. Lack of understanding and appreciation for the purpose, nature and content of Eskom's statutory obligations do not create well-grounded apprehension that irreparable harm will follow if Eskom signs the PPA's.

51. In the light of the above I now proceed to respond to the averments made in the individual paragraphs of the founding affidavit.

H. RESPONSES TO AVERMENTS IN THE INDIVIDUAL PARAGRAPHS OF THE FOUNDING AFFIDAVIT

52. AD PARAGRAPHS 1

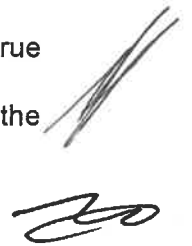
52.1 I admit that the deponent is Mpho Stephen Mokwana.

52.2 I have no knowledge of the remainder of the averments in this paragraph and I therefore cannot admit them.

53. AD PARAGRAPH 2 AND 3

53.1 I do not admit that the facts described in the founding affidavit fall within the personal knowledge of the deponent. He does not describe at all the Applicant's right that is infringed or threatened by Eskom signing the PPA's. Elsewhere in this affidavit, I indicated why the Applicant has not made out a case for the interdictory relief it seeks

53.2 I also do not admit that the averments in the founding affidavit are true and correct. Where necessary, I shall point out the obvious errors in the



founding affidavit.

53.3 I deny that the legal submissions made in the founding affidavit are well founded or correct.

54. AD PARAGRAPH 4 AND 7

54.1 I admit that the Applicant is the Coal Transporters Forum.

54.2 I have no knowledge of the averments in these paragraphs and I am not able to deal with them. I therefore cannot admit them.

55. AD PARAGRAPHS 8 TO 10

55.1 I admit the contents of these paragraphs.

56. AD PARAGRAPH 11 TO 48

56.1 I have no knowledge of the averments in these paragraphs and I am not able to deal with them. I therefore cannot admit them.

56.2 However, I do not take issue with the contents referenced herein insofar as same are correctly reflected in annexures "B1 to B35".

57. AD PARAGRAPH 49 AND 50

57.1 I take note of the Applicant's description of the relief.

A handwritten signature in black ink, consisting of several overlapping, sweeping strokes that form a stylized, illegible name.

57.2 I have been advised that the Applicant has not shown any basis for the relief and the Applicant is not entitled to the relief sought.

57.3 For reasons that I alluded to earlier regarding the various points *in limine*, this application is misconceived.

58. AD PARAGRAPH 51

58.1 I emphatically deny that the Applicant's rights, constitutional or otherwise have been infringed.

58.2 The Applicant simply makes a bald averments of that a constitutional right has been infringed without providing any factual or legal basis for their contention. This is regrettable, and extremely unsatisfactory.

58.3 The Applicant does not demonstrate any *locus standi*; have brought an application which is abstract and academic without any factual predicate and which suffers from non-joinder.

58.4 I reiterate that in the absence of a right that has been infringed or threatened, the Applicant cannot rely on section 38(e) of the Constitution. I am advised that further legal argument will be presented in this regard, if indeed that is at all necessary.

58.5 Save as aforesaid, I deny the averments made in this paragraph.



59. AD PARAGRAPH 52

59.1 I admit the contents of this paragraphs to the extent that it correctly reflects section 38(e) of the Constitution.



60. AD PARAGRAPH 53 TO 56

60.1 I have no knowledge of the averments in these paragraphs and I am not able to deal with them. I therefore cannot admit them.

61. AD PARAGRAPH 57

61.1 I have dealt with this above save to state ultimately and as a consequence of Eskom's interactions to protect the financial stability of Eskom and the consumers of South Africa, the Minister of Energy publicly announced on 1 September 2017 that *"We had to look at all the matters raised by the team and the recommendations. After lengthy deliberations we came to a conclusion on the following actions:*

- (a) *that the PPA for bid windows 3.5 and 4 will be signed by the end of October 2017;*
- (b) *DoE through the IPP offers to engage with all affected parties for bid windows 3.5 and 4 to renegotiate not above 77 cents per kilowatt hour. This assists greatly in reducing the requirements for additional government guarantees that would impact negatively in the current economic climate and constraints in the fiscus;*

*(c) Eskom to ensure that all contracts are in place for signing on 28 October 2017."*

61.2 Eskom will comply with the Honourable Minister's directive and is preparing to have the required documents ready for signing. This will be subject to proper compliance with all statutory provisions relevant to concluding PPAs and required approvals by NERSA, and the acceptance and sanctioning of the renegotiated 77 cents per kilowatt-hour. It will obviously be subject to what I have stated above.

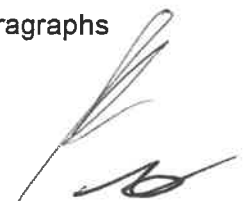
61.3 With respect it serves no purpose to express views contrary to the statutory obligations in relation to the signing of the PPAs in view of the Minister's directive and determination, which stand until set aside.

62. AD PARAGRAPH 58 INCLUDING 58.1, 58.2; 58.3; 58.4; 58.5; 58.6, 58.8, 58.9 AND 58.10

62.1 NERSA in consultation with the MoE made a decision in respect of the ERA section 34(1)(a)(b) and (c) requirements set out in these paragraphs resulting in the section 34(1) Ministerial determinations of 1 August 2011, 19 December 2012 and 18 August 2015.

62.2 I point out that section 34(3) of the ERA provides that NERSA in issuing a generation licence is bound by any determination made by the MoE.

62.3 Save as aforesaid, I do not dispute the averments in these paragraphs insofar as they correctly reflect the provisions of the ERA.



63. AD PARAGRAPH 58.7

63.1 Regulation 6 provides in Regulation 6(3) that once the MoE in consultation with NERSA makes a determination that new generation capacity be established, then the MoE shall also determine the identity of the buyer.

63.2 Save as aforesaid, I deny the averments made in this paragraph.

64. AD PARAGRAPH 59

64.1 Subject to what I have said above, I do not dispute the averment in these paragraphs.

65. AD PARAGRAPH 60 to 62

65.1 I respectfully submit that in light of the gazetted section 34(1) Ministerial determinations of 1 August 2011, 19 December 2012 and 18 August 2015, the Applicant is not able to raise procedural issues relating to NERSA's decisions at this point.

65.2 The Applicant surreptitiously seeks to review the decision of the MoE and NERSA resulting in section 34(1) Ministerial determinations of 1 August 2011, 19 December 2012 and 18 August 2015. This is devious.

65.3 Be that as it may, NERSA is cited and will respond accordingly.



65.4 Save as aforesaid, I deny the averments made in these paragraphs.

66. AD PARAGRAPHS 63 TO 66

66.1 I deny the averments in these paragraphs.

67. AD PARAGRAPHS 67

67.1 I do not dispute the averments in this paragraph.

67.2 I want to make it clear that section 34 Ministerial determinations are binding on Eskom in terms of Regulation 6(5).

68. AD PARAGRAPHS 68 TO 76

68.1 I do not dispute the manner in which the Applicant has outlined the legal matrix within which the function of the Eskom is to be understood.

68.2 I point out that the Applicant is aware of the role of the MoPE and this exacerbates the non-joinder.

69. AD PARAGRAPH 77 TO 85

69.1 I do not dispute the averments in these paragraphs insofar as they correctly reflect the legislation applicable to NERSA.

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70. AD PARAGRAPH 86 TO 91

70.1 I admit that Eskom holds a generation, transmission and distribution licence issued by NERSA.

70.2 I admit the contents of annexures "C" and "D" as extracts of Eskom's licence conditions.

70.3 I point out that the contents of Eskom's generation, transmission and distribution licences are not relevant for the purposes of this application.

71. AD PARAGRAPH 92 TO 104

71.1 I do not dispute the contents of these paragraphs insofar as they correctly reflect the provisions of the ERA.

72. AD PARAGRAPH 105 TO 106

72.1 I deny the averments in these paragraphs.

73. AD PARAGRAPH 107

73.1 I deny that the Applicant is able to make submissions to NERSA after section 34(1) determinations have been gazetted.

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74. AD PARAGRAPHS 107.1

74.1 I do not dispute the averments in this paragraph.

75. AD PARAGRAPHS 107.2 TO 107.6

75.1 I do not dispute the averments in these paragraphs.

76. AD PARAGRAPH 107.7

76.1 I am not aware of the averments made in this paragraph but I do not dispute same.

77. AD PARAGRAPH 107.8

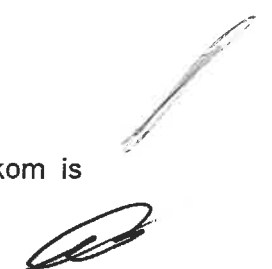
77.1 I admit the averments in this paragraph.

77.2 I point out that Eskom entered into the PPA's in accordance with the section 34(1) Ministerial determinations.

78. AD PARAGRAPH 107.9

78.1 I reiterate that contrary to the Applicant's perception, the reality is that in terms of the legislation, Eskom does not have a choice whether or not to enter into a PPA with an IPP.

78.2 Once the statutory and contractual conditions are fulfilled, Eskom is

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bound in terms of Regulation 6(5) by the section 34(1) determination and must purchase the energy.

79. AD PARAGRAPHS 107.10 TO 107.12

79.1 I have dealt with this above.

79.2 I admit that at present the demand for electricity is stable. I admit that by 2018 Eskom will have excess electricity.

79.3 I admit that if further power purchase agreements are entered into the overcapacity will increase.

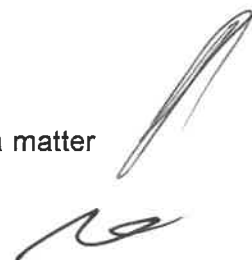
79.4 Eskom is bound in terms of the Ministerial determinations and once all the statutory and contractual conditions are fulfilled, Eskom cannot act in contravention of the legislation.

80. AD PARAGRAPHS 107.13 AND 107.15

80.1 I admit the averments in these paragraphs to the extent they correctly reflect the provisions of the PPA referred to therein and the current selling price of electricity.

81. AD PARAGRAPH 107.16

81.1 I note the contents of this paragraph. I am advised that this is a matter for legal argument.

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82. AD PARAGRAPHS 107.17 TO 107.24

82.1 I admit the averments in these paragraphs.

83. AD PARAGRAPH 107.25 TO 107.32

83.1 I note the contents of these paragraphs and refer to what I have stated above.

83.2 I do not dispute the contents of these paragraph.

84. AD PARAGRAPHS 107.32 TO 107.36

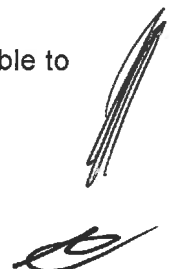
84.1 The averments in these paragraphs are based on exaggerated claims, unfounded rumours and emotionally charged conjectures.

84.2 I therefore submit that there is no substance in the complaint made in this paragraph that Eskom is trading recklessly.

84.3 Save as aforesaid, I deny the averments made in these paragraphs.

85. AD PARAGRAPH 108

I have no knowledge of the averments in these paragraphs and I am not able to deal with them. I therefore cannot admit them.



86. AD PARAGRAPH 109

I am perplexed by the contents of this paragraph.

87. AD PARAGRAPH 110

I do not know of any planned renewal of contracts.

88. AD PARAGRAPH 111

88.1 I emphatically deny the contention that the Applicant has a clear right.

88.2 I deny the rest of the allegations made in this paragraph.

89. AD PARAGRAPHS 112 TO 114

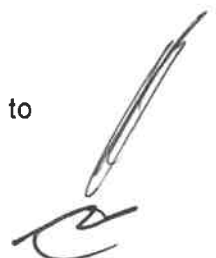
89.1 I admit the correspondence as appears in annexures "H1" and "H2".

89.2 I have been advised that in the circumstances of the present application Eskom was not obliged to furnish the undertaking sought.


89.3 Save as aforesaid, I deny the averments made in these paragraphs.

I. CONCLUSION

90. Having regard to what I have set out above I respectfully ask the Court to dismiss the relief sought in the Notice of Motion.




91. In that event, I ask the Court to order the Applicant to pay the costs of the proceedings including costs of two counsel.

  
MNINAWE COLUMBUS XALUVA

THUS SIGNED AND SWORN TO before me at Serdota on this the 22nd day of September 2017 by the deponent who acknowledges that he/she knows and understands the contents of this affidavit; that it is the truth to the best of his/her knowledge and belief and that he/she has no objection to taking the prescribed oath and regards the same as binding on his/her conscience and the administration of the oath complied with the Regulations contained in Government Gazette No. R1258 of 21 July 1972, as amended.

EX OFFICIO:  
FULL NAMES:  
PHYSICAL ADDRESS:  
DESIGNATION:

  
COMMISSIONER OF OATHS  
Frederick Outhambal  
Commissioner of Oaths  
Practising attorney,  
269 Bayshore Parade  
Drove  
Cresta  
(011) 431-1857.

"MCXI"

## DELEGATION OF AUTHORITY

In terms of the powers, duties, and authorities delegated to me, I

### SUZANNE MAGARET DANIELS

In my capacity as Group Executive: Legal and Compliance) hereby delegate to **MNINAWE COLUMBUS XALUVA** (also known as Wawa Xaluva) in his capacity as Eskom Corporate Specialist: Legal, in the Eskom Legal and Compliance Department, authority to sign all the necessary affidavits and other documents incidental thereto, on behalf of Eskom SOC LTD (Eskom), in respect of actions and applications by Eskom against any of the Coal Transporters Forum litigating against Eskom.

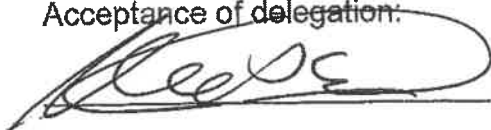


**Suzanne Magaret Daniels**

Group Executive: Legal and Compliance)

Date: 22 September 2017

Acceptance of delegation:



**Mminawe Columbus Xaluva**

Corporate Specialist: Legal and Compliance

Date: 22 Sept 2017

