

STRIKING DOWN OF NUCLEAR DEAL WELCOMED

By Ms Phephelaphi Dube: Director, Centre for Constitutional Rights

The Centre for Constitutional Rights (CFCR) welcomes the decision by the Western Cape High Court, handed down today, which sets aside South Africa's nuclear agreement with Russia. The successful challenge to the agreement was launched by civic organisations, EarthLife Africa (ELA) and the Southern African Faith Communities' Environment Institute (SAFCEI), on the basis that the agreement was unlawful and unconstitutional.

The secret nuclear deal would have reportedly cost the nation R1-trillion and the South African public would be none the wiser - but for the diligence of investigative journalists and the non-governmental organisations who approached the courts.

Apart from the exorbitant costs of the deal, which South African taxpayers would have to bear, the deal transgressed the Constitution's demands that procurement of goods or services must be fair, equitable, transparent and cost-effective. Binding for a minimum of 20 years, the deal would have practically granted South Africa's decision-making powers on the nuclear industry, over to Russia.

The decision is important in emphasising various constitutional principles which underpin the nation's democracy. It affirms the Rule of Law in making apparent, yet again, that the exercise of public power must be done rationally. It is irrational for the government to tie South Africa into a deal its coffers cannot afford and more so, on highly unfavourable terms. It is even more irrational for South Africa to cede its energy plans and policies to a foreign government, regardless of the good historical relations that South Africa may enjoy with that foreign government.

The decision serves as an important reminder that the default position of South Africa is that of openness, transparency and accountability. These values form part of the nation's foundational values, as per the dictates of the Constitution. There may, from time to time, arise a need for the protection of information, particularly where State security is involved. However, an agreement which would negatively affect South Africans does not warrant such protection of information. In any event, in an era where the global trend - given developments in countries such as Japan and Germany - seems to be a move towards more sustainable and environmentally-friendly forms of energy, it seems illogical for the South African government to tie itself into a nuclear deal of such proportions.

As the civil society organisations which challenged the agreement argued, the right to just administrative action is enshrined in the Constitution, and this right encompasses both procedural fairness, as well as State accountability for its actions. The decision affirms the fact that the State must act lawfully and reasonably, while remaining accountable for the decisions which adversely impact South Africans. The State is accountable, not just to its tax base, but to all South Africans who would have been impacted by increased activity in South Africa's nuclear industry.

The decision may very well be taken on appeal, although another court will be hard-pressed to differ on the merits of this decision. Ultimately, the big concern for all South Africans is the number of decisions taken by the government which have been reversed by the Courts. Such decisions range from the striking down of undesirable appointments to positions of power, through to the manner in which social security grants are accessed. This creates the impression of reckless exercise of public power which, but for the Courts, would remain unchallenged - to the detriment of the nation's democracy. Nevertheless, questions must be raised about the Executive's conduct, which lowers the quality of South Africa's constitutional democracy.