

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

Case no: 24396/2017

In the interlocutory application between: -

DEMOCRATIC ALLIANCE Applicant

and

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA Respondent

In re the application between: -

DEMOCRATIC ALLIANCE Applicant

and

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA First Respondent

PRAVIN JAMNADAS GORDHAN Second Respondent

MCEBISI HURBERT JONAS Third Respondent

MALUSI NKANYEZI GIGABA Fourth Respondent

SFISO NORBERT BUTHELEZI Fifth Respondent

REPLYING AFFIDAVIT: URGENT COMPELLING APPLICATION

I, the undersigned,



JAMES SELFE

state under oath as follows:

- 1 I am the Chairperson of the Applicant's Federal Executive with offices at Room 347, Marks Building, Parliament and I am duly authorised to depose to this Affidavit.
- 2 The facts contained in this affidavit are within my personal knowledge, unless the context indicates otherwise, and are true and correct, to the best of my knowledge and belief.
- 3 The purpose of this affidavit is to respond to answering affidavit filed on behalf of the first respondent (the President), to the extent that it is necessary to do so.

THE BELATED SHIFT IN THE PRESIDENT'S STANCE

- 4 At the outset, I point out that the DA learnt, for the first time, in a letter sent a few hours prior to the answering affidavit being filed that the President was not going to furnish the record and reasons pertaining to the dismissal decisions.
- 5 Prior to this, the State Attorney in his written and oral communication with the DA undertook to file the record and requested indulgences so that a proper record of the decision could be furnished in terms of Rule 53 of the Rules of this Court.



The correspondence is attached to the founding affidavit as FA4 and FA6.

- 6 Yet, on 21 April 2017, the day on which the President had undertaken to file the record, his stance shifted completely. In the State Attorney's letter dated 21 April 2017, it was now stated for the first time that the applicant was not entitled to any record or reasons at all:

As will be evidenced in the answering affidavit of the President, in his response to your application to compel the delivery of the records, the decision to reshuffle cabinet as he did was informed by his political judgment that the reshuffle will best deliver on the mandate of the African National Congress received from the majority of the electorate in the last general elections.

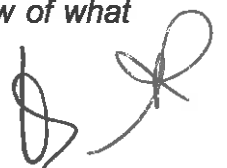
The decision in question is not covered by the above provision of Rule 53 and the President is under no obligation to furnish the applicant with any record.

Rule 53 has no application in the present proceedings. As a result, the applicant is not entitled to the record as envisaged in the Rule.

The letter is attached to the answering affidavit as IC1.

- 7 Thus, it was only after the President had exhausted the indulgences granted by the DA to file the record and in the face of an application to compel that the DA was informed that the President was of the view that Rule 53 was not applicable and the DA was not entitled to the record in terms of Rule 53(1)(b). I address the DA's entitlement to the record below.

- 8 The DA's attorneys wrote back on the same day requiring the President to file his answering affidavit to the compelling application and stating that it disagreed with the President's contentions in this letter and reserving its rights to deal with them fully in due course. The DA's attorneys also notified the President that *"[it] reserves the right to seek a personal costs order against [him] in view of what*

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appear to be his attempts to delay or avoid complying his obligations under the Constitution and Rules of Court." The DA's attorney's letter is attached as **RA1**.

- 9 The President's refusal to furnish the record and reasons regarding his dismissal decisions is inimical to the values of accountability and transparency which form part of our constitutional order. It is not permissible or appropriate for the President to seek to avoid or delay complying with his obligations under the Constitution and the Rules of Court.

THE PRESIDENT'S OBLIGATION TO FURNISH THE RECORD

- 10 The President disputes that the DA is entitled to the record in terms of Rule 53 because the "*main application concerns an executive decision and the [DA] is not entitled to the record in terms of Rule 53*" (paragraph 18 of the answering affidavit).

- 11 The President's assertion that the DA is not entitled to the record and reasons is incorrect and misguided for the following reasons:

11.1 First, there is no dispute that the dismissal decisions concerned amount to executive action. The dismissal decisions concern the exercise of the executive powers granted to the President, in terms of section 91 and 93 of the Constitution.

11.2 Second, it is well-established that the exercise of every public power is subject to the principle of legality and the principle of rationality which

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forms part thereof. This includes the exercise by the President of all of his executive powers. More specifically, it includes the executive powers of the President to dismiss Ministers and Deputy Ministers.

11.3 I point out that the President has recently conceded that this is the case in his affidavit filed in the Constitutional Court in the pending matter of *United Democratic Movement v Speaker of the National Assembly* (CCT 89/2017). The President has stated that:

“ . . . I am advised that in this regard that there are no constitutional constraints on the President on how power is to be exercised or process by which that power [power to appoint and dismiss Ministers] is to be exercised, as long as the exercise of such power is rational.”

[Underlining added.] (paragraph 30)

“ . . . What the law requires of public functionaries is that they exercise their powers only when so authorised by law and within the ambit of such authorisation.”

(paragraph 37)

“What I do as the President of the Republic requires compliance with the Constitution and the law. As a political party, there are [broad] range of political ideological considerations that inform what we do. On the other hand public office requires the exercise of public power to be within constitutional constraints, least of which is rationality. My decision to reshuffle the Cabinet was done for rational purposes.”

[Underlining added.] (paragraph 48)

In order not to overburden the court file I attach only the relevant extracts from the President's answering affidavit in the UDM application is attached

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as RA2. A copy of the President's answering affidavit in the UDM application can be made available to the judge hearing this interlocutory application, if necessary.

11.4 Therefore, whilst the President's decision constitutes executive action it is still subject to a legality review to determine, *inter alia*, whether such decision is lawful, rational and therefore consistent with the Constitution.

11.5 Third: Given that the President's decision is reviewable under the principle of legality it follows that the President must make the record and reasons available to allow for a proper ventilation of the matter. This is made clear by a series of decisions of our highest courts.

11.5.1 This must be done in terms of Rule 53 or, to the extent that Rule 53 is not regarded as wide enough to cover the decisions at issue (which is not conceded), in terms of this court's inherent power to regulate its own process in terms of section 173 of the Constitution.

11.5.2 The purpose of access to a complete record of decision is to allow parties and the Court to understand the material taken into account by the decision maker and the reasons for the decisions. This applies with particular force in respect of the dismissal decisions. Only the President know what facts and documents he relied on, and to what extent, before making the dismissal decisions.

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11.5.3 The DA and this Court cannot assess the lawfulness and rationality of the dismissal decisions without access to the record and facts relied upon by the President.

11.5.4 The record and reasons need to be made available in order to allow for accountability and transparency. The President cannot be allowed to stymie a review of the dismissal decisions simply by refusing to furnish this Court and the DA with the record and reasons for his decision.

11.5.5 Given the previous incident of the President replacing the Finance Minister in December 2015 for approximately 3 days and the cataclysmic effect this decision had on the markets, the value of the Rand and globally on South Africa, as mentioned in the Founding Affidavit, the President knows full well that this decision would have had similar if not greater effect, as it now appears.

11.6 In the circumstances, the President is required to furnish the record and reasons.

URGENCY

12 The President disputes urgency. However, he has failed to even deny, still less engage with, the key allegations made regarding urgency in the founding affidavit, including paragraphs 31 and 32 thereof.

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13 The President appears to suggest that any urgency which may have existed has dissipated as “*The downgrading has already taken place*” (para 22). This is manifestly not correct:

13.1 It is correct that two of the three main ratings agencies – Fitch and S&P Global - have already downgraded South Africa’s status.

13.2 However, as is made clear by paragraph 68 of the founding affidavit in the main application, the third main ratings agency – Moody’s – has not yet done so. Instead, Moody’s has placed South Africa on review for a downgrade due in material part to the dismissals of the Minister of Finance and Deputy Minister of Finance, but has indicated that it will only make this decision in June 2017.

13.3 It is imperative that the main application be decided before Moody’s makes his decision and for that to occur, this compelling application must be decided urgently.

13.4 I emphasise that the importance of the Moody’s downgrade decision has been recognised by the current Minister of Finance. On 19 April 2015, the Finance Minister and a team from National Treasury were scheduled to travel to the United States to meet with ratings agency Moody in order to avert a third down-grade. I attach reports of the Minister of Finance’s press conference attached as **RA3**. There remains the looming threat of a further down-grade. The attempts by the Finance Ministry and the National Treasury to avert a third ratings down-grade show the continued harm

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being suffered as a result of the dismissal decisions.

13.5 To simply assert, as the President has that “the horse has bolted” is callous and fails to appreciate the urgency and continued social and political harm that is arising from this situation.

13.6 Since the launch of the compelling application, it has also emerged that the dismissal decisions also have a direct bearing on the leadership of the Ministry of Finance and National Treasury which is deciding on whether South Africa undertakes the largest ever procurement deal in the form of the Nuclear New Build Procurement (the Nuclear deal). On 21 April 2017, Eskom confirmed in a press release that it had approached National Treasury and *“raised the areas of the current National Treasury Regulations (under the PFMA and PPPFA) which might need to be waived for the proposed Nuclear New Build Procurement (NNBP) process. . .”* Eskom’s press release is attached as **RA4**. If the President’s dismissal decisions were invalid – as the DA contends they were – this matter must be decided before irreversible decisions in respect of the nuclear deal are made. For this to be done this matter must be decided urgently and this cannot be done without the record and reasons also being furnished urgently.

13.7 Lastly, and in any event, as paragraph 32 of the founding affidavit made clear and which the President elected not to dispute, there is considerable public outcry, anxiety and disquiet about the President’s dismissal decisions. It is accordingly in the public interest that this application and

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the main application are determined urgency.

14 Finally, I point out that the main application was launched on 4 April 2017. In terms of the ordinary periods applicable in terms of Rule 53, the record was due on 28 April 2017. This means that by the time this application will be heard, despite the DA's best efforts, the President's dilatory conduct will have secured him more time than is permitted in terms of the Rules of Court. There is no reason why the President should not be compelled to furnish the record forthwith.

RESPONSES TO INDIVIDUAL PARAGRAPHS IN THE ANSWERING AFFIDAVIT

15 In what follows, I address the individual paragraphs in the answering affidavit *ad seriatim*, to the extent necessary.

16 Any allegation that is not specifically traversed, and which is not consistent with what is stated in this reply, should be taken to be denied

Ad paragraphs 1 – 4

17 Save to deny that the facts stated are all true and correct, I note these paragraphs.

Ad paragraphs 5 - 7

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18 I deny these paragraphs. This application is patently urgent for the reasons set out above. There is moreover no legal basis for the President's refusal to furnish the record and reasons.

Ad paragraphs 8 – 10

19 I deny these paragraphs insofar as they contradict the founding affidavit.

20 The President has always undertaken to furnish the record, this is evident from the President's letter dated 6 April 2017 (FA4) where the President "*requested an indulgence until the 28th April 2017 for the delivery of the records*" [Underlining added]. It also appears from the DA's Attorney letter of 11 April 2017 (FA7), wherein I stated: "*We note your undertaking to file the record on or before 21 April 2017 and understand that this relates not merely to the record but also the reasons for the decision*". The State Attorney did not take any issue with this recordal of the undertaking (see FA12).

21 It is only in a letter sent hours before the filing of the President's answering affidavit did the President reveal for the first time that he had no intention of furnishing a record despite having requested indulgences and made several undertakings to do so.

Ad paragraphs 11 – 13

22 I deny these paragraphs. Yet again, in the President's letter dated 11 April 2017, he reiterated his intention to file a record in terms of Rule 53 and stated that "You

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will understand how crucial such a consultation is in order to furnish you with a proper Rule 53 record that you have requested. [Underlining added.] As stated in the DA's attorney, Ms Jonker's recordal of the telephonic conversation with Mr Chowe, he confirmed that the President would be filing the record by 21 April 2017.

Ad paragraphs 14 - 17

23 I deny the contents of these paragraphs. I add further that there has never been any suggestion, prior to 21 April 2017, that the President would not be filing a record at all. The only debate was the timing of the filing of the record. As such, the DA made every attempt to accommodate the President within the urgent confines of the litigation. There is no reason why the President and his legal representatives required in excess of two weeks to inform the DA that they would not be filing a record.

24 Indeed, it appears that had the DA not brought this urgent compelling application that further indulgences would have been sought with the continued promise that the record would be furnished.

Ad paragraphs 18 - 20

25 I note the President's instructions to the State Attorney but deny that they are well founded as a matter of law. The decision indeed concerns constitutes executive action however it does not follow that the DA "*is not entitled to the record in terms of Rule 53*" as asserted by the President.

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Ad paragraph 21

26 I deny the contents of this paragraph. The affidavit misrepresents what is stated in the founding affidavit in the main application.

26.1 At paragraphs 58-59 of the founding affidavit, the DA quoted what has been stated in public by very senior government and ANC officials about the fact that the President relied on the so-called "intelligence report" in taking his decision.

26.2 At paragraph 60, it was indicated that "*While the President has not disclosed the co-called 'intelligence report' on which he seems to have relied, the text of what is apparently the report circulated on social media*". The affidavit then quoted this text circulating on social media.

26.3 At paragraph 61, the DA specifically invited the President to disclose in the Rule record and reasons:

"61.1 Whether he relied on the so-called "intelligence report" in making the dismissal decisions;

61.2 If so:

61.2.1 Whether the report is in the form set out in the text above, and if not to disclose the true report; and

61.2.2 Where the report emanated from"

27 I submit that the DA is entitled to this information before it files its supplementary



affidavit and any further grounds of review. The President's refusal to file a record and reasons seems to be an attempt to impeded and abridge the DA's procedural rights in this regard.

28 Lastly, I deny that the contention that the demand for the "intelligence report" is the basis for urgency. The basis for urgency is explained at paragraphs 31 and 32 and relates to the ongoing effects of the President's dismissal decisions. The point that was made at at paragraph 30 was merely that it is impossible for the main application to proceed until the President has filed his record and reasons and that this is demonstrated, in particular, by the intelligence report issue.

Ad paragraph 22

29 I deny the contents of this paragraph. I refer to what I have stated above regarding urgency.

Ad paragraph 23

30 I deny this paragraph. The DA's application to compel evidently has merit as set out above. Furthermore, there is no basis set out in the answering affidavit for the punitive costs order sought in the answering affidavit.

CONCLUSION

31 In the circumstances, I pray for the relief in the Notice of Motion.

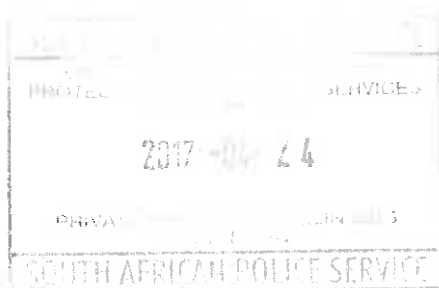
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James Selfe

JAMES SELFE

THUS, SWORN TO AND SIGNED before me at CAPE TOWN on this day of
24TH April 2017 by the deponent who acknowledges that he knows and understands
the contents of this affidavit and he has no objection to taking the prescribed oath and
that he considers the oath as binding on his conscience.

James Selfe
James Selfe



COMMISSIONER OF OATHS

James Selfe

"RAI"

Mindes

MINDE SCHAPIRO & SMITH

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E: sandra@mindes.co.za | www.mindes.co.za

Our Ref: DEM16/0438/E JONKER/sw | Your Ref: 2751 / 17 / Z75 | Date: 21 April 2017

THE STATE ATTORNEY

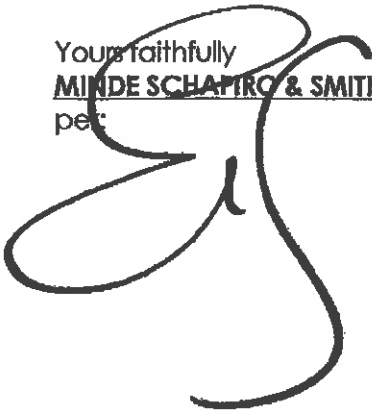
PER EMAIL: JChowe@justice.gov.za

Dear Sir

DA v PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA & 4 OTHERS; GHC : CASE NR 24396/2017

1. Your letter received this morning refers.
2. We disagree with the contentions contained in your letter and reserve the right to deal with them fully in due course.
3. Our client accordingly persists in the compelling application. Please file your client's answering affidavit in the compelling application as a matter of urgency and in any event before close of business today.
4. Our client reserves the right to seek a personal costs order against your client in view of what appear to be his attempts to delay or avoid complying his obligations under the Constitution and Rules of Court.

Yours faithfully
MINDE SCHAPIRO & SMITH INC.
per:



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Vat registration number: 4580257428 | Also at Greenacres, Port Elizabeth



"RA2"

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO.

In the matter between:

UNITED DEMOCRATIC MOVEMENT

Applicant

and

SPEAKER OF THE NATIONAL ASSEMBLY

First Respondent

PRESIDENT JACOB ZUMA

Second Respondent

SECOND RESPONDENT'S ANSWERING AFFIDAVIT

I, the undersigned,

JACOB GEDLEYIHLEKISA ZUMA

do hereby make oath and state that –

INTRODUCTION

1. I am the President of the Republic of South Africa and I depose to this

N5m



these cases is identical.

28. There is therefore no case made out why it would be in the public interest for the applicant to have direct access to the Court. On this ground too, the application stands to be struck off the roll. Further legal argument will be advanced at the hearing of this application.



Appointment and removal of Cabinet Ministers

29. The question of the appointment of Ministers and Deputy Ministers is dealt with by the provision of section 91(2) of the Constitution which reads:

"Cabinet

91(2) The President appoints the Deputy President and Ministers, assigns their powers and functions and may dismiss them"

30. It stands therefore to reason that the Constitutional power to appoint and dismiss Ministers is that of the President, which power he or she exercises as head of the Cabinet. I am advised in this regard there are no constitutional constraints on the President on how that power is to be exercised or the process by which the power is to be exercised, as long as the exercise of such power is rational.



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changes in a country's credit profile. Here, however the timing and scope of the reshuffle raises questions over the signal they send regarding the prospects for ongoing reforms, the underlying strength of South Africa's institutional framework, and the fragile recovery in the country's economic and fiscal position".

36.3. *Fitch -- "In Fitch's view, the cabinet reshuffle, which involved the replacement of the finance minister, Pravin Gordhan, and the deputy finance minister, Mcebisi Jonas, is likely to result in a change in the direction of the economic policy.*

Differences over the country's expensive nuclear programme preceded the dismissal of a previous finance minister, Nhlanhla Nene in December 2015 and in Fitch's view may have also contributed to the decision for the recent reshuffle."


37. i must point out that the factors that inform the risk assessment by rating agencies have nothing to do with whether i, as President, or government have taken decisions lawfully or not. Even decisions that are lawfully taken may be considered by such agencies to impact on the risk profile of a particular country. What the law requires of public functionaries is that they exercise their powers only when so authorised by law and within the ambit of such authorisation.

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G. P.
J. L.
2015/11/11

Counts Npc V Speaker Of The National Assembly And Others 2016 (1)
SA 132 (CC) 'it is political parties, and parties alone, that determine who is allocated to legislative bodies and to the executive'. Such that if a member of Parliament ceases to be a member of the party that nominated him/her, he loses his/her membership of the legislature.

47. I submit therefore that in our current democratic dispensation it is the political parties that are the main constitutive element of the democratic process, the Legislature and the Executive, and not the members allocated by parties to the legislative bodies.

48. I note the utterances attributed to the Secretary General of the ANC, Mr. Gwede Mantashe, and the Deputy President, Mr. Cyril Ramaphosa regarding a perceived failure on my part to consult with ANC leaders and/or officials about changes to cabinet. What I do as the President of the ruling party are matters political. What I do as the President of the Republic requires compliance with the Constitution and the law. As a political party there are brought range of political and ideological considerations that inform what we do. On the other hand public office requires the exercise of public power to be done within the constitutional constraints, least of which is rationality. My decision to reshuffle the Cabinet was done for rational purposes.



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"RA3"

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[The Times journalist manhandled by 'policeman' while Zuma attends Gupta event \(http://www.timeslive.co.za/local/2017/04/20/The-Times-journalist-manhandled-by-policeman-while-Zuma-attends-Gupta-event/\)](http://www.timeslive.co.za/local/2017/04/20/The-Times-journalist-manhandled-by-policeman-while-Zuma-attends-Gupta-event/)

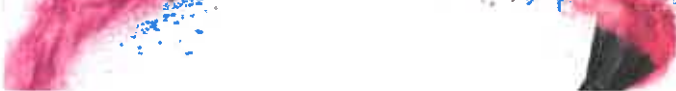


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[Easter road death toll spikes to 235 \(http://www.timeslive.co.za/local/2017/04/21/Easter-road-death-toll-spikes-to-235/\)](http://www.timeslive.co.za/local/2017/04/21/Easter-road-death-toll-spikes-to-235/)

<http://www.timeslive.co.za/local/2017/04/19/Treasury-team-to-meet-Moody%E2%80%99s-in-the-US-Gigaba>

Treasury team to meet Moody's in the US: Gigaba

TMG Digital | 19 April, 2017 11:13



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Finance Minister Malusi Gigaba. File photo.
Image by: JAMES OATWAY / REUTERS

A team from the National Treasury is headed to the United States, where officials will address Moody's, one of the leading international ratings agencies, which has yet to give its verdict on the country's sovereign debt rating.

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Within a week after President Jacob Zuma appointed Malusi Gigaba as finance minister to replace Pravin Gordhan, ratings agencies S&P Global and Fitch downgraded the country's credit rating to junk.

During the same week in April, Moody's put the country's local and foreign currency ratings on review for a downgrade, and is expected to announce its decision within 30 to 90 days.

- [Gigaba disagrees with adviser on economy \(http://www.timeslive.co.za/thetimes/2017/04/19/Gigaba-disagrees-with-adviser-on-economy1\)](http://www.timeslive.co.za/thetimes/2017/04/19/Gigaba-disagrees-with-adviser-on-economy1)

Gigaba told a media briefing in Pretoria that his team will visit the United States to participate in the Spring Meetings of the World Bank Group and the International Monetary Fund, which will take place in Washington from Friday to Sunday.

"We are going to meet among others with Moody's, only Moody's, to give assurance in terms of policy direction of government because we will have an opportunity. They are the ones that have not downgraded us," Gigaba said.

"We need to engage with them, just to have a face-to-face interaction with them."

- [Gigaba walks, talks and swims like the lame duck he is \(http://www.timeslive.co.za/thetimes/2017/04/19/Gigaba-walks-talks-and-swims-like-the-lame-duck-he-is1\)](http://www.timeslive.co.za/thetimes/2017/04/19/Gigaba-walks-talks-and-swims-like-the-lame-duck-he-is1)

Gigaba said he could not give a guarantee that Moody's would not downgrade South Africa's credit rating.

"We are quite confident that the South African economy is resilient enough ... and that we are going to climb back to investment grade, so the setbacks we have suffered so far are temporary setbacks," Gigaba said.

Gigaba said the country's institutions were strong. He said once a budget was adopted, government stuck to the budget and ensured that every department complied with it.

"So we do believe that ratings agencies understand that."

Gigaba said his team would also have an opportunity to interact with some of the investors on a limited scale as this visit was not a full-blown investor roadshow.

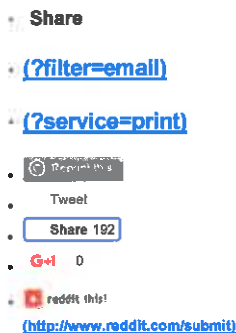
"We think that we should not miss an opportunity to meet investors. We are going to be talking up our country," Gigaba said.

- [Nationalisation of banks is not government policy, says Gigaba \(http://www.timeslive.co.za/politics/2017/04/18/Nationalisation-of-banks-is-not-government-policy%E2%80%9A-says-Gigaba\)](http://www.timeslive.co.za/politics/2017/04/18/Nationalisation-of-banks-is-not-government-policy%E2%80%9A-says-Gigaba)

Gigaba also mentioned that with the imminent departure of Treasury director general Lungisa Fuzile, the department would ensure that by the end of May, interviews would have been done with potential candidates.

"The idea of a South Africa Inc approach to engage investors has proven not only popular but productive and beneficial for the country," Gigaba said.

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Conversations about a waiver regarding nuclear aren't peculiar

2017/04/21

Friday, 21 April 2017: Eskom has noted the reports suggesting that it requested a waiver to the elements of the Standard Infrastructure Procurement and Delivery Manual (SIPDM).

"Eskom can confirm that during the Eskom discussions with National Treasury's Office of Chief Procurement Officer on 28th March this year Eskom raised the areas of the current National Treasury Regulations (under the PFMA and PPPFA) which might need to be waived for the proposed Nuclear New Build Procurement (NNBP) process," says Chief Nuclear Office, Dave Nicholls.

These are related to the proposed evaluation criteria, which would include elements of localisation, the extension of the bid validity from 12 weeks to 2 years, the requirement for "self-designation" under DTI's local content regulations as well as the SIPDM procurement gate 4 (which relates to budget and funding).

"The need for the waiver on the SIPDM gate 4 was to align the process with the Cabinet decision for the vendors' responses to the Request for Proposals to form the basis of the funding model that had to be submitted to Cabinet by the Department of Energy ("**End of Year Statement**" by **President Jacob Zuma on 15 December 2016**). Therefore the finalisation of the budget and funding issues would not be possible prior to RFP issue," Nicholls adds.

The other issue that was discussed was the review of the "feasibility study" that is a requirement of SIPDM. "The SIPDM came into force on the 1 July 2016, and predates the work done by Eskom on the feasibility of new nuclear power stations as well as the Gazetted IRP of 2010. There was discussion of the need to confirm that the work done to date met the objective criteria of the requirements of the SIPDM," Nicholls adds.

"Eskom remains committed to conduct the NNBP in an open and transparent manner to the best interests of South Africa," concludes Nicholls.

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