

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

Case no: 23017/2022

In the application to compel between:

**ORGANISATION UNDOING TAX ABUSE NPC
(Registration no: 2012/064213/08)**

Applicant

and

**THE NATIONAL ENERGY REGULATOR OF
SOUTH AFRICA**

First Respondent

**KARPOWERSHIP SA COEGA (RF) (PTY) LTD
(Registration no: 2020/754336/07)**

Second Respondent

**KARPOWERSHIP SA SALDANHA BAY (RF) (PTY) LTD
(Registration no: 2020/754347/07)**

Third Respondent

**KARPOWERSHIP SA RICHARDS BAY (RF) (PTY) LTD
(Registration no: 2020/754352/07)**

Fourth Respondent

**KARPOWERSHIP SA (PTY) LTD
(Registration no: 2019/537869/07)**

Fifth Respondent

IN RE: THE MAIN REVIEW APPLICATION BETWEEN:

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(Registration no: 2012/064213/08)**

Applicant

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Fifth Respondent

**MINISTER OF MINERAL RESOURCES AND
ENERGY N.O.**

Sixth Respondent

**MINISTER OF FORESTRY, FISHERIES, AND THE
ENVIRONMENT N.O.**

Seventh Respondent

ESKOM HOLDINGS (SOC) LTD
(Registration no: 2002/015527/30)

Eighth Respondent

NOTICE OF MOTION

TAKE NOTICE that the applicant intends to make an application to the above Honourable Court for an order in the following terms:

1. The first respondent shall make available to the applicant a complete, unredacted record in the review proceedings instituted by the applicant on 26 April 2022 under the above case number within 10 (ten) days of the granting of this order.

2. *In the alternative to prayer 1 above:*

- 2.1. The first respondent shall make available to the applicant's legal representatives a complete, unredacted record in the review proceedings instituted by the applicant on 26 April 2022 under the above case number, including any documents that any of the respondents claim to be confidential, within 10 (ten) days of the granting of this order.
- 2.2. The applicant's legal representatives shall sign the confidentiality undertaking attached as annexure "A" hereto which, subject to paragraph 2.3 below, prevents them from disclosing the documents except for purposes of the litigation under the above case number, and then only in a manner agreed between the parties or in accordance with any directions issued by a judge or a court.
- 2.3. The applicant's legal representatives may disclose the full record including any allegedly confidential documents to the applicant's expert witnesses subject to them also signing the confidentiality undertaking attached hereto as annexure "A".
- 2.4. The applicant and its experts may, in any affidavits filed under the above case number, attach and/or refer to any documents contained in the record that they deem relevant including any allegedly confidential documents.

- 2.5. In the event that the applicant or its experts attach or refer to any allegedly confidential documents in any affidavit, the applicant shall, prior to the filing at court of the relevant affidavit serve copies thereof on the respondents' respective attorneys and provide them ten (10) days from date of service (a) to object to any such documents being disclosed in public proceedings on the grounds of confidentiality and (b) to furnish full reasons for such alleged confidentiality.
- 2.6. If the parties cannot agree whether a particular document which forms the subject of such an objection should be disclosed in public proceedings, any party may approach a judge or the court to decide the question and may disclose the contested documents to such judge or court. Any such hearing will be closed to the public.
3. In the event of the alternative relief as set out in prayer 2 above being granted, the first respondent shall comply with prayer 2.1 within 10 (ten) days from the date of this order.
4. The first to fifth respondents are ordered to pay the costs of this application jointly and severally, the one to pay the others to be absolved, on the scale as between attorney and client.
5. Further and/or alternative relief.

TAKE NOTICE FURTHER that the accompanying affidavit of **ANDRI JENNINGS** will be used in support thereof.

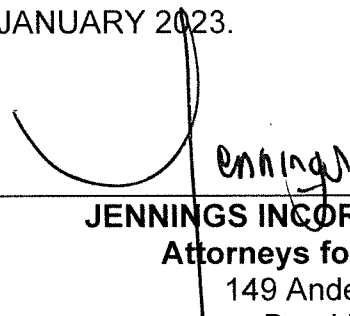
TAKE NOTICE FURTHER that the Applicant has appointed the address of **JENNINGS INCORPORATED** at the address set out hereunder, at which it will accept notice and service of all process in these proceedings.

TAKE NOTICE FURTHER that if you intend opposing this application you are required:

- (a) to notify the Applicant's attorney in writing within five (5) days of service of this application;
- (b) and within fifteen (15) days after you have so given notice of your intention to oppose the application, to file your answering affidavits, if any;
- (c) and further that you are required to appoint in such notification an address referred to in Rule 6(5)(b) of the Uniform Rules of Court at which you will accept notice and service of all documents in these proceedings.

If no such notice of intention to oppose be given, the application will be made on a date to be allocated by the Registrar of the above Honourable Court at 10h00.

SIGNED AT PRETORIA ON THIS 23rd DAY OF JANUARY 2023.


JENNINGS INCORPORATED
Attorneys for Applicant
149 Anderson Street
Brooklyn, Pretoria
Tel: 012 110 4442
Email: andri@jinc.co.za; delia@jinc.co.za
Ref: A JENNINGS/OUT015

TO: THE REGISTRAR OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

AND TO: **PRINCE MUDAU & ASSOCIATES** (Service by email)
Attorneys for First Respondent
Thornhill Office Park
Building 2
94 Bekker Road
Vorna Valley, Midrand
Tel: 010 224 0608
Fax: 086 695 0882
Email: dineo@pm-attorneys.co.za
prince@pm-attorneys.co.za
kganedi@pm-attorneys.co.za

C/O DABISHI NTHAMBELENI INC
103 Doreen Street
Colby, Hatfield
Pretoria
Ref: LIT/PM/MAT180

AND TO: **PINSENT MASONS SOUTH AFRICA INC** (Service by email)
Attorneys for Second to Fifth Respondents
9th Floor
61 St Katherine Street
Sandton
Johannesburg
2196
Tel: 010 493 4603
Fax: 010 493 4611
Email: Jason.Smit@pinsentmasons.com
Andrew.Fawcett@pinsentmasons.com
Tinyiko.Ndlovu@pinsentmasons.com
Sarah.Burford@pinsentmasons.com
Ref: 691335.07000

C/O VZLR ATTORNEYS INCORPORATED
1st Floor/Block 3
Monument Office Park
71 Steenbok Avenue
Monument Park
Pretoria
0181
Tel: 012 435 9444
Email: nadiadt@vzlr.co.za
Ref: Nadia Zeelie

"A"

CONFIDENTIALITY UNDERTAKING:

IN RE: RECORD IN RULE 53 PROCEEDINGS IN THE HIGH COURT OF
SOUTH AFRICA, GAUTENG DIVISION, PRETORIA UNDER CASE
NUMBER 23017/2022

I, the undersigned,

(Name)

(Designation)

hereby undertake that I will not use the documents that NERSA and/or Karpowership claim to be confidential and provided in the above proceedings as part of the record for any purpose other than the litigation under the above case number and as agreed between the parties, and further will not divulge any information or documents contained therein to any party other than the parties listed below, unless otherwise directed by a judge or a court or agreed between the parties.

FOR THE ORGANISATION UNDOING TAX ABUSE ("OUTA"):

1. Andri Jennings (Attorney: Jennings Incorporated)
2. Delia Turner (Attorney: Jennings Incorporated)
3. Adv Jannet Gildenhuys SC (Counsel for OUTA)
4. Adv Sonika Mentz (Counsel for OUTA)
5. Dr Grove Steyn (CEO: Meridian Economics)
6. Adam Roff (Meridian Economics)
7. Adv Stefanie Fick (OUTA representative)
8. Mr Brendon Slade (OUTA representative)

Signed at _____ on this ____ day of _____ 2023.

NAME _____

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First Respondent

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(Registration no: 2020/754336/07)**

Second Respondent

**KARPOWERSHIP SA SALDANHA BAY (RF) (PTY) LTD
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KARPOWERSHIP SA COEGA (RF) (PTY) LTD

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(Registration no: 2020/754336/07)

Second Respondent

KARPOWERSHIP SA SALDANHA BAY (RF) (PTY) LTD
(Registration no: 2020/754347/07)

Third Respondent

KARPOWERSHIP SA RICHARDS BAY (RF) (PTY) LTD
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Seventh Respondent

ESKOM HOLDINGS (SOC) LTD
(Registration no: 2002/015527/30)

Eighth Respondent

FOUNDING AFFIDAVIT

I, the undersigned,

ANDRI JENNINGS

do hereby make oath and say:

1. I am an adult female attorney of the above Honourable Court and director at Jennings Incorporated Attorneys with offices at 149 Anderson Street, Brooklyn, Pretoria.



2. I am the applicant's attorney of record in the matter and have acted in this capacity throughout. As a result of my aforesaid involvement, I have personal knowledge of the facts deposed to herein which are, to the best of my knowledge and belief, both true and correct.
3. Submissions of a legal nature are made in accordance with advice received by the applicant and will be expanded upon at the hearing of the matter.
4. Where I underline parts of quoted texts for emphasis, such emphases are my own.

THE PARTIES

(i) Applicant

5. The applicant is the ORGANISATION UNDOING TAX ABUSE NPC ("OUTA"), a non-profit company duly registered in terms of the Company laws of the Republic of South Africa with registration number 2012/064213/08 and principal place of business at Unit 4, Boskruin Village, Cnr President Fouche and Hawken Road, Bromhof, Johannesburg, 2188, Gauteng.

(ii) Respondents

6. The first respondent is THE NATIONAL ENERGY REGULATOR OF SOUTH AFRICA ("NERSA"), a regulatory authority established as a juristic person in



terms of section 3 of the National Energy Regulator Act 40 of 2004, with principal place of business at Kulawula House, 526 Madiba Street, Arcadia, Pretoria.

7. The second respondent is KARPOWERSHIP SA COEGA (RF) (PTY) LTD, a company duly registered in terms of the Company laws of the Republic of South Africa, with registration number 2020/754336/07 and registered address at 164 Totius Street, Groenkloof, Pretoria, 0027.
8. The third respondent is KARPOWERSHIP SA SALDANHA BAY (RF) (PTY) LTD, a company duly registered in terms of the Company laws of the Republic of South Africa, with registration number 2020/754347/07 and registered address at 164 Totius Street, Groenkloof, Pretoria, 0027.
9. The fourth respondent is KARPOWERSHIP SA RICHARDS BAY (RF) LTD, a company duly registered in terms of the Company laws of the Republic of South Africa, with registration number 2020/754352/07 and registered address at 164 Totius Street, Groenkloof, Pretoria, 0027.
10. The fifth respondent is KARPOWERSHIP SA (PTY) LTD ("Karpowership SA"), a company duly registered in accordance with the Company Laws of the Republic of South Africa, with registration number 2019/537869/07 and registered address at 164 Totius Street, Groenkloof, Pretoria.

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11. The second, third and fourth respondents are wholly owned by Karpowership SA who in turn has as its majority owner a Turkish energy company called Karadeniz Holdings.
12. This is an application to compel delivery of a complete, unredacted record in the main review application (to which I shall refer more fully below). The second, third, fourth and fifth respondents are represented in the main application by Messrs Pinsent Masons who on 20 May 2022 filed a notice of intention to oppose the main application on their behalf. For the sake of convenience and brevity, and where appropriate, I shall refer to the second, third, fourth and fifth respondents collectively as "Karpowership".

THE BACKGROUND TO AND NATURE AND PURPOSE OF THIS APPLICATION

13. On or about 26 April 2022, OUTA issued a review application in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) as read with Rule 53 of the Uniform Rules of Court under the above case number. I shall hereinafter refer to this application as "the main application or "the review application".
14. OUTA seeks an order in the review application for the judicial review and setting aside of the decisions taken by NERSA to grant generation licences to Karpowership for three floating storage and regasification units – otherwise known as "powerships" - at Coega, Saldanha Bay and Richards Bay respectively and an order that the decisions be remitted to NERSA for reconsideration.



15. The review application is opposed by NERSA and Karpowership. ESKOM, the eighth respondent in the review application, has filed a notice to abide. The other two respondents in the review application, being the Minister of the Department of Mineral Resources and Energy ("DMRE") and the Minister of the Department of Forestry, Fisheries, and the Environment ("DFFE") have not filed any documents or processes in the review application.
16. The Notice of Motion in the review application (dated 26 April 2022) calls upon NERSA in terms of Rule 53(1)(b) of the Uniform Rules of Court to despatch to the Registrar, within 15 days after service of the Notice of Motion upon it, the records of all documents and all electronic records that relate to the making of the decisions referred to in the Notice of Motion together with such reasons as it is by law required or desires to give or make, and to notify the applicant that it has done so. It further gives notice that, in terms of Rule 53(4), the applicant may within 10 days from receipt of the record from the Registrar, amend, add to or vary the terms of its Notice of Motion and supplement the founding affidavit.
17. The record fell due in terms of the notice as read with the provisions of Uniform Rule 53(1)(b) on 19 May 2022.
18. On 17 June 2022, NERSA filed a heavily redacted record in the review application. However, it did so without having any agreement in place with OUTA that the record could be redacted and without condonation having been

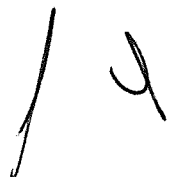
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requested or granted for deviating from the provisions of Rule 53(1)(b) as read with the applicant's Notice of Motion. OUTA will ensure that a copy of the redacted record is filed in a separate bundle and placed before the Honourable Court at the hearing of the matter.

19. The background is that Karpowership had proposed a very restrictive confidentiality agreement in the period leading up to the delivery of the redacted record. It entailed that only the applicant's legal representatives and experts, and not the applicant itself, would have access to those parts of the record that they (Karpowership) considered to be confidential including any subsequently filed affidavits containing such information. I shall deal with the proposed confidentiality regime more fully below. Suffice it to state the following:

- 19.1. Respondents in a review application cannot unilaterally decide which parts of the record should or should not be treated as confidential, and dictate the process from there. The applicant is afforded procedural rights to be given access to the record under Rule 53 and thereafter to supplement its founding papers, which neither NERSA nor Karpowership can curtail at will;

- 19.2. OUTA did not and does not agree to the proposed confidentiality regime and to the resultant limitation of these procedural rights. It holds the view that a confidentiality regime, especially a restrictive one such as has been proposed by Karpowership, where OUTA's legal representatives would not even be able to take instructions from their own client on



aspects relating to the record, has never been properly motivated by Karpowership. It is in any event not warranted in the circumstances where there is every reason to insist on transparency and accountability in the public interest;

19.3. the obligation to make the record available rests on NERSA and not on Karpowership. As will also appear from what is set out below, NERSA seems to act in accordance with the dictates of Karpowership instead of acting independently as is required from the regulator;

19.4. Karpowership's approach in the correspondence leading up to this application (which is dealt with below) that it is for the applicant to identify and motivate access to the parts of the record that Karpowership or NERSA redacted and, if necessary, to bring an application to compel is incorrect. The point of departure must be that the decision maker must comply with the notice or request in the Notice of Motion as read with the provisions of Rule 53 to make the complete record available. If the decision maker or another party wishes to contend that special or exceptional circumstances exist which would justify certain parts of the record being kept confidential, it falls to such respondents to show that such circumstances exist. Where no agreement can be reached with an applicant, as in the present case, such respondents must properly apply to court for condonation for not complying with the rules of court or requests made pursuant thereto. They cannot simply, as they did in this



case, take the law into their own hands and nonetheless file a heavily redacted record.

20. As will appear more fully from the correspondence mentioned below, the dispute over the confidentiality of the record and NERSA's insistence on delivering a redacted record as dictated by Karpowership, in the absence of agreement with OUTA and without first seeking permission from the Honourable Court, led to a stalemate between the parties.
21. In an effort to take the matter forward, OUTA made a **“with prejudice”** proposal on 17 October 2022 to implement a confidentiality regime on the basis set out in the letter attached hereto as annexure **“FA1(a)”**, and accompanied by the confidentiality undertaking attached as annexure **“FA1(b)”**.
22. I emphasize that OUTA's **“with prejudice”** proposal was made not because OUTA believes that either NERSA or Karpowership have demonstrated any special or exceptional circumstances for parts of the record to be kept confidential, but for purposes of moving the matter forward and pursuant to an undertaking given by all parties at a Case Management meeting held on 5 September 2022 before the Honourable Ledwaba DJP that they would attempt to resolve the matter amicably. The **“with prejudice”** proposal was specifically drafted by OUTA to address the concerns expressed by the respondents.



23. Both NERSA and Karpowership rejected OUTA's "**with prejudice**" proposal out of hand, without engaging in any negotiations, as will be more fully discussed below under the heading "OUTA'S WITH PREJUDICE PROPOSAL".
24. Indeed, despite several requests to NERSA to provide an unredacted record in the period between May to October 2022, both NERSA and Karpowership have unequivocally indicated that they will not do so. The position taken by them admits of no other conclusion than that they seek to dictate the process and determine the content of the record, and do not intend to yield in any way.
25. The violation of the constitutional objectives of transparency and accountability and the disregard shown by NERSA and Karpowership for the provisions of the rules of court as well as for the court, leaves OUTA with no choice but to launch this application to compel delivery of the complete record.
26. OUTA has accordingly been advised to serve a notice in terms of Rule 30A on the respondents and, failing compliance within 10 days, to bring an interlocutory application, to compel delivery of a complete and unredacted record in the review application,
27. OUTA served a notice in terms of Rule 30A on the respondents on 12 December 2022, a copy of which is annexed hereto marked "**FA1(c)**". Unsurprisingly, the respondents have to date failed and/or refused to comply with the notice.

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BACKGROUND TO THE REVIEW APPLICATION

28. During or about August 2020, the DMRE published a request for proposal in respect of the Government's Risk Mitigation Independent Power Procurement Programme ("RMIPPP") for the procurement of 2000MW new electricity capacity from a range of energy source technologies.
29. The successful bidders that were selected to provide such new generation electricity would have to obtain generation licences from NERSA and enter into 20-year power purchase agreements ("PPA's") with ESKOM.
30. The fifth respondent, Karpowership SA, was selected as the preferred bidder for procurement of 450MW at Coega, 320MW at Saldanha Bay and 450 MW at Richards Bay using floating storage regasification units ("FRSU's") – otherwise known as "powerships" - moored at these respective harbours to generate electricity.
31. The second, third and fourth respondents are all wholly owned subsidiaries of the fifth respondent, Karpowership SA. Subsequent to the awarding of the bid to Karpowership SA by the DMRE, its three subsidiaries applied to NERSA for the requisite generation licences for generation at Coega, Saldanha Bay and Richards Bay respectively.

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32. OUTA launched its review application to have the decision by NERSA to grant the generation licences to Karpowership reviewed and set aside on 26 April 2022.
33. On or about 25 April 2022, and unbeknownst to OUTA at the time, a non-profit company based in Cape Town, Green Connection NPC ("Green Connection"), also issued a review application against NERSA and Karpowership under case number 23339/2022 in which substantially the same relief is requested, albeit on different grounds and with different emphases.
34. On or about 9 June 2022, both my offices as well as the offices of Messrs Chennells Albertyn Attorneys (acting on behalf Green Connection) were approached by Messrs Pinsent Masons (on behalf of Karpowership) to *inter alia* inform us that they intended to approach the Deputy Judge President for a case management meeting and that they were of the view that the two matters should be heard jointly and on an expedited basis.
35. On 10 June 2022 and 13 June 2022 respectively Green Connection and OUTA indicated their agreement that the matters should be heard jointly. NERSA is yet to formally confirm its stance on a joint hearing. However, I point out at this juncture that OUTA has agreed to a joint hearing, but not a consolidation of the matters, as it is of the view that the OUTA and Green Connection applications should be treated as separate applications, each adjudicated upon its own merits. To the best of my knowledge, Karpowership and Green Connection agree with this view.



36. Following the correspondence in June 2022 as referred to above, correspondence between the attorneys for NERSA, Karpowership, Green Connection and OUTA were circulated to all the parties. A case management meeting scheduled for 5 September 2022 before the Honourable Ledwaba DJP was also attended by representatives of all four parties.
37. I emphasize that this application is brought on behalf of OUTA. OUTA and Green Connection do not share legal representatives or experts and for purposes of this interlocutory application, the review application brought by Green Connection has no further relevance.

THE RECORD AND DISPUTE ABOUT CONFIDENTIALITY

38. As stated, NERSA delivered a heavily redacted record via email on or about 17 June 2022, without providing any reasons for such redactions. Its purported reasons were only provided much later in the form of a spreadsheet on 12 September 2022. An A4 copy of the spreadsheet is attached hereto as annexure “**FA2**” and an A2 colour copy will be made available to the Honourable Court at the hearing of argument. NERSA (or whosoever prepared the spreadsheet) used the colours red, orange and green to differentiate between certain parts of the record. I deal more fully below with the spreadsheet which is insufficient and confusing.

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39. Prior to delivery of the record, starting with the email dated 24 May 2022, a copy of which is attached hereto as annexure “FA3”, Messrs Pinsent Masons requested that the parties enter into a confidentiality agreement before the record was “distributed” by NERSA. The first two paragraphs of the email read:

“In anticipation of receiving the Rule 53 record in this matter, our client has instructed us to request that a confidentiality regime first be agreed before the record is distributed. The proposal is made on the assumption that the record will include certain confidential information regarding client.

In order to control the disclosure of this information, we think the most sensible approach is for our client to either redact or exclude from the record entirely all of its confidential information and include it in a separate confidential record which will only be accessible to the Judge and the respective attorneys/advocates/experts once suitable confidentiality undertakings have been provided. The confidential record will not be shared by any other person (or uploaded onto Caselines) and will be provided to the judge directly (preferably in hard copy) in due course. Likewise, all affidavits which rely on the confidential information will also be subject to the same arrangement.”

40. I point out already at this stage that Karpowership's suggestion above would mean that the representatives of OUTA, the applicant in the review proceedings, would not be able to see the complete record and give instructions on it, nor would OUTA be able to see its own affidavits or the parts thereof that deal with the allegedly confidential information. It goes without saying that this



would be not only prejudicial to OUTA as the applicant but also highly unusual and undesirable for an applicant to not be able to see and give instructions on its own papers.

41. Moreover, prior to the delivery of the redacted record, I repeatedly informed the parties that OUTA could not consent to such a blanket confidentiality agreement unless it was clear what information was sought to be kept confidential. I quote from the relevant correspondence below.

- 41.1. In paragraph 2 of an email of 30 May 2022 to Karpowership's attorneys (attached as annexure "FA4"):

"Neither our client nor our offices are in a position to agree to your client's request without knowing what information is sought to be kept confidential, especially in circumstances where your client is not the party from whom the record is requested."

- 41.2. In paragraph 2 of my letter of 7 June 2022 (attached as annexure "FA5"):

"We have already indicated in our correspondence of 30 May 2022 that neither our client nor our offices are in a position to agree to your client's request that a confidentiality regime is agreed upon without knowing what information is sought to be kept confidential, especially in

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circumstances where your client is not the party from whom the record is requested.”

41.3. In paragraphs 11 and 12 of our letter of 13 June 2022 (attached as annexure “FA6”)

“11. We have already pointed out to you twice that our client cannot agree to a blanket confidentiality arrangement without knowing which documents/information your client wishes to keep confidential. We have invited your client to identify such documents/information so that we can reasonably assess the request, but your client has declined the invitation.

12. What documents your client has provided to NERSA during the application process is known only to your client and NERSA. Your client should therefore be able to predict with a fair degree of certainty what information relating to it will be contained in the record. In view of the above, we fail to understand why your client has declined to specify the documents/information it wishes to keep confidential.”

42. NERSA nevertheless proceeded to file a redacted record with no agreement in place and without seeking condonation from the Honourable Court for deviating from the rules of court and restricting OUTA’s access to the record. Prior to the filing of the redacted record (and for almost three months thereafter), neither

NERSA nor Karpowership provided OUTA with a list of what they considered confidential but expected OUTA to agree to a confidentiality arrangement on the terms dictated by Karpowership.

43. From the founding affidavit filed by OUTA in the review application, it is evident that the cost implications over the anticipated 20-year contract period takes centre stage in OUTA's review application. OUTA consulted two independent energy experts from Meridian Economics based in Cape Town, Dr Grové Steyn and Mr Adam Roff in this regard. Without having had the benefit of the full record including, in particular, the financial information which has been redacted from the record, Dr Steyn provided a preliminary opinion as set out in paragraphs 86 – 104 of OUTA's founding affidavit (**Caselines p 002-37 – 002-44**). He did so based on publicly available information, as confirmed by him under oath. These pages are attached as annexure "FA7". This opinion will be amplified once the complete record is made available and OUTA is entitled to file a supplementary founding affidavit as provided for in Rule 53.
44. It is appropriate to quote part of Dr Steyn's opinion from paragraphs 91 to 97 of OUTA's founding affidavit in the review application:

"(ii) Failure to supply cost-effective power:

91. *The 20-year Karpowership projects will expose consumers to much higher costs and much greater risk than the portfolio of alternatives available to resolve loadshedding in the short term and meet demand over the long term.*



92. *NERSA has failed to do a proper analysis of the project costs and cost risk, and more specifically appears to have misconstrued the issues surrounding the electricity pricing formulas (in particular the gas pricing components) approved as part of the decision. NERSA accordingly did not apply its mind to all the factors that it had to consider in making the decision, in particular pertaining to the following:*

- a) the price for power from the Karpowerships is significantly exposed to exchange rate risk and global gas prices, whereas the alternative generating technologies have little or no such exposure;*
- b) the RfD's state that Karpowership power for the year beginning April 2022 would cost R2.80/kWh, already up 90% from the ~R1.50/kWh bid as at April 2020;*
- c) Meridian's estimates based on its understanding of the bid prices and limited information on the PPA suggest the current price for Karpowership power is close to R5/kWh – roughly two to three times the cost of alternative portfolio based solutions to resolve loadshedding and more than the other more expensive winning bids in the RMIPPP process;*
- d) the gas component of the PPA's pricing formula as disclosed in the RfD appears to result in a substantial over recovery of the regasification cost. According to the RfD there is both a recovery of this in the fixed cost component as well as a percentage premium applied to the gas price. The latter would result in "windfall" profits for the Karpowership fuel providing company as the actual regasification cost is not linked to the price of gas. This has not been interrogated by NERSA at all.*

(iii) *NERSA's failure to conduct a value for money assessment:*

93. *Section 10(2)(e) of the ERA¹ requires that an application for a generation licence must include the plans and ability to comply with any applicable legislation or subordinate legislation. The plans and ability to comply with the Regulations should accordingly have been included in the licence applications.*
94. *With specific reference to regulations 9(1)(a) and 9(1)(b), the application should have included the plans and ability for the PPA's to meet the requirements of:*
- (a) value for money; and*
 - (b) appropriate technical, operational and financial risk transfer to the seller.*
95. *It is Dr Steyn's opinion that the following is required for a conclusion of "value for money" to be reached:*
- a) the service provided by the seller must match the economic need of the buyer. This predetermines the utility or the value in the hands of the buyer (i.e. the service provided must actually be what the buyer needs); and*
 - b) the price at which the service is provided must be:*
 - (i) lower than the economic value of the utility in the hands of the buyer; and*
 - (ii) competitive compared to that of the alternative providers available to the buyer.*

¹ Electricity Regulation Act 4 of 2006.



96. *While NERSA specifically raises these issues briefly in their respective RfD's under the heading "POWER PURCHASE AGREEMENT" (Coega RfD at par 86; Saldanha RfD at par 85; Richards Bay RfD at par 84) they provide no evidence that they have conducted any adequate assessment of them.*
97. *In particular, NERSA did not apply the value for money test. In Dr Steyn's opinion, if NERSA did apply the test, it would have found that the Karpowership projects failed it. NERSA accordingly failed to consider these critical issues in its decision.*
- (iv) *NERSA's failure to consider climate impacts as a critical economic risk to industrial and commercial electricity consumers:*
98. *The world is in the midst of a climate crisis with unprecedented implications for the biosphere and human wellbeing. The South African Government recently published its updated Nationally Determined Contribution ("NDC"), committing the country to decarbonisation targets by 2025 and 2030. Beyond that it is Government policy (along with most countries in the world) to achieve a net zero emissions economy by mid-century. In South Africa the highly carbon intensive power sector will have to do the early heavy lifting to enable South Africa to deliver on its international decarbonisation commitments and avoid punitive carbon border tax adjustments on its exports and other punitive financial impacts on the economy.*
99. *Dr Steyn is of the opinion, that given South Africa's decarbonisation policies and commitments read with the objects of the ERA, and the fact that the country's power sector is the most carbon intensive in the world, thereby exposing the entire economy to excessive trade and financing related climate risk, climate factors are not irrelevant when NERSA considers the award of a 20-year generation licence for a fossil fuel plant, when cleaner, cheaper and faster options are available. South African*

electricity consumers will be forced to consume this power for this entire period and the state will be the guarantor of the power off-take. This is contrary to the objectives set out in section 2(b) of the ERA that places an obligation on NERSA to:

“ensure that the interests and needs of present and future electricity customers and end users are safeguarded and met, having regard to the governance, efficiency, effectiveness and long-term sustainability of the ESI within the broader context of economic energy regulation in the Republic.”

100. *High capacity factor gas power as proposed by Karpowership, will mostly not displace CO₂ emitting coal power as claimed by NERSA in the RfD, but will rather displace the amount of future renewable energy that will be built. It will thus result in a higher emitting power sector than what would otherwise have been the case, thereby undermining the country's efforts to decarbonise its economy.*
101. *According to Dr Steyn NERSA has not in any way considered and applied its mind to these critical climate related economic risk factors when it evaluated the Karpowership licence application. It would at a minimum have been necessary to consider whether the additional emissions from the Karpowership projects will compromise the ability of the power sector to fulfil its leading role in enabling South Africa to deliver on its self-adopted NDC emissions reduction targets.*
102. *Dr Steyn is further of the opinion that NERSA's assertion in the Rfd that “It is factually correct that powerships are more labour intensive than renewables”, is false. Empirical evidence overwhelmingly shows that renewables provide much more employment on a per kWh basis.*

45. I quote the above excerpts from the founding affidavit in the review application not to elicit a response to Dr Steyn's opinion at this stage (the respondents will

have an opportunity to respond thereto in their answering affidavit once OUTA has had an opportunity to file supplementary founding papers upon receipt of the complete record), but to highlight material aspects of OUTA's case in the review application and, accordingly, to demonstrate to this Honourable Court the relevance of the financial information in Karpowership's application which has been omitted from the unilaterally redacted record.

46. OUTA further relies in the review application on NERSA's obligations in terms of the Electricity Regulation Act 4 of 2006 ("the ERA") read with the Electricity Regulations on New Generation Capacity, 2011 to the ERA, as amended (GN 399 published in Government Gazette 342626) ("the Regulations") promulgated pursuant thereto. I quote section 2 of the ERA and regulations 9 and 10 below for purposes of this application to illustrate why the omitted financial information is relevant to the review application. Indeed, NERSA cannot be held accountable unless the material documents that lead to the decision to grant the licences are made available.

47. Section 2 of the ERA lists the objects of the Act and reads as follows:

"2. *The objects of this Act are to-*

(a) achieve the efficient, sustainable and orderly development and operation of electricity supply infrastructure in South Africa;

(b) ensure that the interests and needs of present and future electricity customers and end users are safeguarded and met, having regard to the governance, efficiency, effectiveness and long-term sustainability

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of the electricity supply industry within the broader context of economic energy regulation in the Republic;

- (c) *facilitate investment in the electricity supply industry;*
- (d) *facilitate universal access to electricity;*
- (e) *promote the use of diverse energy sources and energy efficiency;*
- (f) *promote the competitiveness and customer and end user choice; and*
- (g) *facilitate a fair balance between the interests of customers and end users, licensees, investors in the electricity supply industry and the public.*

48. Regulation 9 of the Regulations under the heading **Concluding the power purchase agreement** provides as follows:

- “(1) A power purchase agreement between the buyer and an IPP must meet the following requirements-
- (a) *value for money;*
 - (b) *appropriate technical, operational and financial risk transfer to the generator;*
 - (c) *effective mechanisms for implementation, management, enforcement and monitoring of the power purchase agreement; and*
 - (d) *satisfactory due diligence in respect of the buyer's representative and the proposed generator in relation to matters of their*

respective competence and capacity to enter into the power purchase agreement.

(2) *Before the buyer concludes a power purchase agreement, the buyer or the procurer must, subject to any approvals required in terms of the PFMA-*

(a) *ensure that the power purchase agreement meets the requirements set out in sub-regulation (1);*

(a) *ensure that the buyer has a contract management plan that explains the capacity of the buyer, and its proposed mechanisms and procedures, to effectively implement, manage, enforce, monitor and report on the power purchase agreement and any other agreements relating to a new generation capacity project to which the buyer is a party, to National Treasury and the Minister on a regular basis; and*

(c) *put in place arrangements to ensure that any portion of the buyer's allowable revenue approved or allocated by the Regulator for purposes of implementation of new generation capacity projects will be used solely for the purpose of ensuring that the buyer's financial obligations in respect of new generation capacity projects will be met."*

49. Regulation 10 of the Regulations, under the heading **Cost recovery** provides as follows:

"The Regulator shall, when determining licence conditions relating to prices, charges and tariffs, ensure that the buyer is able to recover, at least, the full amount of the costs incurred by the buyer in the following categories:

- (a) all payments made for the purchase of new generation capacity, in terms of a power purchase agreement entered into in terms of or as contemplated in these Regulations;
- (b) all amounts paid by the buyer in terms of the power purchase agreement (other than those referred to in paragraphs (a) and (e)), provided that the buyer shall have acted efficiently in the exercise of those rights and the fulfilment of those obligations in terms of the power purchase agreement which gave rise to such payments;
- (c) the efficiently incurred costs of the buyer in performing any function contemplated in these Regulations;
- (d) the efficiently incurred costs of the buyer in administering power purchase agreements;
- (e) costs of, and amounts paid by the buyer arising from the termination of a power purchase agreement; and
- (f) all other costs efficiently incurred by the buyer in participating in an IPP procurement programme and in purchasing new generation capacity through new generation capacity projects, including, without limitation, operating expenditure, professional fees and hedging costs."

50. There are no licence conditions contained in the record. All information about charge rates and tariffs used is redacted. Any information as to how the fluctuation in the Dollar/Rand exchange rate over the next 20 years was dealt with during the decision-making process that would be required by NERSA to conduct a value assessment, is redacted.
51. Moreover, from OUTA's founding affidavit it is evident that the enormous projected costs of the Karpowership projects over a period of 20 years (estimated by OUTA to be in excess of R200 billion) will have an impact on South African taxpayers, and whether there was a proper cost consideration is one of the great concerns with the award of the generation licences.
52. The financial information as referred to above is by no means exhaustive of the documents that OUTA requires access to. Information and summaries about the PPA's are redacted, BBBEE compliance information is redacted, additional information (whatever that may entail) is redacted. Many paragraphs and tables together with the headings are redacted in their entirety, as can be seen from the list attached as annexure "**FA8**" that was prepared by my offices on 29 August 2022. This list was compiled in an attempt to make sense of the heavily redacted record to which, at the time, no index or list of redactions were received and in preparation for the case management meeting that was scheduled for 5 September 2022.
53. As stated, OUTA has a procedural right under rule 53, as applicant in the review proceedings, to be afforded access to the complete record, to review it and to



decide on which parts it wishes to rely for purposes of supplementing its founding papers.

THE CASE MANAGEMENT MEETING AND SUBSEQUENT EVENTS

54. On Friday afternoon 2 September 2022 at 16:14, Pinsent Masons sent a letter attached as annexure “**FA9**” to the Honourable Ledwaba DJP wherein it stated *inter alia* that “*To protect its information, Karpowership proposed a confidentiality regime which is identical to that which has been approved by the Constitutional Court in the Helen Suzman² decision.*”
55. The letter referred to above only came to my attention on Monday morning 5 September 2022, shortly before the start of the meeting before the Honourable Ledwaba DJP and neither I nor the counsel instructed by me had sufficient time to properly consider the content prior to commencement of the meeting. At the meeting it was clear that the other parties were in the same position, and none had had an opportunity to consider the content of the letter prior to the meeting. The meeting was then adjourned with an indication from all parties that they would attempt to find an amicable resolve.
56. I point out here already that the confidentiality regime referred to in the *Helen Suzman* decision was not as such approved by the Constitutional Court but cited in that decision as an example of where the parties have entered into a very restrictive confidentiality agreement in circumstances very different to the

²

Helen Suzman Foundation v Judicial Services Commission 2018 (4) SA 1 (CC)



present facts. The regime was followed by the parties in *Bridon*³ where exceptional circumstances very different from those in the present matter were present.

57. It was therefore misleading to suggest to the DJP and the parties so shortly before the meeting that the regime was “approved” in *Helen Suzman*. In fact, from the *Helen Suzman* decision it is evident that confidentiality will only in truly deserving and exceptional circumstances be a basis for non-disclosure. Full legal argument in this regard will be advanced on behalf of the applicant at the hearing of the matter.
58. Moreover, it appears from Karpowership’s letter of 2 September 2022, a copy of which is annexed hereto marked “**FA9**”, and more specifically paragraph 5.6 thereof, that they wish to add further restrictions to the already very restrictive regime referred to in *Helen Suzman*:

“Be that as it may, no prejudice is suffered by the applicants if the above regime is adopted. Karpowership’s position is that the record must be prepared on both a confidential and non-confidential basis (with the applicants being given full access to the latter). The confidential record should only be made available to the applicants’ legal representatives and if they are of the view that certain information ought to be made available on an unrestricted basis then they are free to approach the court for relief.”

³ *Bridon International BmbH v International Trade Administration Commission and Others* 2013 (3) SA 197 (SCA)

59. The above proposal restricts access to the parties' legal representatives. This means that the onus will be on OUTA's legal representatives to decide what may or may not be relevant without consulting with or taking instructions from OUTA and without having input from OUTA's appointed experts. We (as legal representatives) will then further bear the *onus* to approach the Court for relief if we are not satisfied with the access to documents being so restricted.
60. The legal representatives do not have the expertise to make such a determination. It is further unfathomable how expert reports can be prepared without experts having access to the record and how proper instructions can be obtained from our clients if they are not privy to the record.
61. As mentioned above, at the time when the case management meeting was held on 5 September 2022, NERSA had neither delivered an index of the record nor a list of portions of the record that was redacted. The record is voluminous, and without a list of the redacted items (other than the one prepared by my offices with limited success due to the vast redactions which included paragraph headings), little progress could be made with any discussions. The list of redacted items was only provided on 12 September 2022 by NERSA via email and in the form of the spreadsheet referred to above and attached as "**FA2**".
62. The confusion created by the spreadsheet is evident from the layout thereof. For example, on the first page it is indicated next to the items "*Shareholding structure*", "*Summary of Fuel Supply Agreement*", "*Summary of Financial*



Information", *"Summary of tariffs"*, *"Summary of economic information"*, *Summary of PPA*" and *"Summary of Technical Information"* that these items are not redacted, whilst in the record they are redacted. The remaining parts of the spreadsheet are similarly confusing.

63. The spreadsheet is accordingly of little assistance to properly identify what has been redacted and the reasons for it.
64. Moreover, the Honourable Court will note that throughout the four pages of the spreadsheet, reliance in support of the allegation of confidentiality is placed on sections 34 and 36(1) of the Promotion of Access to Information Act 2 of 2000 ("PAIA").
65. Sections 34 and 36(1) of PAIA read as follows:

34 (1) *Subject to subsection (2), the information officer of a public body must refuse a request for access to a record of the body if its disclosure would involve the unreasonable disclosure of personal information about a third party, including a deceased individual.*

(2) A record may not be refused in terms of subsection (1) insofar as it consists of information

- (a) about an individual who has consented in terms of section 48 or otherwise in writing to its disclosure to the requester concerned;*
- (b) that was given to the public body by the individual to whom it relates and the individual was informed by or on behalf of the public body, before it is given, that the information belongs to a*



class of information that would or might be made available to the public;

- (c) *already publicly available;*
- (d) *about an individual's physical or mental health, or wellbeing, who is under the care of the requester and who is*
 - (i) *under the age of 18 years; or*
 - (ii) *incapable of understanding the nature of the request,**and if giving access would be in the individual's best interests;*
- (e) *about an individual who is deceased and the requester is*
 - (i) *the individual's next of kin; or*
 - (ii) *making the request with the written consent of the individual's next of kin; or*
- (f) *about an individual who is or was an official of a public body and which relates to the position or functions of the individual, including, but not limited to*
 - (i) *the fact that the individual is or was an official of that public body;*
 - (ii) *the title, work address, work phone number and other similar particulars of the individual;*
 - (iii) *the classification, salary scale, remuneration and responsibilities of the position held or services performed by the individual; and*
 - (iv) *the name of the individual on a record prepared by the individual in the course of employment.*

.....

36 (1) *Subject to subsection (2), the information officer of a public body must refuse a request for access to a record of the body if the record contains-*

- (a) trade secrets of a third party;*
- (b) financial, commercial, scientific or technical information, other than trade secrets, of a third party, the disclosure of which would be likely to cause harm to the commercial or financial interests of that third party; or*
- (c) information supplied in confidence by a third party the disclosure of which could reasonably be expected-*
 - (i) to put that third party at a disadvantage in contractual or other negotiations; or*
 - (ii) to prejudice that third party in commercial competition.*

66. Where reliance is placed on section 34 of PAIA, NERSA simply inserted in the spreadsheet the words “*personal information*” as justification for it, and where reliance is placed on section 36, the justification for each of the redacted items reads:

“This is commercial information, the disclosure of which would be likely to cause harm to commercial or financial interests. Moreover, it is information supplied in confidence, the disclosure of which could also reasonably be expected to-

- (i) put a third party at a disadvantage in contractual or other negotiations;*
- or*
- (ii) prejudice that third party in commercial competition.”*

67. In the first instance, section 7(1) of PAIA provides that that Act does not apply to a record of a public body or a private body if that record is requested for the purpose of civil proceedings, if it is requested after the commencement of the civil proceedings and if the production of or access to that record for the purpose of civil proceedings is provided for in any other law. The record requested in terms of the Notice of Motion as read with Rule 53 thus falls squarely within the purview of section 7(1) of PAIA.
68. In any event, save for the insufficient and generic justification referred to above, NERSA has not provided any basis to substantiate its reliance on these sections (and in particular section 36(1) of PAIA). No facts are provided to support any of the assertions made in support of the alleged confidentiality.
69. The spreadsheet provided by NERSA on 12 September 2022 was accompanied by an email from NERSA's attorney, Messrs Prince Mudau (attached as annexure "**FA10**") wherein he stated:
- "Kindly take note that all the information highlighted in green, red and orange cannot be used, published or disseminated pending finalization of a confidentiality regime, as to do so would be a violation of Karpowership's rights."*
70. It appears from this statement that none of the highlighted parts can be used, yet the red highlighted parts on the spreadsheet are marked "not redacted" and the orange highlighted parts are marked "partially redacted". NERSA's

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attorneys' statement that the highlighted parts cannot be used is accordingly contradicted by the spreadsheet itself.

71. Secondly, NERSA is guided by the misconception that there will be a "violation of Karpowership's rights" if it (NERSA) complies with Rule 53.
72. It is submitted that neither NERSA nor Karpowership has shown that access to the complete and unredacted record will or may cause either party harm or, if so, where and how such harm may occur. Such harm must be objectively considered and cannot merely be based on a vague allegation of possible commercial harm without any indication as to what such harm may entail and/or how it may occur.
73. OUTA accordingly submits that it is entitled to the full record and seeks an order in terms of the Notice of Motion.

OUTA'S "WITH PREJUDICE" PROPOSAL

74. On 17 October 2022, OUTA approached NERSA and Karpowership with a "with prejudice" proposal on a confidentiality regime, which regime was similar to one that was agreed to by the parties in **Cape Town City v South African National Roads Authority and Others 2015 (3) SA 386 (SCA)**. The proposal is set out in paragraphs 8.1 to 8.5 of the letter attached as "FA1(a)" as follows:



- 8.1 *NERSA will provide OUTA's legal representatives with copies of the documents forming part of the Rule 53 record which NERSA and/or Karpowership claim to be confidential. Such representatives will sign the attached confidentiality undertaking which prevents them from using or disclosing the documents except for purposes of the litigation in question, and then only in a manner agreed between the parties or in accordance with any directions by a judge or a court.*
- 8.2 *A list of names of OUTA's representatives and experts involved in the matter is contained in the attached confidentiality undertaking. OUTA's legal representatives may disclose the record to these listed individuals, subject to them also signing the confidentiality undertaking. Should OUTA at a later stage need to appoint further experts (other than those listed), or involve other representatives from OUTA, the documents may be disclosed to such experts and/or representatives, subject to them also signing the attached confidentiality undertaking.*
- 8.3 *OUTA will then prepare its supplementary founding affidavit as envisaged by Rule 53 and any expert reports it may deem necessary, using any documents contained in the record that it regards as relevant to the application, and may place such affidavit and expert report(s) with the relevant documents from the record attached thereto before the Court hearing the review application.*
- 8.4 *Prior to the filing at court of the supplementary founding affidavit and any expert reports OUTA wishes to rely on in the review application, OUTA will first serve copies thereof on the parties' respective attorneys and will provide the parties ten (10) days from date of service to object to any information or documents contained therein being disclosed as part of public proceedings on the grounds of confidentiality. Any objections on the grounds of confidentiality must be accompanied by reasons for such alleged confidentiality.*



8.5 *If the parties cannot agree whether a particular document or part thereof that forms part of or is referred to in OUTA's supplementary founding affidavit and/or expert report(s) and to which objection has been made as set out in 8.4 above, should be dealt with publicly in open court or on a closed basis, the parties will approach a judge or the court to decide the question at a preliminary hearing. Any such preliminary hearing will be closed, and the parties and the judge or court hearing the matter will be able to have sight of and refer to copies of the contested documents. The parties will endeavour to agree suitable dates and arrangements for any such hearing.*

8.6 *OUTA records that at this stage it does not concede the validity of any claim to confidentiality.*

75. The confidentiality undertaking attached as “**FA1(b)**” was attached to the proposal, wherein the names of the people to whom the record would be disclosed are set out. These include OUTA's two counsel, the two attorneys in my office dealing with the matter, the two representatives at OUTA dealing with the matter, and the two independent experts from Meridian Economics appointed by OUTA to serve as experts in the matter.

76. The proposal and undertaking were specifically drafted to address the concerns about confidentiality of all the parties and in order to take the matter forward. It would have caused no prejudice to either NERSA or Karpowership to accept this proposal. The alternative relief sought in prayer 2 of the Notice of Motion is based on this “**with prejudice**” proposal.

77. On 26 October 2022 NERSA's attorney replied to the proposal with the letter attached as annexure “**FA11**”. The letter merely stated that NERSA's position

regarding the confidentiality regime remained the same, and it was suggested that the DJP be approached for a further case management meeting.

78. No constructive feedback was provided by NERSA regarding OUTA's proposal, nor were any reasons given as to why the confidentiality regime proposed by OUTA would not be acceptable. In fact, no effort was made whatsoever by NERSA to engage in a *bona fide* and meaningful manner to resolve the stalemate pertaining to the issue of confidentiality of the record.
79. It bears mentioning that NERSA has not previously expressed any position regarding the confidentiality but has merely echoed whatever Karpowership's position has been throughout. This is also evident from NERSA's email quoted in paragraph 69 above, a copy of which is attached as "**FA10**", which shows that NERSA's primary concerns lay with the violation of Karpowership's rights despite such claim to confidentiality of the record not yet having been established.
80. On 28 October 2022, I responded to NERSA's attorneys with the letter attached as annexure "**FA12**" re-iterating *inter alia* that NERSA had not afforded OUTA the courtesy of at least engaging in negotiations and providing an explanation as to why OUTA's proposal is not acceptable. No further response was received from NERSA's attorneys.

81. On 3 November 2022, Karpowership responded to OUTA's "**with prejudice**" proposal with the email attached as annexure "**FA13**", and more specifically paragraph d) thereof as follows:

"d) The applicants seek to disclose the confidential documents to persons who clearly will not be able to meaningfully contribute to the purport or effect of them. Our client cannot disclose its confidential information to individuals who are not external legal representatives or independent experts – absent an order compelling it to do so. It is apparent that this is the essence of the impasse and, as a result, our client will await the application to compel – which, needless to say, it will oppose."

82. From OUTA's founding affidavit it is evident that OUTA is using external independent energy experts from Meridian Economics in Cape Town. Their names were provided to NERSA and Karpowership in OUTA's "**with prejudice**" proposal ("**FA1(b)**"). The other names are the two representatives of OUTA, OUTA's two advocates on brief in the review application, myself and Ms Turner from my office who is assisting me in the matter. The listed people are all able and required to meaningfully contribute to OUTA's review application.

83. The vague allegation that OUTA is seeking "*to disclose the confidential documents to persons who clearly will not be able to meaningfully contribute to the purport or effect of them*" is therefore not only untrue, but also displays the dictatorial attitude which Karpowership has had throughout the proceedings



thus far: Karpowership will dictate what information should be treated as confidential and Karpowership will decide who can and cannot contribute “*meaningfully*” to the matter.

84. It is with respect inappropriate for Karpowership to be the judge in its own cause and decide who can meaningfully contribute to the matter, and then force OUTA to approach the Court to obtain access to the record.
85. It is submitted that this attitude about a respondent’s role in review proceedings and the attempt to unilaterally take over the role of the Court and bend the process to its will is misguided.
86. The email from Messrs Pinsent Masons of 3 November 2022, attached as annexure “**FA13**”, further contains an inaccurate allegation of what happened at the case management meeting that was held on 5 September 2022 before the Honourable Ledwaba DJP in paragraph c) thereof, which incorrectly records:
- “c) *At the previous case management meeting, our senior counsel (with the endorsement of the DJP) proposed that the applicants identify which confidential documents they want access to and who they like those documents to be considered by. We have not received a response to that proposal.*”
87. The above statement is inaccurate in several respects:

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- 87.1. the Honourable Ledwaba DJP did not in my understanding of what transpired at the meeting “endorse” any of the parties’ positions at the case management meeting, which I also attended;
- 87.2. as mentioned above, Karpowership sent a letter after 16h00 on the Friday afternoon before the Monday morning case management meeting without alerting anyone thereto. It quoted the *Helen Suzman* case therein and incorrectly asserted that the Constitutional Court had “approved” the confidentiality regime suggested by it. The letter only came to my attention shortly before the meeting. As it became clear at the meeting that all the other parties were caught unprepared and without having had sufficient time to consider the accuracy of what was stated, the meeting was adjourned and the parties undertook to attempt to resolve the matter;
- 87.3. in my letter of 29 August 2022 to the DJP, copied to all parties and attached hereto as “**FA14**”, wherein I set out OUTA’s proposed agenda for the case management meeting that was scheduled for 5 September 2022, I specifically stated in paragraph 2.4 of the letter:

“Importantly, the financial information and projected costs of the project over 20 years are material elements of the merits of OUTA’s review application and have been completely redacted without motivation.



87.4. Both NERSA and Karpowership were therefore aware at the time that OUTA regards this information as material. Both NERSA and Karpowership are further aware of the fact that OUTA does not believe that any of the information should be treated as confidential but has in good faith made the “**with prejudice**” proposal wherein the names of the 8 people who would have access to the record were provided in order to take the matter forward.

87.5. It is therefore inaccurate to say that Karpowership did not know which documents OUTA wanted access to and whom OUTA wanted to consider those documents.

88. Karpowership's response again illustrates that they are, as they have been throughout, attempting to dictate the process and are not transparent. It is not, with respect, for OUTA to provide a list of items it requires and then for NERSA and/or Karpowership to decide whether or not to provide the documents. The *onus* to make out a case for its entitlement to the record is not on OUTA. As applicant in the review application, it is entitled to the full record as of right.

CONCLUSION

89. It is submitted that this is a matter of public interest and that both OUTA and the South African public at large are entitled to this information in order for NERSA to be held accountable for its decisions to grant the generation licences

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to Karpowership. Information cannot merely be regarded as confidential because one of the parties says it is.

90. Through its refusal to provide an unredacted record without providing proper justification, NERSA has attempted to shift the burden of showing that the record is not exempt from disclosure, to OUTA, thereby frustrating the process. This is amplified by NERSA's outright refusal of OUTA's "**without prejudice**" proposal without having engaged in a *bona fide* manner to reach a solution.
91. There is no justification for the attempts of Karpowership to dictate the process and unilaterally decide who can or cannot "*meaningfully*" contribute to the matter and who may or may not have access to the record. It is further clear that NERSA has no interest in actively engaging in the process but merely echoes the position of Karpowership. This is of concern.
92. There are no exceptional or special circumstances present that justify deviation from the general principle enshrined in section 32 of the Constitution that everyone has the right of access to any information held by the state. This is the cornerstone of transparency and accountability.
93. OUTA, as applicant in the review proceedings, is entitled to assess the information and considerations that served before NERSA contained in the record, which gave rise to the award of the generation licences with long-term and far-reaching financial and environmental implications and which form the subject of the review proceedings. Its entitlement arises under Rule 53(3) which



envisages that a complete record be provided to an applicant in review proceedings for purposes of supplementing its founding affidavit and amending its Notice of Motion upon receipt of the record and having selected what is relevant from the record to serve as evidence in the review application. There is no provision for a respondent to dictate the terms on which a record is provided and unilaterally deliver a redacted record without at least seeking condonation from a court. In any event, it is submitted that there is not any proper justification for such departure from the rules in the present circumstances.

94. In addition, transparency is key to accountability in respect of the conferral of long-term state contracts. It is accordingly also in the public interest that the full record be made available.
95. NERSA has conveniently sought to pass the responsibility to OUTA to assert its rights to a complete record and to approach the Court.
96. Even if the Honourable Court finds that there is merit in the assertion of confidentiality and that the reasons provided in the spreadsheet is sufficient (which is denied), it is submitted that the “**with prejudice**” offer made by OUTA addressed any concerns that both Karpowership and NERSA may have. There was simply no reason for NERSA's blanket refusal thereof, nor has any such reason(s) been provided.

Handwritten signature or initials, possibly 'A' or 'J', in the bottom right corner of the page.

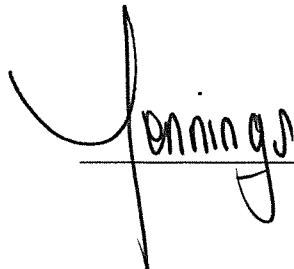
COSTS


97. OUTA has made every effort to avoid costly litigation about the provision of the record and to prevent unnecessary delays in the finalisation of the litigation. This is illustrated clearly by OUTA's reasonable "**with prejudice**" offer that was aimed at finding middle ground, despite not agreeing with Karpowership's position which was also adopted by NERSA. Both NERSA and Karpowership rejected OUTA's proposal out of hand, however, without any *bona fide* engagement on the proposed terms. This ultimately rendered this application inevitable.
98. In the event that this application is opposed by NERSA and/or Karpowership and the applicant succeeds with the application, it is submitted that costs should be awarded against these respondents on the scale as between attorney and client for reasons already set out above and which may be summarised as follows:
- 98.1 NERSA's disregard of the provisions of Rule 53 as read with the notice of motion in this matter.
- 98.2 NERSA's taking the law into its own hands by simply filing a redacted record in the absence of agreement by the applicant and without having sought or received condonation for non-compliance with the rules by this honourable court.

A handwritten signature or set of initials, possibly 'A' or 'J', written in black ink at the bottom right of the page.

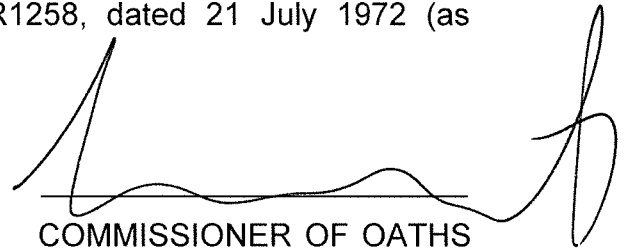
- 98.3 NERSA's acting in accordance with the dictates of Karpowership instead of as an independent regulator.
- 98.4 Karpowership's unilateral attempts to dictate to NERSA, and to the other parties, who may or may not see the record and who can and cannot make a meaningful contribution with no regard to the rules of court or NERSA's independence.
- 98.5 NERSA's and Karpowership's unreasonable rejection of OUTA's with-prejudice proposal.
99. It is accordingly submitted that a punitive costs order would be appropriate in the circumstances.
100. Should the application be refused, it is submitted that OUTA, a non-profit organisation acting in the public interest to ensure that safeguards are in place to protect the tax-paying public from costly and controversial projects like the Karpowership one, should not be mulcted with the costs of this application.

In the premises I pray that an order be granted in terms of the Notice of Motion.


DEPONENT



Signed and sworn before me at PRETORIA this 23rd day of JANUARY 2023 after the deponent declared that she is familiar with the contents of this statement, regards the prescribed oath as binding on her conscience and has no objection against taking the said prescribed oath. There has been compliance with the requirements of the Regulations contained in Government Gazette R1258, dated 21 July 1972 (as amended).



COMMISSIONER OF OATHS

FULL NAMES:

CAPACITY:

ADDRESS:

BERNARD BEZUIDENHOUT

KOMMISSARIS VAN EDE
COMMISSIONER OF OATHS
PRAKTISERENDE PROKUREUR R.S.A
PRACTISING ATTORNEY R.S.A
149 ANDERSON STREET
BROOKLYN, PRETORIA, 0181



"FAICa)"

Delia Turner

From: Andri Jennings
Sent: Monday, October 17, 2022 1:54 PM
To: Tinyiko Ndlovu; Andrew Fawcett; Jason Smit; Rob Morson (Projects); Nombasa Mazwai; prince@pm-attorneys.co.za; dineo@pm-attorneys.co.za; kganedi@pm-attorneys.co.za; 'Irene Komape'; 'Zubaida'
Cc: Irene Pienaar; Delia Turner; Carol van der Vyver | Chennells Albertyn; fiona@chennellsalbertyn.co.za; Johannesburg.Litigation@dentons.com
Subject: CASE NO: 23017/2022 - ORGANISATION UNDOING TAX ABUSE NPC // THE NATIONAL ENERGY REGULATOR OF S.A 7 OTHERS and CASE NO: 23339/22 - THE GREEN CONNECTION NPC // THE NATIONAL ENERGY REGULATOR OF S.A & 5 OTHERS - OUT015
Attachments: LETTER TO NERSA AND KARPOWERSHIP 17.10.2022.pdf; Confidentiality undertaking.pdf

Good day.

Please find attached hereto a letter and attachment for your attention.

Kind Regards/Vriendelike Groete,
Andri Jennings
Director/Direkteur



JENNINGS

INCORPORATED

ATTORNEYS, NOTARIES, CONVEYANCERS & COST CONSULTANTS

Head Office: 149 Anderson Street, Brooklyn, Pretoria | O: 012 110 4442
18 Ross Street, Cullinan | O: 012 110 4442
222 Smit Street, 21st Floor, Braamfontein, Johannesburg | O: 010 005 4572
21 Woodlands Drive, Country Club Estate, Building 2, Woodmead, Johannesburg | O: 011 258 8770

VAT No: 4680291974 | Reg No: 2018/065399/21 | www.jinc.co.za

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JENNINGS

INCORPORATED

ATTORNEYS, NOTARIES, CONVEYANCERS & COST CONSULTANTS

OUR REFERENCE: A JENNINGS/OUT015
YOUR REFERENCE:
DATE: 17 October 2022

TO: PINSENT MASONS SOUTH AFRICA INCORPORATED
(REF: 691335/07000)

PRINCE MUDAU & ASSOCIATES
(REF: LIT/PM/MAT180)

KAPITWALA INCORPORATED t/a DENTONS SOUTH AFRICA
(REF: V JACKLIN - LEVIN/0027171.01880)

CHENELLS ALBERTYN ATTORNEYS
(REF: 11306FB/cvdv)

Sirs

ORGANISATION UNDOING TAX ABUSE NPC//NATIONAL ENERGY REGULATOR OF SOUTH AFRICA AND 7 OTHERS (23017/2022)

THE GREEN CONNECTION NPC ("GREEN CONNECTION")//NATIONAL ENERGY REGULATOR OF SOUTH AFRICA & 5 OTHERS (23339/2022)

1. We refer to your letter dated 2 September 2022 and in particular the aspect of the proposed confidentiality regime dealt with therein as well as the Case Management meeting held before the Honourable Ledwaba DJP on 5 September 2022, where the parties undertook to engage on the issue of confidentiality in order to attempt to move the matter forward.
2. We have further perused the letters from Messrs Chennells Albertyn and your response thereto.

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Reg No: 2018/065399/21 | VAT No: 4660291974

Andri Jennings (LLB - UP) Director | Debra Turner (LLB - UP) Associate Attorney

Cindy Pestana (LLB - UHISA) Conveyancer | Malissa van der Linde (LLB - NWU) Attorney

Annandé van der Merwe (B Com (LAW), LLB - UP) Consultant | Leon van der Merwe (LLB - UP) Consultant

office@jinc.co.za

Head Office: 149 Anderson Street, Brooklyn, Pretoria | O: 012 110 4442

18 Ross Street, Cullinan | O: 012 110 4442

222 Smit Street, 21st Floor, Broomfontein, Johannesburg | O: 010 005 4572

21 Woodlands Drive, Country Club Estate, Building 2, Woodmead, Johannesburg | O: 011 558 8770

3. The confidentiality regime proposed by your client as referred to in the *Helen Suzman Foundation*¹ judgment (which was in fact granted in the *Bridon International*² case) was cited by the Constitutional Court merely as an example of where a confidentiality regime had been imposed on parties in circumstances very different from those in the present matter. In *Bridon*, the court only ordered the confidentiality regime after having weighed the conflicting interests of the parties and having found certain documentation to be confidential. One of the parties did not dictate which documents should be confidential.
4. The confidentiality regime granted in *Bridon* (and referred to in *Helen Suzman Foundation*) is an example of a very strict confidentiality regime where parties were granted access to information in the most restrictive manner possible. Such a restrictive confidentiality regime will be imposed only in very limited circumstances.
5. The circumstances that justified a restrictive confidentiality regime in *Bridon* are not present here. In fact, your client has at no stage provided any justification as to why any of the information in the record should be kept confidential. Our client's requests in this regard have throughout been met with vague, general statements about confidentiality and an ill-conceived notion that Karpowership can dictate the terms under which the record is to be provided.
6. There is further no reason why we should be precluded from sharing the record with our client and the experts to discuss it, take instructions and prepare expert reports. The confidentiality regime proposed by your client would prevent us from doing so.

¹ Helen Suzman Foundation v Judicial Services Commission 2018 (4) SA 1 (CC)

² Bridon International GmbH v International Trade Administration Commission and Others 2013 (3) SA 197 (SCA)



7. Our client will therefore not agree to such a strict and unjustified confidentiality regime as proposed by your client. However, in the spirit of finding a practical and reasonable solution to move the matter forward, we propose a confidentiality regime similar to the one that was agreed to by the parties in Cape Town City v South Africa National Roads Authority and Others 2015 (3) SA 386 (SCA).
8. We propose an agreement between the parties on the terms as set out in 8.1 to 8.5 below:
- 8.1 NERSA will provide OUTA's legal representatives with copies of the documents forming part of the Rule 53 record which NERSA and/or Karpowership claim to be confidential. Such representatives will sign the attached confidentiality undertaking which prevents them from using or disclosing the documents except for purposes of the litigation in question, and then only in a manner agreed between the parties or in accordance with any directions by a judge or a court.
- 8.2 A list of names of OUTA's representatives and experts involved in the matter is contained in the attached confidentiality undertaking. OUTA's legal representatives may disclose the record to these listed individuals, subject to them also signing the confidentiality undertaking. Should OUTA at a later stage need to appoint further experts (other than those listed), or involve other representatives from OUTA, the documents may be disclosed to such experts and/or representatives, subject to them also signing the attached confidentiality undertaking.
- 8.3 OUTA will then prepare its supplementary founding affidavit as envisaged by Rule 53 and any expert reports it may deem necessary, using any documents contained in the record that it regards as relevant



to the application, and may place such affidavit and expert report(s) with the relevant documents from the record attached thereto before the Court hearing the review application.

8.4 Prior to the filing at court of the supplementary founding affidavit and any expert reports OUTA wishes to rely on in the review application, OUTA will first serve copies thereof on the parties' respective attorneys and will provide the parties ten (10) days from date of service to object to any information or documents contained therein being disclosed as part of public proceedings on the grounds of confidentiality. Any objections on the grounds of confidentiality must be accompanied by reasons for such alleged confidentiality.

8.5 If the parties cannot agree whether a particular document or part thereof that forms part of or is referred to in OUTA's supplementary founding affidavit and/or expert report(s) and to which objection has been made as set out in 8.4 above, should be dealt with publicly in open court or on a closed basis, the parties will approach a judge or the court to decide the question at a preliminary hearing. Any such preliminary hearing will be closed, and the parties and the judge or court hearing the matter will be able to have sight of and refer to copies of the contested documents. The parties will endeavour to agree suitable dates and arrangements for any such hearing.

8.6 OUTA records that at this stage it does not concede the validity of any claim to confidentiality.

9. In addition to the practical benefits of the proposal, we believe it will also prevent possible unnecessary litigation. For example, your client may consider that certain information in the record is confidential, but OUTA may consider such information not relevant to the application and accordingly not use it in the supplementary

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founding affidavit. Potential disputes about such information are then automatically resolved without the need for protracted arguments about its disclosure in court proceedings.

10. Please note that our client remains of the view that the record should not be treated as confidential and that the *onus* to prove that a document is confidential and may not be used in open court remains on the party alleging such confidentiality. There can be no automatic assumption of confidentiality. However, the above proposal is made to allay any concerns your client and NERSA may have about confidentiality and allow the matter to move forward without the need for costly interlocutory applications before the record has even been filed.
11. Please note that the proposal is made **with prejudice**. Should your client and NERSA not be amenable to the proposal and continue to withhold the complete record unless our client agrees to the restrictive and unwarranted confidentiality regime that your client wishes to impose, our client will have no alternative but to institute an application to compel the provision of the complete record. In such an event this letter will be included in the application.
12. Kindly revert with your client's response by close of business on 26 October 2022, failing which we will instruct counsel to proceed with the drafting of an application to compel the record together with the appropriate request for costs against NERSA and Karpowership.

TRANSMITTED ELECTRONICALLY AND UNSIGNED

Kind regards,

Andri Jennings

Director



"FAL(b)"

CONFIDENTIALITY UNDERTAKING:

IN RE: RECORD IN RULE 53 PROCEEDINGS IN THE HIGH COURT OF
SOUTH AFRICA, GAUTENG DIVISION, PRETORIA UNDER CASE
NUMBER 23017/2022

I, the undersigned,

(Name)

(Designation)

hereby undertake that I will not use the documents that NERSA and/or Karpowership claim to be confidential and provided in the above proceedings as part of the record for any purpose other than the litigation under the above case number and as agreed between the parties, and further will not divulge any information or documents contained therein to any party other than the parties listed below, unless otherwise directed by a judge or a court or agreed between the parties.

FOR THE ORGANISATION UNDOING TAX ABUSE ("OUTA"):

1. Andri Jennings (Attorney: Jennings Incorporated)
2. Delia Turner (Attorney: Jennings Incorporated)
3. Adv Jannet Gildenhuys SC (Counsel for OUTA)
4. Adv Sonika Mentz (Counsel for OUTA)
5. Dr Grove Steyn (CEO: Meridian Economics)
6. Adam Roff (Meridian Economics)
7. Adv Stefanie Fick (OUTA representative)
8. Mr Brendan Slade (OUTA representative)

Signed at _____ on this ____ day of October 2022.



NAME _____

21

"FAKCCJ"

Delia Turner

From: Andri Jennings
Sent: Monday, December 12, 2022 8:09 AM
To: dineo@pm-attorneys.co.za; prince@pm-attorneys.co.za; kganedi@pm-attorneys.co.za
Cc: Jason Smit; Andrew Fawcett; Tinyiko Ndlovu; Sarah Burford; nadiadt@vzlr.co.za; StateAttorneyPretoria@justice.gov.za; Johannesburg.Litigation@dentons.com; anzelle@rbattorneys.co.za; litigation@rbattorneys.co.za; Irene Pienaar; Delia Turner
Subject: CASE NO: 23017/2022 - ORGANISATION UNDOING TAX ABUSE NPC // THE NATIONAL ENERGY REGULATOR OF S.A 7 OTHERS - OUT015
Attachments: LETTER DATED 12.12.2022.pdf; NOTICE IN TERMS OF RULE 30A.pdf

Good day,

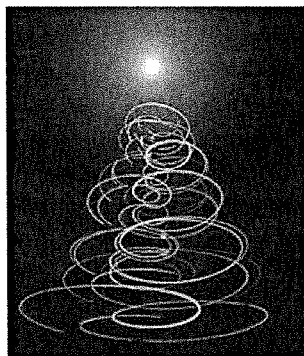
We refer to the abovementioned matter.

In terms of **Rule 4A(1)(c)** of the Uniform Rules of Court, which provides for the service of documents and notices to be effected by electronic mail, we hereby serve the following legal processes:

1. OUTA's Notice in terms of Rule 30A.
2. Letter dated 12.12.2022.

We trust that the above is in order.

Kindly acknowledge receipt hereof.



Please note that our office will close on Thursday, 15 December 2022 at 12h00 and open on Monday, 9 January 2023. We wish all our clients and colleagues a Merry Christmas and a Happy New Year!!

Please note that our Director – Andri Jennings will be available for any urgent matters during this time. She can be reached at her e-mail andri@jinc.co.za.

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case no: 23017/2022

In the matter between:

ORGANISATION UNDOING TAX ABUSE NPC
(Registration no: 2012/064213/08)

Applicant

and

THE NATIONAL ENERGY REGULATOR OF
SOUTH AFRICA

First Respondent

KARPOWERSHIP SA COEGA (RF) (PTY) LTD
(Registration no: 2020/754336/07)

Second Respondent

KARPOWERSHIP SA SALDANHA BAY (RF) (PTY) LTD
(Registration no: 2020/754347/07)

Third Respondent

KARPOWERSHIP SA RICHARDS BAY (RF) (PTY) LTD
(Registration no: 2020/754352/07)

Fourth Respondent

KARPOWERSHIP SA (PTY) LTD
(Registration no: 2019/537869/07)

Fifth Respondent

MINISTER OF MINERAL RESOURCES AND
ENERGY N.O.

Sixth Respondent

MINISTER OF FORESTRY, FISHERIES, AND THE
ENVIRONMENT N.O.

Seventh Respondent

ESKOM HOLDINGS (SOC) LTD
(Registration no: 2002/015527/30)

Eighth Respondent

NOTICE IN TERMS OF RULE 30A



TAKE NOTICE that in terms of the Notice of Motion in the review application issued on 26 April 2022 out of the above Honourable Court under the above case number, the first respondent was called upon in terms of Rule 53(1)(b) of the Uniform Rules of Court to despatch to the Registrar of the above Honourable Court, within 15 (fifteen) days after service of the Notice of Motion upon it, the records of all documents and all electronic records that relate to the making of the decisions referred to in the Notice of Motion, together with such reasons as the first respondent is by law required or desired to give, and to notify the applicant that it has done so.

TAKE NOTICE FURTHER that by having delivered a redacted record on 17 June 2022 and by having failed to deliver a complete record, the first respondent has failed to comply with a request made or notice given pursuant to Rule 53(1)(b).

TAKE NOTICE FURTHER that the applicant hereby affords the first respondent a period of 10 (ten) days from service hereof to comply with the request made or notice given pursuant to the provisions of Rule 53(1)(b) to deliver the records of all documents and all electronic records that relate to the making of the decisions referred to in the Notice of Motion and to notify the applicant that it has done so failing which the applicant intends, after the lapse of 10 days, to apply for an order that the said notice or request be complied with.

SIGNED AT PRETORIA ON THIS 12TH DAY OF DECEMBER 2022.

A handwritten signature in black ink, consisting of a stylized 'Y' or '4' shape followed by a vertical line.

**JENNINGS INCORPORATED****Attorneys for Applicant**

149 Anderson Street

Brooklyn, Pretoria

Tel: 012 110 4442**Email:** andri@jinc.co.zadelia@jinc.co.za**Ref:** A JENNINGS/OUT015

TO: THE REGISTRAR OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

AND TO: **PRINCE MUDAU & ASSOCIATES** (Service by email)
Attorneys for First Respondent
Thornhill Office Park
Building 2
94 Bekker Road
Vorna Valley, Midrand
Tel: 010 224 0608
Fax: 086 695 0882
Email: dineo@pm-attorneys.co.za
prince@pm-attorneys.co.za
kganedi@pm-attorneys.co.za

C/O DABISHI NTHAMBELENI INC

103 Doreen Street

Colby, Hatfield

Pretoria

Ref: LIT/PM/MAT180

AND TO: **PINSENT MASONS SOUTH AFRICA INC** (Service by email)
Attorneys for Second to Fifth Respondents
9th Floor
61 St Katherine Street
Sandton
Johannesburg
2196
Tel: 010 493 4603
Fax: 010 493 4611
Email: Jason.Smit@pinsentmasons.com
Andrew.Fawcett@pinsentmasons.com
Tinyiko.Ndlovu@pinsentmasons.com
Sarah.Burford@pinsentmasons.com
Ref: 691335.07000



C/O VZLR ATTORNEYS INCORPORATED

1st Floor/Block 3
 Monument Office Park
 71 Steenbok Avenue
 Monument Park
 Pretoria
 0181
Tel: 012 435 9444
Email: nadiadt@vzlr.co.za
Ref: Nadia Zeelie

AND TO: THE MINISTER OF MINERAL RESOURCES AND ENERGY N.O.
Sixth Respondent
 C/O THE STATE ATTORNEY
 SALU BUILDING
 316 THABO SEHUME STREET
 PRETORIA

AND TO: THE MINISTER OF FORESTRY, FISHERIES, AND THE ENVIRONMENT N.O.
Seventh Respondent
 C/O THE STATE ATTORNEY
 SALU BUILDING
 316 THABO SEHUME STREET
 PRETORIA

AND TO: KADITWALA INCORPORATED *(Service by email)*
T/A DENTONS SOUTH AFRICA
Attorneys for Eight Respondent
 Unit 36, 5th Floor, Katherine & West Building
 114 West Street
 Sandton
Tel: 011 326 6257
Email: Johannesburg.Litigation@dentons.com
Ref: V Jacklin-Levin/0027171.01880

C/O RUDOLPH BOTHA ATTORNEYS

273 Cradock Avenue
 Lyttelton Manor
 Centurion
Tel: 012 664 0656
Email: anzelle@rbattorneys.co.za
Caselines: litigation@rbattorneys.co.za
Ref: AN/PK/BE197

41

41

[illegible]

"FA3"

Irene Pienaar

From: Tinyiko Ndlovu <Tinyiko.Ndlovu@pinsentmasons.com>
Sent: 24 May 2022 01:40 PM
To: prince@pm-attorneys.co.za; dineo@pm-attorneys.co.za; kganedi@pm-attorneys.co.za
Cc: Rob Morson (Projects); Jason Smit; Andrew Fawcett; Sarah Burford; Nombasa Mazwai; Irene Pienaar; Delia Turner; Andri Jennings; Johannesburg.Litigation@dentons.com
Subject: RE: ORGANISATION UNDOING TAX ABUSE NPC // THE NATIONAL ENERGY REGULATOR OF SOUTH AFRICA AND 7 OTHERS [PM-SA.FID40785]

Dear Sir

In anticipation of receiving the Rule 53 record in this matter, our client has instructed us to request that a confidentiality regime first be agreed before the record is distributed. This proposal is made on the assumption that the record will include certain confidential information regarding client.

In order to control the disclosure of this information, we think the most sensible approach is for our client to either redact or exclude from the record entirely all of its confidential information and include it in a separate confidential record which will only be accessible to the Judge and the respective attorneys / advocates / experts once suitable confidentiality undertakings have been provided. The confidential record will not be shared with any other person (or uploaded onto Caselines) and will be provided to the judge directly (preferably in hard copy) in due course. Likewise, all affidavits which rely on the confidential information will also be subject to the same arrangement.

We don't think this approach will prejudice any party, particularly the Applicant, and is one that is widely adopted in this kind of matter. As part of the regime, it would be necessary for each party's legal representatives and experts to provide a written undertaking to not disclose any confidential information (including to their clients) or to utilize it for any purpose other than the review. Should you be amenable to this approach then we are prepared to draft the confidentiality undertaking which you and the attorneys for the other parties can provide comment on.

Please let us know if you have any concerns or suggestions in order to take this forward.

Tinyiko Ndlovu
Lawyer
for Pinsent Masons

D: +27 10 493 4587 M: +27 66 246 8368 I: 294587

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Pinsent Masons supports agile working, so please don't feel you need to respond to this email outside your working hours.

From: Andri Jennings <andri@jinc.co.za>
Sent: Monday, 23 May 2022 11:33
To: Tinyiko Ndlovu <Tinyiko.Ndlovu@pinsentmasons.com>
Cc: dineo@pm-attorneys.co.za; prince@pm-attorneys.co.za; kganedi@pm-attorneys.co.za; Rob Morson (Projects) <Rob.Morson@pinsentmasons.com>; Jason Smit <Jason.Smit@Pinsentmasons.com>; Andrew Fawcett <Andrew.Fawcett@pinsentmasons.com>; Sarah Burford <Sarah.Burford@pinsentmasons.com>; Nombasa Mazwai <Nombasa.Mazwai@pinsentmasons.com>; Irene Pienaar <irene@jinc.co.za>; Delia Turner <delia@jinc.co.za>
Subject: [EXTERNAL] RE: ORGANISATION UNDOING TAX ABUSE NPC // THE NATIONAL ENERGY REGULATOR OF SOUTH AFRICA AND 7 OTHERS [PM-SA.FID40785] - OUT015

OUR REF: A JENNINGS / OUT015

Good day.

We refer to the abovementioned matter as well as the Notice of Intention to Oppose which was emailed to our office.

"FA4"

Irene Pienaar

From: Andri Jennings
Sent: 30 May 2022 10:53 AM
To: Tinyiko Ndlovu; prince@pm-attorneys.co.za; dineo@pm-attorneys.co.za; kganedi@pm-attorneys.co.za
Cc: Rob Morson (Projects); Jason Smit; Andrew Fawcett; Sarah Burford; Nombasa Mazwai; Irene Pienaar; Delia Turner; Johannesburg.Litigation@dentons.com
Subject: RE: ORGANISATION UNDOING TAX ABUSE NPC // THE NATIONAL ENERGY REGULATOR OF SOUTH AFRICA AND 7 OTHERS [PM-SA.FID40785] - OUT015

Good day,

1. We refer to your email of 23 May 2022 regarding your client's contention that certain documents contained in the record may be confidential and your request that a confidentiality regime be agreed upon before the record is distributed.
2. Neither our client nor our offices are in a position to agree to your client's request without knowing what information is sought to be kept confidential, especially in circumstances where your client is not the party from whom the record is requested.
3. We therefore request that you first specify which documents your client wishes to keep confidential and the reasons for this, so that we can be in a better position to consider your proposal.

We await your soonest reply.

Kind Regards/Vriendelike Groete,
Andri Jennings
Director/Direkteur



JENNINGS

INCORPORATED

ATTORNEYS, NOTARIES, CONVEYANCERS & COST CONSULTANTS

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18 Ross Street, Cullinan | O: 012 110 4442
222 Smit Street, 21st Floor, Braamfontein, Johannesburg | O: 010 005 4572
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VAT No: 4660291974 | Reg No: 2018/065399/21 | www.jinc.co.za

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From: Tinyiko Ndlovu <Tinyiko.Ndlovu@pinsentmasons.com>
Sent: 24 May 2022 01:40 PM

"FAS"

Delia Turner

From: Andri Jennings
Sent: Tuesday, June 7, 2022 12:39 PM
To: Tinyiko Ndlovu; prince@pm-attorneys.co.za; dineo@pm-attorneys.co.za; kganedi@pm-attorneys.co.za
Cc: Rob Morson (Projects); Jason Smit; Andrew Fawcett; Sarah Burford; Nombasa Mazwai; Irene Pienaar; Delia Turner; Johannesburg.Litigation@dentons.com
Subject: RE: ORGANISATION UNDOING TAX ABUSE NPC // THE NATIONAL ENERGY REGULATOR OF SOUTH AFRICA AND 7 OTHERS - OUT015 [PM-SA.FID40785]
Attachments: LETTER DATED 7 JUNE 2022.pdf

Good day.

Please find attached hereto a letter for your attention.

Kind Regards/Vriendelike Groete,
Andri Jennings
Director/Direkteur



Head Office: 149 Anderson Street, Brooklyn, Pretoria | O: 012 110 4442
18 Ross Street, Cullinan | O: 012 110 4442
222 Smit Street, 21st Floor, Braamfontein, Johannesburg | O: 010 005 4572
21 Woodlands Drive, Country Club Estate, Building 2, Woodmead, Johannesburg | O: 011 258 8770

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From: Tinyiko Ndlovu <Tinyiko.Ndlovu@pinsentmasons.com>

Sent: 06 June 2022 09:58 AM

To: Andri Jennings <andri@jinc.co.za>; prince@pm-attorneys.co.za; dineo@pm-attorneys.co.za; kganedi@pm-attorneys.co.za

Cc: Rob Morson (Projects) <Rob.Morson@pinsentmasons.com>; Jason Smit <Jason.Smit@Pinsentmasons.com>; Andrew Fawcett <Andrew.Fawcett@pinsentmasons.com>; Sarah Burford <Sarah.Burford@pinsentmasons.com>; Nombasa Mazwai <Nombasa.Mazwai@pinsentmasons.com>; Irene Pienaar <irene@jinc.co.za>; Delia Turner <delia@jinc.co.za>; Johannesburg.Litigation@dentons.com



JENNINGS

INCORPORATED

ATTORNEYS, NOTARIES, CONVEYANCERS & COST CONSULTANTS

OUR REFERENCE: A JENNINGS/OUT015

YOUR REFERENCE:

DATE: 07 June 2022

TO: PRINCE MUDAU & ASSOCIATES
(REF: LIT/PM/MAT180)

PINSENT MASONS SOUTH AFRICA INCORPORATED
(REF: 691335/07000)

KAPITWALA INCORPORATED t/a DENTONS SOUTH AFRICA
(REF: V JACKLIN - LEVIN/0027171.01880)

Sirs

ORGANISATION UNDOING TAX ABUSE NPC//NATIONAL ENERGY REGULATOR OF SOUTH AFRICA AND 7 OTHERS (23017/2022)

1. We refer to your email of 6 June 2022.
2. We have already indicated in our correspondence of 30 May 2022 that neither our client nor our offices are in a position to agree to your client's request that a confidentiality regime is agreed upon without knowing what information is sought to be kept confidential, especially in circumstances where your client is not the party from whom the record is requested.
3. Our client can accordingly not agree to a blanket confidentiality agreement. In order to avoid going around in circles, we will not engage in any further correspondence in this regard unless we receive the information requested in our correspondence of 30 May 2022.
4. We record that your client's Notice of Intention to Oppose which was sent by email on 20 May 2022 (without prior agreement for service to take place by email), was sent out of time.

5. We further record that on 17 May 2022, our offices received a request from NERSA for an extension of time to file the record by no later than 10 June 2022. On 19 May 2022 (and prior to your client's late filing of its Notice of Intention), we advised NERSA's attorneys that our client would grant such an indulgence.
6. We therefore disagree with your insinuation that such an indulgence to NERSA granted by our client is inappropriate in the circumstances:
 - a) your client failed to file a timely Notice of Intention to Oppose and there was no attorney on record at the time on behalf of your client;
 - b) the indulgence was granted only on behalf of our client and not on behalf of any other party to the proceedings.
7. Should your client have any further concerns in this regard, we suggest that it should exercise any remedies that may be available to it in an appropriate forum.

TRANSMITTED ELECTRONICALLY AND UNSIGNED

Kind regards,
Andri Jennings
Director

A handwritten signature in black ink, consisting of a stylized 'A' followed by a vertical line.

"FAL"

Delia Turner

From: Delia Turner
Sent: Monday, June 13, 2022 2:52 PM
To: Tinyiko Ndlovu; Andri Jennings; prince@pm-attorneys.co.za; dineo@pm-attorneys.co.za; kganedi@pm-attorneys.co.za; carol@chennellsalbertyn.co.za; fiona@chennellsalbertyn.co.za
Cc: Rob Morson (Projects); Jason Smit; Andrew Fawcett; Sarah Burford; Nombasa Mazwai; Irene Pienaar; Johannesburg.Litigation@dentons.com
Subject: RE: ORGANISATION UNDOING TAX ABUSE NPC // THE GREEN CONNECTION NPC // THE NATIONAL ENERGY REGULATOR OF SOUTH AFRICA AND OTHERS [PM-SA.FID40785]
Attachments: LETTER DATED 13 JUNE 2022.pdf

Good day,

Find attached hereto a letter for your further attention.

Kind Regards/Vriendelike Groete,
Delia Turner
Associate Attorney/Assosiaat Prokureur



JENNINGS

INCORPORATED

ATTORNEYS, NOTARIES, CONVEYANCERS & COST CONSULTANTS

Head Office: 149 Anderson Street, Brooklyn, Pretoria | O: 012 110 4442
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From: Tinyiko Ndlovu <Tinyiko.Ndlovu@pinsentmasons.com>

Sent: Thursday, June 9, 2022 9:16 AM

To: Andri Jennings <andri@jinc.co.za>; prince@pm-attorneys.co.za; dineo@pm-attorneys.co.za; kganedi@pm-attorneys.co.za; carol@chennellsalbertyn.co.za; fiona@chennellsalbertyn.co.za

41



ATTORNEYS, NOTARIES, CONVEYANCERS & COST CONSULTANTS

OUR REFERENCE: A JENNINGS/OUT015
YOUR REFERENCE:
DATE: 13 June 2022

TO: PRINCE MUDAU & ASSOCIATES
(REF: LIT/PM/MAT180)

PINSENT MASONS SOUTH AFRICA INCORPORATED
(REF: 691335/07000)

KAPITWALA INCORPORATED t/a DENTONS SOUTH AFRICA
(REF: V JACKLIN - LEVIN/0027171.01880)

CHENELLS ALBERTYN ATTORNEYS
(REF: UNKNOWN)

Sirs

ORGANISATION UNDOING TAX ABUSE NPC//NATIONAL ENERGY REGULATOR OF SOUTH AFRICA AND 7 OTHERS (23017/2022)

THE GREEN CONNECTION NPC ("GREEN CONNECTION") // NATIONAL ENERGY REGULATOR OF SOUTH AFRICA & 5 OTHERS (23339/2022)

1. We address this letter to you on behalf of our client, the Organisation Undoing Tax Abuse NPC ("OUTA").
2. We refer to your letter dated 9 June 2022 as well as the accompanying draft letter that your offices intend to send to the DJP and to which our comments were invited.



3. We request that, should you send the intended letter, you remove the last sentence in paragraph 1.3 thereof and instead attach this letter with our client's views and comments thereto and specifically draw the DJP's attention to it.

Ad request for case management:

4. We confirm that due to the complexity of the matter and the anticipated volume of the documents to be filed, our client has no objection to the matter being referred for case management.

Ad background contained in your draft letter:

5. We note the background provided in paragraph 2 of your draft letter, which refers to the merits of the application and seeks to establish a basis for urgency. It also gives the impression that "but for" these review applications the project can proceed. This is not the case.
6. It is not our intention to discuss the merits of these applications in correspondence, but for the sake of transparency we believe that if such background is provided (particularly if it is used as a justification for an accelerated timeline), it is imperative that it is also recorded that your client does not have the necessary environmental authorisations in place to proceed with the project.

A handwritten signature or set of initials, possibly 'Y' followed by a stylized flourish, located in the bottom right corner of the page.

7. Regardless of the outcome of these review applications pertaining to the electricity generation licences, your client will not be able to proceed with the project without strictly complying with the provisions of the relevant environmental legislation.

Ad consolidation or joint hearing:

8. We note that your letter refers to both a joint hearing or a consolidation of the two matters. We point out that there is a clear distinction between a joint hearing of matters and a consolidation of matters.
9. Our client is not a party to the Green Connection application and does not have access to Green Connection's application on Caselines. If the relief requested is substantially the same as indicated in your letter, our client has no objection in principle to a joint hearing (provided we are given access to the Green Connection application on Caselines and have the opportunity to properly peruse it and consult thereon).
10. However, our client will not agree to a consolidation of the two applications.

Ad confidentiality of documents:

11. We have already pointed out to you twice that our client cannot agree to a blanket confidentiality arrangement without knowing which documents/information your client wishes to keep confidential. We have invited your client to identify such documents/information so that we can reasonably assess the request, but your client has declined the invitation.

A handwritten signature or set of initials, possibly 'Y' followed by a stylized flourish, located in the bottom right corner of the page.

12. What documents your client has provided to NERSA during the application process is known only to your client and NERSA. Your client should therefore be able to predict with a fair degree of certainty what information relating to it will be contained in the record. In view of the above, we fail to understand why your client has declined to specify the documents/information it wishes to keep confidential.
13. In order to save time and to demonstrate our client's *bona fides* in this regard, we suggest the following:
- 13.1 that when the record is provided, writer hereof undertakes not to disclose the documents to OUTA, but to keep them in her office and disclosed and discuss them only with our client's appointed counsel until your client has identified which of the information it considers confidential;
- 13.2 once your client has clearly identified this information, writer hereof (in consultation with counsel) will review the information together with the reasons given for the alleged confidentiality and then comment on it;
- 13.3 should there be a dispute as to the confidentiality of the documents/information identified and/or its inclusion in the record, a time period will be agreed between the parties within which your client may apply by way of an interlocutory application for a court to rule on the confidential nature of the documents/information. The parties will further agree time periods within which further papers in such an application must be filed. Pending the outcome of such an application writer hereof shall only give access to the record to our client's appointed counsel.



Ad indulgence for late delivery of the record:

14. We record that your client's notice of intention to oppose was filed out of time and only on 20 May 2022. On 17 May 2022, NERSA requested our client's indulgence to file the record by no later than 10 June 2022. The indulgence was granted on behalf of our client on 19 May 2022.
15. We confirm that, despite the indulgence that was granted, NERSA did not deliver the record by 10 June 2022.

Ad special allocation:

16. We disagree with your assertions under the heading "*Conclusion*" in your letter, and in particular the inaccurate impression created that these review applications are causing a delay in resolving the problem of South Africa's electricity supply, and that an expedited hearing of these applications will lead to resolving the electricity crisis. As pointed out above and in our client's founding papers, there are still several unresolved issues independent of our client's review application pertaining to the RMIPPPP without which your client cannot proceed.
17. To the extent that it is implied that these review applications are "disruptive" and negatively impact the public, our client holds the opposite view and believes that it is the granting of the licences and potential implementation of the project that is highly detrimental to the public at large.
18. We therefore deny that the allegations contained in your letter constitute a proper basis for an urgent or expedited hearing in this matter.

Handwritten signature or initials in black ink, consisting of a stylized 'y' followed by a vertical line.

19. However, due to the anticipated volume of the application (with the documents expected to exceed 500 pages, especially if the matters are heard together) and the expected longer duration of the hearing, our client has no objection to the parties requesting a special allocation subject to the availability of counsel for all parties.

TRANSMITTED ELECTRONICALLY AND UNSIGNED

Kind regards,
Andri Jennings
Director

A handwritten signature in black ink, consisting of a stylized 'A' followed by a vertical line.

(v) Absence of information about tariff / price variation dependent on the US dollar:

83. NERSA's answer to the lack of transparency regarding financial information was answered with a blanket reliance on confidentiality. It failed to deal with the issue of price variation in circumstances where prices over the next 20 years will be dependent on the US dollar price. This causes uncertainty and may come at tremendous costs for the South African public.
84. The lack of transparency points to a decision that was procedurally unfair as the public was not informed of and able to comment on and submit relevant facts and evidence to NERSA on the costs involved over the next 20 years. Furthermore, NERSA did not take into account relevant considerations and the decision was reached in an arbitrary manner.
85. In the premises the decision falls to be reviewed and set aside in terms of section 6(2)(c) and/or 6(2)(e) and/or 6(2)(f) of PAJA.

G. EXPERT OPINION:

86. For purposes of this application and obtaining an expert opinion, OUTA consulted energy specialist Dr Grové Steyn, the Chief Executive Officer of Meridian Economics ("Meridian"). I was advised by Dr Steyn that, on the information already available and without the benefit of the full record, it is evident that many relevant factors were not properly considered by NERSA in

reaching its decision to grant the generation licences. As such, NERSA failed to properly fulfill the oversight function bestowed upon it by the legislature and comply with its obligations in terms of the ERA. I summarise in paragraphs 87 – 102 below Dr Steyn's opinion based on the NERSA Reasons for Decision ("RfD") in the three Karpowership decisions and other documents and information available at this stage.

(i) Not required for meeting electricity demand:

87. The Karpowership generation licences and PPA's are not required to resolve South Africa's current loadshedding problems on an urgent basis. There are faster and substantially cheaper generation project options available to complement the portfolio of existing generation resources on the grid to eliminate loadshedding in the short-term.
88. Independent studies consistently demonstrate that there is no economic rationale or need for baseload or mid-merit (high-capacity factor) gas power generation in the South African power system for at least the next ten years. Karpowership projects will operate at a capacity factor of 50% and up to 66%. This will be in the mid-merit to baseload range. Forcing in projects such as the Karpowership ones licensed by NERSA will thus impose additional and unnecessary financial, economic, and environmental costs on the South African economy.

89. It is further likely that trends in current technological developments in technologies that compete with the Karpowership solution (such as high-capacity factor wind generators combined with different forms of short- and longer term storage, and peaking plant) and rapidly increasing climate constraints, will soon have the effect of rendering mid-merit and baseload gas fired power projects uneconomic and technologically obsolete.
90. Powerships are typically deployed as a short-term emergency solution in the event of disaster or other power crisis. The granting of licences for the envisaged period of 20 years is unprecedented and inappropriate.
- (ii) Failure to supply cost-effective power:
91. The 20-year Karpowership projects will expose consumers to much higher costs and much greater risk than the portfolio of alternatives available to resolve loadshedding in the short term and meet demand over the long term.
92. NERSA has failed to do a proper analysis of the project costs and cost risk, and more specifically appears to have misconstrued the issues surrounding the electricity pricing formulas (in particular the gas pricing components) approved as part of the decision. NERSA accordingly did not apply its mind to all the factors that it had to consider in making the decision, in particular pertaining to the following:

002-39

- a) the price for power from the Karpowerships is significantly exposed to exchange rate risk and global gas prices, whereas the alternative generating technologies have little or no such exposure;
- b) the RfD's state that Karpowership power for the year beginning April 2022 would cost R2.80/kWh, already up 90% from the ~R1.50/kWh bid as at April 2020;
- c) Meridian's estimates based on its understanding of the bid prices and limited information on the PPA suggest the *current* price for Karpowership power is close to R5/kWh – roughly two to three times the cost of alternative portfolio based solutions to resolve loadshedding and more than the other more expensive winning bids in the RMIPPP process;
- d) the gas component of the PPA's pricing formula as disclosed in the RfD appears to result in a substantial over recovery of the regasification cost. According to the RfD there is both a recovery of this in the fixed cost component as well as a percentage premium applied to the gas price. The latter would result in "windfall" profits for the Karpowership fuel providing company as the actual regasification cost is not linked to the price of gas. This has not been interrogated by NERSA at all.

(iii) NERSA's failure to conduct a value for money assessment:

93. Section 10(2)(e) of the ERA requires that an application for a generation licence must include the plans and ability to comply with any applicable legislation or

002-40

subordinate legislation. The plans and ability to comply with the Regulations should accordingly have been included in the licence applications.

94. With specific reference to regulations 9(1)(a) and 9(1)(b), the application should have included the plans and ability for the PPA's to meet the requirements of:

(a) value for money; and

(b) appropriate technical, operational and financial risk transfer to the seller.

95. It is Dr Steyn's opinion that the following is required for a conclusion of "value for money" to be reached:

a) the service provided by the seller must match the economic need of the buyer. This predetermines the utility or the value in the hands of the buyer (i.e. the service provided must actually be what the buyer needs); and

b) the price at which the service is provided must be:

(i) lower than the economic value of the utility in the hands of the buyer; and

(ii) competitive compared to that of the alternative providers available to the buyer.

96. While NERSA specifically raises these issues briefly in their respective RfD's under the heading "*POWER PURCHASE AGREEMENT*" (Coega RfD at par 86; Saldanha RfD at par 85; Richards Bay RfD at par 84) they provide no evidence that they have conducted any adequate assessment of them.

002-41

97. In particular, NERSA did not apply the value for money test. In Dr Steyn's opinion, if NERSA did apply the test, it would have found that the Karpowership projects failed it. NERSA accordingly failed to consider these critical issues in its decision.

(iv) NERSA's failure to consider climate impacts as a critical economic risk to industrial and commercial electricity consumers:

98. The world is in the midst of a climate crisis with unprecedented implications for the biosphere and human wellbeing. The South African Government recently published its updated Nationally Determined Contribution ("NDC"), committing the country to decarbonisation targets by 2025 and 2030. Beyond that it is Government policy (along with most countries in the world) to achieve a net zero emissions economy by mid-century. In South Africa the highly carbon intensive power sector will have to do the early heavy lifting to enable South Africa to deliver on its international decarbonisation commitments and avoid punitive carbon border tax adjustments on its exports and other punitive financial impacts on the economy.
99. Dr Steyn is of the opinion, that given South Africa's decarbonisation policies and commitments read with the objects of the ERA, and the fact that the country's power sector is the most carbon intensive in the world, thereby exposing the entire economy to excessive trade and financing related climate risk, climate factors are not irrelevant when NERSA considers the award of a 20-year generation licence for a fossil fuel plant, when cleaner, cheaper and

faster options are available. South African electricity consumers will be forced to consume this power for this entire period and the state will be the guarantor of the power off-take. This is contrary to the objectives set out in section 2(b) of the ERA that places an obligation on NERSA to:

"ensure that the interests and needs of present and future electricity customers and end users are safeguarded and met, having regard to the governance, efficiency, effectiveness and long-term sustainability of the ESI within the broader context of economic energy regulation in the Republic."

100. High capacity factor gas power as proposed by Karpowership, will mostly not displace CO₂ emitting coal power as claimed by NERSA in the RfD, but will rather displace the amount of future renewable energy that will be built. It will thus result in a *higher* emitting power sector than what would otherwise have been the case, thereby undermining the country's efforts to decarbonise its economy.
101. According to Dr Steyn NERSA has not in any way considered and applied its mind to these critical climate related economic risk factors when it evaluated the Karpowership licence application. It would at a minimum have been necessary to consider whether the additional emissions from the Karpowership projects will compromise the ability of the power sector to fulfil its leading role in enabling South Africa to deliver on its self-adopted NDC emissions reduction targets.

002-43

102. Dr Steyn is further of the opinion that NERSA's assertion in the Rfd that *"It is factually correct that powerships are more labour intensive than renewables"*, is false. Empirical evidence overwhelmingly shows that renewables provide much more employment on a per kWh basis.
103. A confirmatory affidavit from Dr Steyn together with an abbreviated curriculum vitae setting out his qualifications and expertise is attached as annexure "FA18".
104. The above illustrates that there are numerous relevant considerations that NERSA failed to take into account when making the decisions to grant the generation licences to Karpowership. NERSA failed its obligation towards the South African public as set out in section 2 of the ERA and section 10(1) of NERA when the licences were granted without having regard to the public interest.

H. **FURTHER SUBMISSIONS:**

(i) **Procedural unfairness:**

105. At the time of making the impugned decisions NERSA must have been aware that there were experts who would have been able to advise on Karpowership's ability to comply with the applicable environmental legislation as well as on the costs, risks, and use of alternatives. Despite this, NERSA seems not to have taken the views of any such experts into account.

002-44

"FAS"

OUR REFERENCE: A JENNINGS/OUT015
YOUR REFERENCE: LIST OF REDACTED RECORDS
DATE: 29 AUGUST 2022

ANNEXURE "A" - LIST OF REDACTED RECORDS FROM RECORD RECEIVED FROM NERSA

1. Page 4 - Id numbers of directors of Karpowership
2. Page 7 - Contact details of Generation Station
3. Page 13 - Table of Content
4. Page 14 - Summary of PPA response, Key terms, and tariff structure
5. Page 15 - Financial Information
6. Page 26 - BEE Compliance Information
7. Page 28 - Support documents, Table of Content
8. Page 30 - Various items in the Table of Content
9. Page 31 - Various items in the Table of Content
10. Page 54 - Email address and names
11. Page 421, 422 - Table 1 of the Charge Rates used to calculate the tariff in terms of Schedule 9 of the Power Purchase Agreement
12. Page 438, 439 - Financial Information
13. Page 441 - Table 8, The Applicant's Charge Rates for calculating the tariff




14. Page 442 - Paragraph 66 in its entirety together with the heading and table under paragraph 71
15. Page 443, 444 - Paragraph 82 in its entirety together with the heading
16. Page 446 - Paragraph 94 in its entirety together with the heading
17. Page 456 - Contractual Arrangement, Particulars of Fuel Supply Arrangements
18. Page 457- Attachment to Particulars of Fuel Supply Arrangements
19. Page 458 - Section E - Maintenance Programmes and Decommissioning Costs and Attachment
20. Page 459 - E3, Details of major generation station expansion and modifications planned for in the feasibility study (Dates, Costs in Rands (state year) and description)
21. Page 460 - Section F1, F2 and F3 together with attachments of Section F, Customer Profile
22. Page 461 - Summary of Power Purchase Agreement and attachments, Notes to Section F
23. Page 463 - Financial Information- Section G1, attachment of G2, G3 and attachment, G4 and attachment, Fill in table
24. Page 464 - Notes to Section G
25. Page 465 - Answers to the following questions under Section H - Human Resources Information
 - 25.1 What is the skill level for working on the project?
 - 25.2 What types of jobs will be available during construction and then during operations for the local immediate community?
26. Page 466 - Training and Powership Academy
27. Page 468 - Item 8 in the Support Documents and Table of Content



28. Page 474 – Attachment: Items 10 – 15 in the Support Documents and Table of Content
29. Page 476 – Attachment: Item 16 in Support Documents and Table of Contents
30. Page 478, 479– Various items in the Table of Content of Application for an Electricity Generation Licence in terms of the Electricity Regulation Act
31. Page 555, 556 – Table 1 indicating the charge rates used to calculate the tariff in Schedule 9 of the Power Purchase Agreement
32. Page 574 – Financial Information
33. Page 575 – Paragraph 59 to 62 in its entirety together with the heading
34. Page 576 – Paragraph 66 in its entirety together with the heading
35. Page 577 – Table and Paragraph 68 in its entirety together with the heading
36. Page 578 – Paragraph 73 and Paragraph 76 in its entirety together with the heading and with Table
37. Page 582 – Paragraph 94 in its entirety together with the heading
38. Page 1147 – Contact information of Kishoor Pitamber at Karpowership
39. Page 1148 – Details of Directors of Karpowership
40. Page 1151 – Contact information of Kishoor Pitamboor at Karpowership
41. Page 1154 – Table of Content of Particulars of Fuel Supply Arrangements
42. Page 1157 – Section F – Customer Profile, Item 4 and Item 5 Attachments and Table of Contents



43. Page 1158 - Response on Summary of Power Purchase Agreement and Key terms of the Power Purchase Agreement and tariff structure
44. Page 1159 - Section G: Financial Information - Response to G1 to G3 and table in G4
45. Page 1170 - Detailed economic development percentages that have been submitted as part of the RMIPPPPP, Detailed economic development values that have been submitted as part of the RMIPPPPP as well as Table of Contents
46. Page 1172 - Item 16 in Support Documents and Table of Contents
47. Page 1174, 1175 - Various items in Table of Contents - Supporting Documents - Karpowership Coega
48. Page 1240, 1241 - Table 1 of Charge Rates used to calculate the tariff in Schedule 9 of the Power Purchase Agreement
49. Page 1260 - Financial Information - Paragraph 51 to 53 in its entirety together with the heading
50. Page 1261 - Paragraph 59, 60 and 62 in its entirety together with the heading
51. Page 1263 - Table 8 of Applicant's charge rules for calculating the tariff using the above formulas
52. Page 1264, 1265 - Paragraph 68 and 74 in its entirety together with the heading together with table
53. Page 1268 - Paragraph 96 in its entirety together with the heading


Kind regards
Delia Turner
Attorney

41

"FAQ"

Irene Pienaar

From: Tinyiko Ndlovu <Tinyiko.Ndlovu@pinsentmasons.com>
Sent: 02 September 2022 04:14 PM
To: LuMuneri@judiciary.org.za
Cc: Carol van der Vyver | Chennells Albertyn; kganedi@pm-attorneys.co.za; dineo@pm-attorneys.co.za; prince@pm-attorneys.co.za; fiona@chennellsalbertyn.co.za; Andrew Fawcett; Jason Smit; Sarah Burford; Nombasa Mazwai; Rob Morson (Projects); Anna-Marie A. Nieuwoudt; Johannesburg.Litigation@dentons.com; Andri Jennings; Irene Pienaar
Subject: RE: Case Number 23339/2022: Green Connection / NERSA and others [PM-SA.FID40785]
Attachments: PM L - Honourable Acting Judge President - NERSA Reviews (2 September 20220).pdf
Importance: High

Dear Sir / Madam

Please see the attached correspondence for the attention of the Acting Judge President regarding the case management meeting of 5 September 2022.

Given the timing, we are unable to deliver a hard copy and apologize for any inconvenience.

Thank you

Tinyiko Ndlovu
Lawyer
for Pinsent Masons

D: [+27 10 493 4587](tel:+27104934587) M: [+27 66 246 8368](tel:+27662468368) I: [294587](tel:+27294587)

Winner – 'Law Firm of the Year' at the Legal Business Awards 2021

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From: Carol van der Vyver | Chennells Albertyn [<mailto:carol@chennellsalbertyn.co.za>]
Sent: Friday, September 2, 2022 12:10 PM
To: 'Lutendo Muneri' <LuMuneri@judiciary.org.za>; 'jason.smit@pinsentmasons.com' <jason.smit@pinsentmasons.com>; 'andrew.fawcett@pinsentmasons.com' <andrew.fawcett@pinsentmasons.com>; 'fiona@chennellsalbertyn.co.za' <fiona@chennellsalbertyn.co.za>; 'prince@pm-attorneys.co.za' <prince@pm-attorneys.co.za>; 'dineo@pm-attorneys.co.za' <dineo@pm-attorneys.co.za>; 'kganedi@pm-attorneys.co.za' <kganedi@pm-attorneys.co.za>; 'Tinyiko.Ndlovu@pinsentmasons.com' <Tinyiko.Ndlovu@pinsentmasons.com>; 'Sarah.Burford@pinsentmasons.com' <Sarah.Burford@pinsentmasons.com>; 'Rob.Morson@pinsentmasons.com' <Rob.Morson@pinsentmasons.com>; 'Nombasa.Mazwai@pinsentmasons.com' <Nombasa.Mazwai@pinsentmasons.com>; 'Sidesha.sidesha@gmail.com' <Sidesha.sidesha@gmail.com>; 'Siviwe Sidesha' <SSidesha@judiciary.org.za>; 'Anna-Marie A. Nieuwoudt' <AnNieuwoudt@judiciary.org.za>; 'Olebogeng Rapoo' <LRapoo@judiciary.org.za>; 'Johannesburg.Litigation@dentons.com' <Johannesburg.Litigation@dentons.com>
Subject: Case Number 23339/2022: Green Connection / NERSA and others
Importance: High

Dear Sirs / Ms

Attached is our letter and agenda for your urgent attention.





BY E-MAIL

Acting Judge President
The Honourable Mr Justice Ledwaba
LuMuneri@judiciary.org.za
annieuwoudt@judiciary.org.za

Our Ref: 717435.11691335.07000

DDI +27104934587

E: Jason.Smit@pinsentmasons.com

2 September 2022

Dear Honourable Acting Judge President Ledwaba,

ORGANISATION FOR UNDOING TAX ABUSE / NATIONAL ENERGY REGULATOR OF SOUTH AFRICA AND 7 OTHERS (CASE NO: 23017/2022)

GREEN CONNECTION / NATIONAL ENERGY REGULATOR OF SOUTH AFRICA AND 5 OTHERS (CASE NO: 23339/2022)

DIRECTORS
Junaïd Banoobhai
Claire Barclay
Jurg van Dyk
Edward James
Deidre Simaan
Jason Stuart Smit
Daniella Zussa

1. We refer to: -
 - 1.1 the case management meeting scheduled for 5 September 2022;
 - 1.2 the proposed Agenda delivered by OUTA on 29 August 2022; and
 - 1.3 Green Connection's correspondence in response which was sent on 2 September 2022.
2. We address you on behalf of our client, Karpowership SA (Pty) Ltd and its subsidiaries namely, Karpowership SA Saldanha Bay (RF) Proprietary Limited, Karpowership SA Coega (RF) Proprietary Limited and Karpowership SA Richard's Bay (RF) Proprietary Limited (collectively referred to as "**Karpowership**") in relation to the above matters.
3. This letter is not intended to constitute a complete response to the issues raised either by OUTA or Green Connection in the above correspondence and is intended to only clarify Karpowership's position ahead of the case management meeting.
4. **CONSOLIDATION**
 - 4.1 Karpowership agrees that it would be preferable for the respective applications to be heard jointly and on a case managed basis. This is to enable the reviews to be heard efficiently and with minimal impact on the court's time and resources.

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5. **RULE 53 RECORD**

- 5.1 At the outset, we record that Karpowership rejects both directions that have been requested by OUTA and Green Connection on this issue.
- 5.2 Karpowership's submissions will be made in full before Your Lordship, but we believe that some context may be helpful for present purposes. As part of its electricity generation license applications (which are the subject of these reviews), our client was required to submit some of its confidential information (which it did on a redacted basis). The reason this information was made confidential is because it is either protected in terms of the provisions of PAIA and POPIA or other undertakings which our client has given to the Department of Mineral Resources and Energy as part of the RMIPPPP. This information relates to, for example, our client's proprietary trade secrets.
- 5.3 Karpowership has never objected to the disclosure of this information as part of the review proceedings or disputed its relevance. All Karpowership has requested is that suitable protection first be put in place before its confidential information is disclosed to third parties.
- 5.4 To protect its information, Karpowership proposed a confidentiality regime which is identical to that which has been approved by the Constitutional Court in the *Helen Suzman* decision.¹ For your Lordship's convenience the regime contemplated, was cited by the Constitutional Court with approval as follows:²

"access to the confidential part of the Commission's record to legal representatives of the parties in the main application and one independent expert appointed by each party to assist in that application. In addition, these persons w[ould] only have access after they ha[d] signed a confidentiality undertaking in the form dictated by the order. In terms of that undertaking the signatory pledge[d] not to divulge the information that he or she obtained from the record to anybody outside the stipulated group of persons, which group d[id] not include the parties themselves or any of their employees. The order further require[d] that any pleading, affidavit or argument filed in the main application be made up in two parts – a confidential version and a non-confidential version; that all references to confidential information be expunged from the non-confidential version; and that access to the confidential version be reserved to permitted persons and the judge presiding in the main application."

- 5.5 Both applicants rejected our proposal and made their own separate counterproposals (the details of which are set out in their correspondence). Our view is that these counterproposals are inadequate and leave our client vulnerable in a context where (i) the confidentiality of this information is protectable by law and (ii) our client disputes the standing of the applicants to bring these reviews (and, in turn, to gain even limited access to this information).
- 5.6 Be that as it may, no prejudice is suffered by the applicants if the above regime is adopted. Karpowership's position is that the record must be prepared on both a confidential and non-confidential basis (with the applicants being given full access to the latter). The confidential record should only be made available to the applicants' legal

¹ *Helen Suzman Foundation v Judicial Service Commission* (CCT289/16) [2018] ZACC 8; 2018 (4) SA 1 (CC); 2018 (7) BCLR 763 (CC) (24 April 2018).

² *Helen Suzman*, at paragraph 73.



representatives and if they are of the view that certain information ought to be made available on an unrestricted basis then they are free approach the court for relief.

- 5.7 In response to paragraph 2.3 of Green Connections letter specifically, the reference to "experts" in our client's draft proposal means independent experts. With respect, it's apparent that Mr Trollip is not acting independently in these proceedings. Nevertheless, the regime proposed by Karpowership would enable either applicant to approach the court for relief if the parties are unable to resolve a dispute on this aspect.

6. **SPECIAL ALLOCATION**

- 6.1 While our client had initially requested that the reviews be heard on an expedited basis, it agrees that such a request may now be premature given the impasse on the Rule 53 record.

Yours faithfully

Pinsent Masons South Africa Inc (registered no. F17331)

This letter is sent electronically and so is unsigned

"fA10"

Delia Turner

From: kganedi@pm-attorneys.co.za
Sent: Monday, September 12, 2022 3:41 PM
To: Andri Jennings
Cc: 'Carol van der Vyver | Chennells Albertyn'; fiona@chennellsalbertyn.co.za; 'Tinyiko Ndlovu'; 'Andrew Fawcett'; 'Jason Smit'; 'Sarah Burford'; 'Nombasa Mazwai'; 'Rob Morson (Projects)'; Johannesburg.Litigation@dentons.com; Irene Pienaar; Delia Turner; 'Prince Mudau'; dineo@pm-attorneys.co.za; zubaida@pm-attorneys.co.za; 'Irene Komape'
Subject: RE: CASE NO: 23017/2022 - ORGANISATION UNDOING TAX ABUSE NPC // THE NATIONAL ENERGY REGULATOR OF S.A 7 OTHERS and CASE NO: 23339/22 - THE GREEN CONNECTION NPC // THE NATIONAL ENERGY REGULATOR OF S.A & 5 OTHERS
Attachments: Index to Rule 53 Record - OUTA and THE GREEN CONNECTION v NERSA 23017 - 2022 and 23339-2022.doc; Redactions Analysis V2.xlsx

Dear Sirs/Ms

Attached please find the requested information comprising of the revised provisional index and the list of redacted items.

Kindly take note that all the information highlighted in green, red and orange cannot be used, published or disseminated pending finalization of a confidentiality regime, as to do so would be a violation of Karpowership's rights.

Kind Regards,

Kganedi Mashabathakga



Prince Mudau & Associates
ATTORNEYS, NOTARIES AND CONVEYANCERS

Tel: 010 224 0608
Direct line: 010 224 0643
Fax: 086 695 0882
P.O Box 31884 Braamfontein 2017
Building 2 Thornhill Office Park,
94 Bekker Street, Vorna Valley, Midrand 1685.



41

"FAI"

Delia Turner

From: kganedi@pm-attorneys.co.za
Sent: Thursday, October 27, 2022 10:42 AM
To: Andri Jennings; 'Tinyiko Ndlovu'; 'Andrew Fawcett'; 'Jason Smit'; 'Rob Morson (Projects)'; 'Nombasa Mazwai'; prince@pm-attorneys.co.za; dineo@pm-attorneys.co.za; 'Irene Komape'; 'Zubaida'
Cc: Irene Pienaar; Delia Turner; 'Carol van der Vyver | Chennells Albertyn'; fiona@chennellsalbertyn.co.za; Johannesburg.Litigation@dentons.com
Subject: RE: CASE NO: 23017/2022 - ORGANISATION UNDOING TAX ABUSE NPC // THE NATIONAL ENERGY REGULATOR OF S.A 7 OTHERS and CASE NO: 23339/22 - THE GREEN CONNECTION NPC // THE NATIONAL ENERGY REGULATOR OF S.A & 5 OTHERS - OUT015
Attachments: OUTA v NERSA - Letter 27 October 2022.pdf

Dear Sirs

Attached please find correspondence for your attention.

Kind regards,

Kganedi Mashabathakga



Tel: 010 224 0608
Fax: 086 695 0882
P.O Box 31884 Braamfontein 2017
Building 2 Thornhill Office Park,
94 Bekker Street, Vorna Valley, Midrand 1685.



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4/



Our reference: LIT/PM/MAT180
Your reference: A JENNINGS/OUT015
Date: 26 October 2022

TO: JENNINGS INCOPORATED
(REF: 691335/07000)

Dear Madam

ORGANISATION UNDOING TAX ABUSE NPC // NATIONAL ENERGY REGULATOR OF
SOUTH AFRICA AND 7 OTHERS (CASE NO 23017/2022)

1. We acknowledge receipt of your letter dated 17 October 2022.
2. Our client's instructions are as follows:
 - 2.1 Its position regarding the confidentiality regime remains the same;
 - 2.2 Having regard to the time that has lapsed since the meeting with the DJP, it is evident that the parties are unable to resolve the issue on their own; and
 - 2.3 In the circumstances, it is suggested that the parties approach the DJP and have a directive issued regarding the filing of the unredacted records.

Yours Faithfully,

PRINCE MUDAU & ASSOCIATES
(sent electronically, thus unsigned)

Delia Turner

"FA12"

From: Andri Jennings
Sent: Friday, October 28, 2022 2:27 PM
To: Sarah Burford
Cc: Tinyiko Ndlovu; Andrew Fawcett; Jason Smit; Rob Morson (Projects); Nombasa Mazwai; prince@pm-attorneys.co.za; dineo@pm-attorneys.co.za; kganedi@pm-attorneys.co.za; 'Irene Komape'; 'Zubaida'; Irene Pienaar; Delia Turner; Carol van der Vyver | Chennells Albertyn; fiona@chennellsalbertyn.co.za; Johannesburg.Litigation@dentons.com; Jason Smit
Subject: RE: CASE NO: 23017/2022 - ORGANISATION UNDOING TAX ABUSE NPC // THE NATIONAL ENERGY REGULATOR OF S.A 7 OTHERS and CASE NO: 23339/22 - THE GREEN CONNECTION NPC // THE NATIONAL ENERGY REGULATOR OF S.A & 5 OTHERS - OUT015
Attachments: LETTER TO PINSENT MASONS DATED 28.10.2022.pdf

Good day.

Please see attached hereto a letter for your attention.

Kind Regards/Vriendelike Groete,
Andri Jennings
Director/Direkteur



Head Office: 149 Anderson Street, Brooklyn, Pretoria | O: 012 110 4442
18 Ross Street, Cullinan | O: 012 110 4442
222 Smit Street, 21st Floor, Braamfontein, Johannesburg | O: 010 005 4572
21 Woodlands Drive, Country Club Estate, Building 2, Woodmead, Johannesburg | O: 011 258 8770

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From: Sarah Burford <Sarah.Burford@pinsentmasons.com>
Sent: 26 October 2022 04:27 PM
To: Andri Jennings <andri@jinc.co.za>



ATTORNEYS, NOTARIES, CONVEYANCERS & COST CONSULTANTS

OUR REFERENCE: A JENNINGS/OUT015
YOUR REFERENCE:
DATE: 28 October 2022

TO: PINSENT MASONS SOUTH AFRICA INCORPORATED
(REF: 691335/07000)

PRINCE MUDAU & ASSOCIATES
(REF: LIT/PM/MAT180)

KAPITWALA INCORPORATED t/a DENTONS SOUTH AFRICA
(REF: V JACKLIN - LEVIN/0027171.01880)

CHENELLS ALBERTYN ATTORNEYS
(REF: 11306FB/cvdv)

Sirs

ORGANISATION UNDOING TAX ABUSE NPC//NATIONAL ENERGY REGULATOR OF SOUTH AFRICA AND 7 OTHERS (23017/2022)

THE GREEN CONNECTION NPC ("GREEN CONNECTION")//NATIONAL ENERGY REGULATOR OF SOUTH AFRICA & 5 OTHERS (23339/2022)

1. We refer to your email of 26 October 2022 wherein you indicated that you are still in the process of obtaining instructions from your client pertaining to our client's "with prejudice" proposal dated 19 October 2022 regarding a confidentiality regime.

2. We note that your client who previously pressed for an expedited hearing in this matter has changed tack since its unsuccessful appeal to the DFFE and the initiation of a new EIA process. We record that our client is intent on advancing the review application and will resist any attempts by your client to delay the matter.
4. As a courtesy and in the absence of a firm undertaking as to when you will revert to us, our client is prepared to extend the period within which an answer is required from your client to close of business on Wednesday 2 November 2022.
5. Should we not have received a clear answer by then, and to avoid further unnecessary delays, our client will have no choice but to proceed with an application to compel the provision of the complete record in the review proceedings as well as for an appropriate cost order.
6. Our client's rights remain reserved in full.

TRANSMITTED ELECTRONICALLY AND UNSIGNED

Kind regards,
Andri Jennings
Director

A handwritten signature in black ink, consisting of a stylized 'A' followed by a vertical line.

Delia Turner

"FA13"

From: Tinyiko Ndlovu <Tinyiko.Ndlovu@pinsentmasons.com>
Sent: Thursday, November 3, 2022 9:42 AM
To: Carol van der Vyver | Chennells Albertyn; prince@pm-attorneys.co.za; dineo@pm-attorneys.co.za; kganedi@pm-attorneys.co.za; Andrew Fawcett; Jason Smit; Sarah Burford; Rob Morson (Projects); Nombasa Mazwai; Andri Jennings; Irene Pienaar; Delia Turner; Johannesburg.Litigation@dentons.com
Cc: 'Fiona Bester'
Subject: RE: Green Connection / NERSA and others [PM-SA.FID46323]

Dear All

Given the position that has been communicated by the applicants, it seems that an application to compel, at least from OUTA, is now inevitable.

While OUTA elects to cast sinister aspersions in its letter against our client, our client will not be drawn into an irrelevant duel nor will it litigate the substantive issues through correspondence.

However, our client considers it necessary to clarify certain key points:

- a) Our client has never given a "blanket" refusal to disclosing its confidential information. It has only requested that a suitable confidentiality regime first be put in place.
- b) It is incorrect that our client has not explained which information it considers confidential and why. A detailed excel spreadsheet was provided to both applicants (via NERSA), setting this information out as well as providing cross-references to the record. If that explanation was considered inadequate in any respect or if OUTA required further clarity, it could have sought that further clarity.
- c) At the previous case management meeting, our senior counsel (with the endorsement of the DJP) proposed that the applicants identify which confidential documents they want access to and who they would like those documents to be considered by. We have not received a response to that proposal.
- d) The applicants seek to disclose the confidential documents to persons who clearly will not be able to meaningfully contribute to the purport or effect of them. Our client cannot disclose its confidential information to individuals who are not external legal representatives or independent experts – absent an order compelling it to do so. It is apparent that this is the essence of the impasse and, as a result, our client will await the application to compel – which, needless to say, it will oppose.

Tinyiko Ndlovu
Lawyer
for Pinsent Masons

D: [+27 10 493 4587](tel:+27104934587) M: [+27 66 246 8368](tel:+27662468368) I: [294587](tel:+27214587)

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Pinsent Masons supports agile working, so please don't feel you need to respond to this email outside your working hours.

From: Carol van der Vyver | Chennells Albertyn <carol@chennellsalbertyn.co.za>
Sent: Tuesday, 01 November 2022 11:41
To: prince@pm-attorneys.co.za; dineo@pm-attorneys.co.za; kganedi@pm-attorneys.co.za; Tinyiko Ndlovu <Tinyiko.Ndlovu@pinsentmasons.com>; Andrew Fawcett <Andrew.Fawcett@pinsentmasons.com>; Jason Smit <Jason.Smit@Pinsentmasons.com>; Sarah Burford <Sarah.Burford@pinsentmasons.com>; Rob Morson (Projects) <Rob.Morson@pinsentmasons.com>; Nombasa Mazwai <Nombasa.Mazwai@pinsentmasons.com>; 'Andri Jennings' <andri@jinc.co.za>; 'Irene Pienaar' <irene@jinc.co.za>; 'Delia Turner' <delia@jinc.co.za>; Johannesburg.Litigation@dentons.com

2/

"FA14"

Delia Turner

From: Andri Jennings
Sent: Monday, August 29, 2022 10:11 AM
To: Lutendo Muneri; jason.smit@pinsentmasons.com; andrew.fawcett@pinsentmasons.com; fiona@chennellsalbertyn.co.za; prince@pm-attorneys.co.za; dineo@pm-attorneys.co.za; kgedi@pm-attorneys.co.za; Tinyiko.Ndlovu@pinsentmasions.com; Sarah.Burford@pinsentmasions.com; Rob.Morson@pinsentmasons.com; Nombasa.Mazwai@pinsentmasons.com; carol@chennellsalbertyn.co.za; Sidesha.sidesha@gmail.com; Siviwe Sidesha; Anna-Marie A. Nieuwoudt; Olebogeng Rapoo
Cc: Irene Pienaar; Delia Turner
Subject: RE: CASE NO: 23017/2022 - ORGANISATION UNDOING TAX ABUSE NPC // THE NATIONAL ENERGY REGULATOR OF S.A 7 OTHERS and CASE NO: 23339/22 - THE GREEN CONNECTION NPC // THE NATIONAL ENERGY REGULATOR OF S.A & 5 OTHERS
Attachments: FINAL LETTER TO DJP DATED 29.08.2022.pdf

Good day.

We refer to the abovementioned matter under case number: 23017/2022.

We confirm that we act on behalf of Organisation Undoing Tax Abuse NPC "OUTA" herein.

Please find attached hereto a letter for your attention.

The letter contains an introduction, OUTA's proposed agenda as well as Annexure "A" thereto.

We confirm that same will also be filed at the office of the AJP.

We trust that the above is in order.





JENNINGS

INCORPORATED

ATTORNEYS, NOTARIES, CONVEYANCERS & TRUST CONSULTANTS

OUR REFERENCE: A JENNINGS/OUT015

YOUR REFERENCE:

DATE: 29 August 2022

TO: DEPUTY JUDGE PRESIDENT
THE HONOURABLE MR JUSTICE LEDWABA

AND TO: PRINCE MUDAU & ASSOCIATES
(REF: LIT/PM/MAT180)

PINSENT MASONS SOUTH AFRICA INCORPORATED
(REF: 691335/07000)

KAPITWALA INCORPORATED t/a DENTONS SOUTH AFRICA
(REF: V JACKLIN - LEVIN/0027171.01880)

CHENELLS ALBERTYN ATTORNEYS
(REF: 11306FB/cvdv)

Sirs

AGENDA PROPOSED BY THE ORGANISATION UNDOING TAX ABUSE NPC ("OUTA") FOR CASE MANAGEMENT MEETING BEFORE THE HONOURABLE LEDWABA DJP SCHEDULED FOR 5 SEPTEMBER 2022 AT 08:30

In re: Case number 23017/2022 (OUTA v NERSA & Others)
Case number 23339/2022 (Green Connection v NERSA & Others)

Please find attached the agenda proposed by the Organisation Against Tax Abuse NPC ("OUTA"), the applicant in matter number 23017/2022 for the case management meeting scheduled for 5 September 2022 at 08:30 before the Honourable Ledwaba DJP. The agenda contains the main points for discussion, a brief background, and OUTA's position in respect of the discussion points.

The case management meeting is scheduled for the two review applications brought by OUTA and The Green Connection NPC respectively in the above Honourable Court under case number 23017/2022 and 23339/2022 against the National Energy Regulator ("NERSA") and Others.

All other parties in both the above-mentioned proceedings are copied hereto.


Kind regards,
Andri Jennings
Director





JENNINGS

INCORPORATED

ATTORNEYS, NOTARIES, CORPORATORS & COST CONSULTANTS

OUR REFERENCE: A JENNINGS/OUT015
YOUR REFERENCE:
DATE: 29 August 2022

TO: DEPUTY JUDGE PRESIDENT
THE HONOURABLE MR JUSTICE LEDWABA

AND TO: PRINCE MUDAU & ASSOCIATES
(REF: LIT/PM/MAT180)

PINSENT MASONS SOUTH AFRICA INCORPORATED
(REF: 691335/07000)

KAPITWALA INCORPORATED t/a DENTONS SOUTH AFRICA
(REF: V JACKLIN - LEVIN/0027171.01880)

CHENELLS ALBERTYN ATTORNEYS
(REF: 11306FB/cvdv)

Sirs

AGENDA PROPOSED BY THE ORGANISATION UNDOING TAX ABUSE NPC ("OUTA") FOR CASE MANAGEMENT
MEETING BEFORE THE HONOURABLE LEDWABA DJP SCHEDULED FOR 5 SEPTEMBER 2022 AT 08:30

In re: Case number 23017/2022 (OUTA v NERSA & Others)
Case number 23339/2022 (Green Connection v NERSA & Others)

1. Consolidation:

According to OUTA the parties are all in agreement that the two review applications referred to above shall be jointly heard but not consolidated. The Case Manager will be requested to confirm this and/or provide further direction in this regard.

2. Record:

- 2.1 NERSA filed a redacted record on 17 June 2022 with substantial and material parts of the record redacted, despite there being no agreement in place regarding the redaction of the record.
- 2.2 Prior to the filing of the redacted record OUTA repeatedly informed the respondents that it (OUTA) could not agree to the redaction of the record unless the respondents specifically indicated what parts they wished to redact, whereafter OUTA would be in a position to consider its position. Such parts were never identified.
- 2.3 OUTA further made suggestions in a letter dated 13 June 2022 regarding the confidential handling of the record whilst there was still a dispute about the redaction. No response was received to OUTA's suggestions and NERSA proceeded to file a redacted record on 17 June 2022. A brief list of the redactions that were compiled by OUTA is attached as annexure "A". This list is not exhaustive as OUTA does not have knowledge of the full extent of what was redacted.

A handwritten signature or set of initials, possibly 'YJ', in black ink, located in the bottom right corner of the page.

2.4 Importantly, the financial information and projected costs of the project over 20 years are material elements of the merits of OUTA's review application and have been completely redacted without motivation.

2.5 It is OUTA's view that NERSA does not comply with the provisions of Rule 53. OUTA will accordingly request the Case Manager:

2.5.1 to direct NERSA to file the complete record within 10 days;

2.5.2 should NERSA fail to file the complete record within 10 days from being directed to do so, that it be directed to file a substantive application for condonation for non-compliance with the Rules of Court within 10 days thereof;

2.5.3 in the event of NERSA filing an application for condonation, that the parties be permitted to approach the Case Manager again for purposes of setting down time periods for the filing of further papers in and hearing of the interlocutory application.

3. Special allocation:

It is OUTA's view that it is premature at this stage for an allocation to be requested whilst the dispute about the record is pending.

4/

 Jennings
Kind regards
Andri Jennings
Director





JENNINGS

INCORPORATED

ATTORNEYS, NOTARIES, OMBUDSMEN, COST CONSULTANTS

OUR REFERENCE: A JENNINGS/OUT015
YOUR REFERENCE: LIST OF REDACTED RECORDS
DATE: 29 AUGUST 2022

ANNEXURE "A" - LIST OF REDACTED RECORDS FROM RECORD RECEIVED FROM NERSA

1. Page 4 - Id numbers of directors of Karpowership
2. Page 7 - Contact details of Generation Station
3. Page 13 - Table of Content
4. Page 14 - Summary of PPA response, Key terms, and tariff structure
5. Page 15 - Financial Information
6. Page 26 - BEE Compliance Information
7. Page 28 - Support documents, Table of Content
8. Page 30 - Various items in the Table of Content
9. Page 31 - Various items in the Table of Content
10. Page 54 - Email address and names
11. Page 421, 422 - Table 1 of the Charge Rates used to calculate the tariff in terms of Schedule 9 of the Power Purchase Agreement
12. Page 438, 439 - Financial Information
13. Page 441 - Table 8, The Applicant's Charge Rates for calculating the tariff

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Andri Jennings (LLB - UP) Director | Delia Turner (LLB - UP) Associate Attorney

Cindy Pestana (LLB - UNISA) Conveyancer | Suliene van Rensburg (BA - LLB) Associate Attorney, Notary and Conveyancer

Malissa van der Linde - Candidate Legal Practitioner | Ian Jennings - Candidate Legal Practitioner

office@jinc.co.za

Head Office: 149 Anderson Street, Brooklyn, Pretoria | O: 012 110 4442

16 Persh Street, Cullinan | O: 012 110 4442

227 Smit Street, 21st Floor, Braamfontein, Johannesburg | O: 010 005 4572

21 Woodlands Drive, Country Club Estate, Building 2, Woodmead, Johannesburg | O: 011 258 5770

14. Page 442 - Paragraph 66 in its entirety together with the heading and table under paragraph 71
15. Page 443, 444 - Paragraph 82 in its entirety together with the heading
16. Page 446 - Paragraph 94 in its entirety together with the heading
17. Page 456 - Contractual Arrangement, Particulars of Fuel Supply Arrangements
18. Page 457- Attachment to Particulars of Fuel Supply Arrangements
19. Page 458 - Section E - Maintenance Programmes and Decommissioning Costs and Attachment
20. Page 459 - E3, Details of major generation station expansion and modifications planned for in the feasibility study (Dates, Costs in Rands (state year) and description)
21. Page 460 - Section F1, F2 and F3 together with attachments of Section F, Customer Profile
22. Page 461 - Summary of Power Purchase Agreement and attachments, Notes to Section F
23. Page 463 - Financial Information- Section G1, attachment of G2, G3 and attachment, G4 and attachment, Fill in table
24. Page 464 - Notes to Section G
25. Page 465 - Answers to the following questions under Section H - Human Resources Information
 - 25.1 What is the skill level for working on the project?
 - 25.2 What types of jobs will be available during construction and then during operations for the local immediate community?
26. Page 466 - Training and Powership Academy
27. Page 468 - Item 8 in the Support Documents and Table of Content



28. Page 474 - Attachment: Items 10 - 15 in the Support Documents and Table of Content
29. Page 476 - Attachment: Item 16 in Support Documents and Table of Contents
30. Page 478, 479- Various items in the Table of Content of Application for an Electricity Generation Licence in terms of the Electricity Regulation Act
31. Page 555, 556 - Table 1 indicating the charge rates used to calculate the tariff in Schedule 9 of the Power Purchase Agreement
32. Page 574 - Financial Information
33. Page 575 - Paragraph 59 to 62 in its entirety together with the heading
34. Page 576 - Paragraph 66 in its entirety together with the heading
35. Page 577 - Table and Paragraph 68 in its entirety together with the heading
36. Page 578 - Paragraph 73 and Paragraph 76 in its entirety together with the heading and with Table
37. Page 582 - Paragraph 94 in its entirety together with the heading
38. Page 1147 - Contact information of Kishoor Pitamber at Karpowership
39. Page 1148 - Details of Directors of Karpowership
40. Page 1151 - Contact information of Kishoor Pitamboor at Karpowership
41. Page 1154 - Table of Content of Particulars of Fuel Supply Arrangements
42. Page 1157 - Section F - Customer Profile, Item 4 and Item 5 Attachments and Table of Contents



43. Page 1158 - Response on Summary of Power Purchase Agreement and Key terms of the Power Purchase Agreement and tariff structure
44. Page 1159 - Section G: Financial Information - Response to G1 to G3 and table in G4
45. Page 1170 - Detailed economic development percentages that have been submitted as part of the RMIPPPPP, Detailed economic development values that have been submitted as part of the RMIPPPPP as well as Table of Contents
46. Page 1172 - Item 16 in Support Documents and Table of Contents
47. Page 1174, 1175 - Various items in Table of Contents - Supporting Documents - Karpowership Coega
48. Page 1240, 1241 - Table 1 of Charge Rates used to calculate the tariff in Schedule 9 of the Power Purchase Agreement
49. Page 1260 - Financial Information - Paragraph 51 to 53 in its entirety together with the heading
50. Page 1261 - Paragraph 59, 60 and 62 in its entirety together with the heading
51. Page 1263 - Table 8 of Applicant's charge rules for calculating the tariff using the above formulas
52. Page 1264, 1265 - Paragraph 68 and 74 in its entirety together with the heading together with table
53. Page 1268 - Paragraph 96 in its entirety together with the heading

Kind regards
Delia Turner
Attorney

