REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE Number: 56907/21

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED: YES/NO

2022 .....

In the matter between: -

AFRICAN CLIMANTE 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**

JUDGMENT

This Judgment was handed down electronically by circulation to the parties' and or parties' representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed on 5 December 2022.

1. This is an interlocutory application to compel compliance with rule 53(1)(b) of the uniform rules of court and thus for the production of a complete record.

2. Unhappy with the decision relating to the provision of 'new coal-fired power', a group of applicants instituted proceedings against the Minister of Mineral Resources and Energy, the National Energy Regulator of South Africa, the Minister of Forestry, Fisheries and the Environment and the President of the Republic of South Africa to set aside certain decisions 'to the extent that they make provision for 1500MW of 'new coal-fired power'.

3. The first two applicants are registered non-profit companies who, broadly speaking have the interests of the environment at heart. The third applicant is a

trust which operates, it states, as a non-profit environmental justice service and developmental organisation.

4. The application was launched in November 2021. The Notice of Motion, where relevant for the purposes of this judgment, reads as follows:

‘1. The following decisions (‘the impugned decisions’) are declared to be inconsistent with the Constitution of the Republic of South Africa, 1996 (‘Constitution’), unlawful and invalid:

1.1 The determination published by the Minister of Mineral Resources and Energy (‘Minister’) on 25 September 2020 as GN1015 in Government Gazette No. 43734, to the extent that this includes provision for 1500MW of new coal-fired power.

1.2 The concurrence published by the National Energy Regulator of South Africa (‘NERSA’) on or about 10 September 2020, to the extent that this supported the Minister’s determination in respect of 1500MW of new coal-fired power.

1.3 The Integrated Resource Plan 2019, published on 18 October 2019 as GN1360/2019 in Government Gazette 42784, to the extent that it makes provision for 1500MW of new coal-fired power.

2. The impugned decisions are set aside to the extent that they make provision for 1500MW of new coal-fired power.

3. To the extent necessary, the applicants’ delay in bringing the review application in terms of the Promotion of Administrative Justice Act 3 of 2000 (‘PAJA’), alternatively the constitutional principle of legality, is condoned and/or the 180 day time period under PAJA is extended so as to terminate one day after the institution of this application’.

5. The notice of motion then continues in the normal manner and then states:

'TAKE NOTICE FURTHER that:

(a) In terms of Rule 53(1)(a) of the Uniform Rules of Court, the Minister and NERSA are called upon to show cause why the impugned decisions should not be reviewed[1], declared invalid and set aside.

(b) In terms of Rule 53(1)(b), the Minister and NERSA are called upon, within 15 days of the receipt of this notice of motion, to dispatch to the Registrar the record of all documents and all electronic records that relate to the making of the impugned decisions, together with such reasons as they are by law required or may require to give or make, and to notify the applicants' attorneys that this has been done.

(c) In terms of Rule 53(4), the applicants may within 10 days of the receipt of the record from the Registrar, amend, add to, or vary the terms of its notice of motion and supplement the founding affidavit, by delivery of a notice and accompanying affidavit'.

6. Dissatisfied with the extent of the record that was produced by the first respondent, the Minister of Mineral Resources and Energy, the applicants in April 2022 brought an application seeking an order in the following terms:

'1. The first respondent is directed, within 10 days of service of this order, to comply with Rule 53(1)(b) of the Uniform Rules of Court by dispatching to the applicants, and uploading onto CaseLines, a complete record containing all documents and all electronic records (including correspondence, contracts, memoranda, advice, recommendations, evaluations, internal deliberations and the like) that relate to the decisions which are subject to the main review application under case no. 56907/21.

[1] the emphasis is that of the court

2. In the event that the first respondent fails to comply with paragraph 1 of this order, the applicants may return to Court on the same papers, duly supplemented, for further relief, including an order striking out the first respondent's opposition to the main application'.

7. There was, as usual, some correspondence between the parties in order to obtain an extension of the deadline within which to file the necessary record. On 20 January 2022, the state attorney, on behalf of the first respondent, it is alleged, 'electronically filed an index and partial rule 53 record, amounting to 295 pages, the bulk of which comprised of relevant documents that were already attached in support of the applicants' founding papers in the main application'.

8. On 3 February 2022 the applicants' attorneys addressed a letter to the state attorney advising them of what they alleged is the incomplete record and referring them to the constitutional authority that a record must contain 'every scrap of paper throwing light, however indirectly' on decisions under review. The letter continued at paragraph 6 and stated the following:

'6. Without limiting the generality of this request for a complete record, the following records appear to be missing. We, therefore, request that you provide all documents, notes, minutes, memoranda, physical and electronic correspondence, recordings, and the like related to the following:

6.1 internal deliberations and the inclusion of new coal generation capacity in the 2019 IRP;[2]

[2] This is a reference to the integrated resource plan referred to in paragraph 1.3 of the notice of motion in the main application

6.2 the ‘policy adjustment’ referred to in the 2018 draft IRP, which led to the introduction of new coal generation capacity in the 2019 IRP;

6.3 the decision to impose ‘build limits’ on renewable energy in the 2019 IRP;

6.4 the basis for the estimation of a ‘minimum four years lead time for coal projects and natural gas infrastructure’ referred to in paragraph 2.1 of the Minister’s reasons letter (see annexure ‘FA38’ to the founding affidavit, p 901);

6.5 the Minister’s consideration of public / stakeholder comments and submissions in preparing the 2019 IRP and the determination;

6.6 all modelling, including datasets and assumptions, conducted in preparing the IRP 2019 and/or the determination i.e. modelling outputs for the scenario with and without the annual renewable energy constraint, and the CO2 emission constraint scenario provided by the then Department of Environmental Affairs;

6.7 on 2 September 2020 CER sent a further letter to the Department of Mineral Resources and Energy (‘DMRE’), highlighting the significant gaps in the documents provided by (see annexure ‘FA96’ to the founding affidavit, p 1427). These included the absence of any documents reflecting the assumptions used in the modelling process in the IRP 2019 or the draft IRP 2018 such as:

6.7.1 the modelling outputs for the scenario with and without the annual renewable energy constraint as demonstrated in Table 5 of the 2019 IRP, including the capacity factors allocated to each technology;

6.7.2 the water use and greenhouse gas (GHG) data relied on, and the outputs of the full scope of annual GHG emissions (not only carbon dioxide) and water use under all scenarios modelled by the Department of Mineral Resources and Energy;

6.7.3 emission abatement technology costs and the sources for the values incorporated into modelling for the IRP 2019; and

6.7.4 the incremental cost output and tariff increases for all scenarios of the IRP 2019.

6.8 The GHG emission construction scenario provided by the then Department of Environmental Affairs;

6.9 Work performed by service providers and consultants related to the 2019 IRP and the determination, which relate to the inclusion of new coal generation capacity;

6.10 The mandatory socio-economic impact assessment for the 2019 IRP, in terms of the Socio-Economic Impact Assessment System (SEIAS Guidelines, 2015);

6.11 Commissioning of, and/or any feasibility studies undertaken in terms of Regulation 5 of the Electricity Regulations on New Generation Capacity, which are acknowledged in the 2019 IRP as a risk mitigation measure to 'consider the cost of new capacity, risks (technical, financial and operational) and value for money (economic benefits)' (see annexure 'FA24' to the founding affidavit, pp 692-3 and 737;

6.12 The audit report as referred to in page 8 of NERSA's reasons letter under item 9.1.2 – 'DMRE engaged an independent consultant to audit the IRP 2019 model' (see annexure 'FA40' to the founding affidavit, p 919);

6.13 Meetings and/or communications between the Minister, officials of the DMRE, and/or their advisors with coal industry representatives, lobbyists, investors and associated parties related to the 2019 IRP and the determination;

6.14 Studies conducted on the costs and feasibility of the high efficiency low emission ('HELE') technology referenced in the 2019 IRP;

6.15 Any assessment of the climate change and other environmental impacts of the procurement of 1500MW of new coal capacity in preparing the 2019 IRP and the determinations; and

6.16 Any efforts to ensure that children and young people were heard and that their interests were considered in allowing the decisions under review.'

9. The state attorney, on behalf of the first respondent, answered that letter on 1 March 2021. There is no indication in the response that the documents do not exist and the refusal to provide the documents is, in essence, based upon the reasoning that the IRP is a "revised plan for 2010 to 2030" which is not a "reviewable action" and the relief sought in the notice of motion, and in particular that addressed to the 2019 IRP as dealt with in paragraph 1.3 thereof is not a review, either in terms of PAJA or the principle of legality. It is contended that, in essence, it is declaratory relief as set out in section 21 of the Superior Courts Act, 10 of 2013 as read with sections 38 and 172 of the constitution. The letter concludes that:

‘The documents and/or information sought in your above letter are therefore not of the kind as contemplated in terms of rule 53 and the authorities cited above, and are thus hereby refused’.

10. Pursuant to that response, the present application was brought.

11. The thrust of the ground of opposition of the first respondent is set out in the introduction section of the heads of argument filed. They are of course embroidered upon in the balance of the heads of argument. In the main however I understand them to be this:

11.1. It is contended that the relief sought in the main application ‘is patently not a reiview’. This is because, apparently, there is no order sought to review and set aside the impugned decisions. It is further contended in the heads of argument that the grounds for review in the main

application are ‘scant’ and in support of this allegation reference is made to paragraphs 416 and 417 of the main application.

11.2. It is further contended that because the 2019 IRP is not ‘founded in legislation’ it is not a decision capable of being reviewed.

12. For the reasons which follow I am not inclined to uphold either one of the grounds of opposition.

13. Just the very wording of the notice of motion which is quoted earlier in this judgment is, in my view, demonstrative of the fact that it is a review and not simply declaratory relief as set in section 21 of the Superior Courts Act.

14. Counsel for the first respondent herself conceded that if prayer 2 of the notice of motion was to read ‘the impugned decisions are reviewed and set aside to the extent that they make provision for 1500MW of new coal-fired power’ then that would transform the relief sought in the notice of motion into a review. I do not believe that the addition of those two words is what would transform the relief sought into a review and that absent them it is not. When one considers the notice of motion as a whole, together with the allegations in the founding affidavit, even if they were to be scant[3], it is clear that the relief which is sought, even if there was to be a criticism of clumsy drafting, is that of a review. The fact that the founding affidavit in the main application has ‘scant’ grounds of review does not in any manner affect, in my view, the nature of the relief sought. It may well be that the grounds in the founding affidavit are

[3] No such finding is made in this judgment

insufficient and not properly dealt with but that is an issue which strikes at the merits of the main application and does not affect the nature of the application. I am of course not called upon to make a decision in that regard.

15. The argument that because the 2019 IRP is not a decision capable of being reviewed the documents are to be refused is in my view also not a sustainable ground of opposition to the application to compel the production of the record. It might well be held by the court hearing the main application that the 2019 IRP is not a reviewable decision, but that is not for this court to decide. A decision by this court that the 2019 IRP is not a reviewable decision and that the records are not to be provided on that basis would mean that it is a final decision on the reviewability of the 2019 IRP. That could lead to an appeal and result in a part heard matter. In any event, the documents sought by the applicants may well shed light on the reviewability of the IRP 2019. For that reason, I would be inclined to make an order that those documents be provided.

16. There is a further reason. It seemed to me during a debate with counsel for the first respondent that there was a concession that the impugned decisions referred to in paragraphs 1.1 and 1.2 of the notice of motion in the main application have, at least to a certain extent, their source in the 2019 IRP. If that is so, the 2019 IRP documents that are sought may well also be relevant to those decisions which are sought to be set aside. For that reason too, they probably fall under the epithet of ’every scrap of paper’**.**

17. The parties are *ad idem* on the law regarding the importance of filing a proper rule 53 record and the legal principles in that regard. But the debate, of course, was a different one.

18. I am inclined therefore to grant the application.

19. The draft order that was handed up to me and as sought by the applicants wanted the record to be produced within 10 days. That is clearly an unreasonable request and after having taken instructions, the applicants softened somewhat and indicated that they would be satisfied if the record had to be produced within 30 days.

20. Even that, in my view, would not be reasonable particularly given the time of the year and that in all probability at least some of those responsible for collating and providing the documentation might be on their annual leave. I want to avoid a situation that the first respondent has to approach this court and possibly ask for an extension of time in the court order. I have decided to be a little more generous in the time that I afford the first respondent to collate the documents.

21. I will therefore make an order that the documents are to be produced by close of business on 28 February 2023.

22. Both sides were represented by two counsel. There is no reason in my view as to why costs should not follow the event.

23. I thus make the following order:

Order

24. The first respondent is directed, by close of business on 28 February 2023, to comply with rule 53(1)(b) of the uniform rules of court by dispatching to the applicants, and upload onto CaseLines, a complete record containing all documents and all electronic records (including correspondence, contracts, memoranda, advice, recommendations, evaluations, internal deliberations and the like) that relate to the decisions which are subject to the main review application under case no. 56907/21.

25. In particular, insofar as they exist, the first respondent is ordered to provide those documents set out in in the letter of 3 February and quoted paragraph 8 of this judgment.

26. In the event that the first respondent fails to comply with paragraphs 1 and 2 of this order, the applicants may return to court on the same papers, duly supplemented, for further relief, including an order striking out the first respondent's opposition to the main application.

27. The first respondent is ordered to pay the costs of this application, including the costs consequent upon the employment of two counsel.

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REINARD MICHAU

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Date of hearing: 17 November 2022

Date of judgment: 9 December 2022

Appearance

On behalf of the Applicants	Adv C McConnachie
	Adv T Pooe
On behalf of the First Respondent	Adv MPD Chabedi
	Adv Bronkhorst