

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 23017/2022

In the matter between:

**ORGANISATION UNDOING TAX ABUSE
NPC**

Applicant

and

**THE NATIONAL ENERGY REGULATOR
OF SOUTH AFRICA**

First Respondent

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

Second Respondent

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

Third Respondent

**KARPOWERSHIP SA RICHARDS BAY (RF)
(PTY) LTD**

Fourth Respondent

KARPOWERSHIP SA (PTY) LTD

Fifth Respondent

**SECOND TO FIFTH RESPONDENTS' ANSWERING AFFIDAVIT:
APPLICATION TO COMPEL PRODUCTION OF RECORD**

I, the undersigned

MEHMET KATMER

do hereby state under oath that:

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- 1 I am an adult male director of each of the second to fifth respondents (*Karpowership*). I am duly authorized to make this affidavit to oppose the application on Karpowership's behalf.
- 2 The facts in this affidavit are within my personal knowledge unless the context indicates otherwise, and are, to the best of my belief, true. I have read the founding affidavit deposed to by Adri Jennings dated 23 January 2023.
- 3 I respond thematically to the founding affidavit and, thereafter, deal with allegations made in the individual paragraphs of the founding affidavit.
- 4 Before doing so, I briefly summarise Karpowership's grounds of opposition to the present application.

OVERVIEW

- 5 OUTA applies to compel NERSA to provide it with a "*complete, unredacted record*" in the review proceedings instituted by OUTA. Alternatively, OUTA seeks to impose an inelegant and flawed confidentiality regime of its own preference.
- 6 OUTA's application is replete with scurrilous and vexatious allegations, including accusations that Karpowership seeks to "*take the law into their own hands*"; that it "*displays a dictatorial attitude*"; and that it is "*attempt[ing] to unilaterally take over the role of the Court and bend the process to its will*".

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- 7 Karpowership will show that these and other similar allegations against it are baseless. They fail to have regard to the extensive endeavours that Karpowership and its attorneys embarked upon in good faith to avert the present litigation or, at least, to narrow the disputed issues as far as practicable. I deal with these endeavours – which OUTA has not seen fit to disclose – in detail.
- 8 Karpowership will show that for all of OUTA's criticisms of Karpowership and NERSA, the present application was not prompted by their conduct. Rather, it arises as a consequence of OUTA failing to comply with the obligations it voluntarily assumed at a case management meeting before the Acting Judge President. Those obligations entailed OUTA agreeing to identify the documents they disputed were confidential. Despite NERSA furnishing OUTA with an index to the record and a list of documents over which confidentiality was claimed and the reason for the claim, OUTA failed to comply with its undertaking. The result is that the disputed issues were not limited and the parties did not reach agreement on an appropriate confidentiality regime given the confidential nature of the information that OUTA now seeks to compel the unredacted disclosure of.
- 9 OUTA has misconceived the *onus* of proof applicable to applications of the present nature. It elected not to launch its application on the basis that it identified which documents or information the respondents' assert confidentiality over are not, in fact, confidential. It is not for Karpowership to make out such a case.
- 10 However, in order to protect Karpowership's rights, along with ensuring that Karpowership complies with the legal obligations it assumed during the Risk Mitigation Independent Power Producers Procurement Programme (*RMI4P*)

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proceedings, Karpowership will make counter-application for an order that a confidentiality regime be granted. I attach a copy of Karpowership's proposed confidentiality regime marked "A". Karpowership submits that the proposed regime is appropriate given the highly sensitive nature of the documentation and the prejudice it stands to suffer should they be disclosed publicly.

- 11 In the circumstances, Karpowership will ask that OUTA's application should be dismissed and that Karpowership's counter-application be granted, with costs.

THE FACTS

Karpowership and the RMI4P bid

- 12 The fifth respondent is a special purpose vehicle incorporated with the sole purpose of bidding for (and implementing) projects under the RMI4P. It is a partnership between Karadeniz Holdings (Pty) Ltd (*Karadeniz*) and Powergroup SA (Pty) Ltd (*Powergroup*). Karadeniz is a 51% shareholder and Powergroup is a 49% shareholder in the second respondent. Each of the second, third and fourth respondents are wholly owned subsidiaries of the fifth respondent.
- 13 Powergroup is a 100% South African black-owned special purpose vehicle.
- 14 Karadeniz is the largest floating power plant owner, operator, and builder in the world. As of 1 May 2021, the company has a consolidated installed capacity of more than 5GW including solar, geothermal, and thermal generation. It has a workforce of circa 2600 people globally.


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- 15 Karadeniz, together with its land-based operations, has 20 years of experience in the energy sector. Karadeniz has invested in floating power plants (*Powerships*) since 2009 and has 30 completed assets in its fleet.
- 16 Powerships are ship or barge-mounted, fully integrated, floating power plants. Power is fed directly into the transmission network from onboard High Voltage substations. Powerships can flexibly provide base-load, mid-merit or peak shaving electricity generation capacity to the host country's grid. Powerships have reciprocating engines on board.
- 17 Karadeniz, under its global joint venture "KARMOL", owns three Floating Storage and Regasification Units (*FSRU*). A FSRU is a floating Liquid Natural Gas (*LNG*) import terminal, which can store and regasify the LNG stored onboard. It is a vital component for the LNG supply chain. The FSRU combines the key elements of an LNG storage vessel and a regasification facility into a single unit.
- 18 Karpowership bid for a cumulative 1220MW of power generation capacity, to be provided by floating power plants (*Powerships*) at three locations: 450 MW at Coega, 450MW at Richards Bay and 320 MW at Saldanha Bay. These Powerships would use regasified LNG as fuel.
- 19 Karpowership's bid complied with the technical, financial, economic development and legal requirements of the RFP.
- 20 Karpowership's bids were successful, and it was appointed as a preferred bidder.

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The NERSA license application

- 21 On 13 April 2021, each of the second, third and fourth respondents made applications for licenses to NERSA to operate generation facilities (*license applications*) in terms of s 7 of the Electricity Regulation Act, 4 of 2006 (*ERA*).
- 22 As part of these license applications, each of the second to fourth respondents were required to submit some of their confidential information. They did this confidentially, and on a redacted basis. The information was made confidential because it is of a confidential nature, including being recognized as such in terms of the provisions of the Promotion of Access to Information Act, 2 of 2000 (*PAIA*) or the Protection of Personal Information Act, 4 of 2013 (*POPIA*) or other undertakings that Karpowership had given to the Department of Mineral Resources and Energy (*DMRE*) as part of the RMI4P.
- 23 In broad categories, the confidential information concerned, amongst others:
- 23.1 Information that Karpowership had undertaken to the DMRE to keep confidential.
- 23.2 Information of a commercially and technically sensitive nature.
- 23.3 Financial information concerning the financial profitability and feasibility of the projects.
- 23.4 Technical know-how that revealed how Karpowership operated its Powerships which amounted to a trade secret.

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- 23.5 BEE undertakings and ratios that formed part of Karpowership's technical know-how.
- 23.6 Information concerning the costs that Karpowership would incur in executing the projects which was both commercially sensitive and could prejudice third-parties such as Karpowership's suppliers.
- 23.7 Information on tariffs, their calculation and Karpowership's LNG price methodology, the disclosure of which would cause prejudice to Karpowership in South Africa as well as in other jurisdictions and expose Karpowership to a risk of its suppliers claiming damages from Karpowership.
- 24 I deal with the confidential information in greater detail later on in this affidavit.
- 25 On 22 September 2021, NERSA approved the applications made by the second, third and fourth respondents to operate generation facilities in terms of s 7 of the ERA.
- 26 On 29 October 2021, NERSA publicly published its reasons for these decisions.

Initial attempts to agree on a confidentiality regime

- 27 On 26 April 2022, OUTA instituted its review application in this Court. This was 179-days after NERSA had published the reasons for its decisions. OUTA did so without providing any explanation for why it took 179-days to institute its application in circumstances where s 7(1) of the Promotion of Administrative

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Justice Act, 3 of 2000 (PAJA) obliges OUTA to institute proceedings for judicial review “*without unreasonable delay*” and not later than 180 days of the date when OUTA became aware of NERSA’s decisions and the reasons for it.

- 28 Whether OUTA complied with its obligation in s 7(1) of PAJA to institute its review application without unreasonable delay will form part of the subject of the main application. The point for present purposes is that OUTA was content to take six months to institute its review application. OUTA’s absence of diligence will again become apparent when the timing of the present application is considered.
- 29 On 20 May 2022, Karpowership’s attorneys delivered its notice of intention to oppose the review application.
- 30 On 24 May 2022, Karpowership’s attorneys sent an email to OUTA and NERSA attached marked **AA 1**. The letter dealt with the status of the Rule 53 record and asserted a claim for confidentiality over certain documents in the following terms:

“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

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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."

31 In so doing, Karpowership legitimately exercised its rights, as well as complied with the legal obligations it assumed during the RMI4P proceedings. It did not "unilaterally decide which parts of the record should or should not be treated as confidential", "dictate the process from there" or "curtail [the rights in Rule 53] at will", as OUTA contends. Karpowership made a proposal to the other parties and requested that they articulate any concerns or suggestions they might have to take the matter forward. Karpowership initiated a discussion and provided an open platform for the parties to engage with one another on the nature and content of a mutually agreeable confidentiality regime.

32 On 27 May 2022, NERSA's attorneys responded to Karpowership's attorneys. NERSA's attorneys indicated that Karpowership's approach accorded with the approach adopted by NERSA when Karpowership had made its generation license application. NERSA would revert to its attorneys with instructions on

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which documents were agreed to be confidential when submitted by Karpowership and would communicate its stance to Karpowership. A copy the email is attached marked **AA 2**.

33 On 30 May 2022, OUTA's attorneys responded to Karpowership's attorneys' proposal. They indicated that neither OUTA nor they were in a position to agree to Karpowership's request without knowing what information was sought to be kept confidential. OUTA's attorneys requested that Karpowership's attorneys specify which documents Karpowership regarded as confidential and the reasons for this so that OUTA could consider Karpowersip's proposal. A copy the email is attached marked **AA 3**.

34 On 2 June 2022, the attorneys acting for the Green Connection (GC), a party that had brought its own review against NERSA's decisions, responded to Karpowership's attorneys' proposal. GC's attorneys requested Karpowership's attorneys to provide a list of documents that Karpowership regarded as being confidential information along with reasons why Karpowership considered the documentation or information to be confidential. GC's attorneys would only be in a position to consider agreeing to a confidentiality regime once they were in possession of this information. A copy of the letter is attached marked **AA 4**.

35 I pause to point out that the stance adopted by OUTA and GC was perplexing given that it is the information contained in documentation that is confidential. This information could feature in multiple documents and in different sections. A document may not be confidential *per se* but may include information of a confidential nature that should be identified as such and redacted.

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- 36 On 3 June 2022, Karpowership's attorneys responded indicating that Karpowership could not respond to the requests from OUTA and GC until Karpowership knew what NERSA intended on including in the record. Karpowership's attorneys indicated that on 27 May 2022, NERSA's attorneys had indicated that they were waiting for instructions on the content of the record. Karpowership's attorneys thus requested that NERSA provide an update on the record's status.
- 37 Karpowership's attorneys reiterated that it would be suitable to agree a confidentiality regime before the delivery of the record. Karpowership was prepared to assist NERSA in any way to expedite this process. Karpowership's view was that agreeing a confidentiality regime before the record is delivered would not prejudice GC or OUTA because (i) the regime contemplated would enable its attorney to seek the disclosure of relevant confidential information either with consent or through approaching the court for an order; and (ii) OUTA's affidavit already identified the information Karpowership considered confidential.
- 38 I pause to point out that the affidavit referred to in Karpowership's attorneys' letter was OUTA's founding affidavit in the review application. The founding affidavit in the review application contained, amongst others, confidential information regarding projects costs and risks; NERSA's methodology of awarding licenses; KPS financial modelling; and evidence of NERSA conducting an adequate assessment of the PPAs.
- 39 Karpowership's attorneys' letter continued to state that Karpowership would share a draft of the proposed undertaking for the parties' consideration. In the

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event that NERSA made the record available on 8 June either without agreeing to the confidentiality undertakings or in a form that otherwise violates Karpowership's rights then Karpowership would take the necessary measures.

- 40 A copy of Karpowership's attorneys' email is attached marked **AA 5**.
- 41 On 6 June 2022, OUTA's attorneys sent Karpowership's attorneys a further email requesting a response to their email of 30 May 2022. A copy of the email is attached marked **AA 6**.
- 42 OUTA's attorneys did so despite Karpowership's attorneys having already set out its stance in their email of 3 June 2022. Never-the-less, on 6 June 2022, Karpowership's attorneys responded reiterating that NERSA's attorneys were yet to revert regarding the composition of the record. Karpowership's attorneys recorded that the information requested by OUTA was not necessary for an agreement on a confidentiality undertaking as it was evident from OUTA's founding affidavit what the information pertained to. Karpowership's attorneys indicated it would be preferrable for the parties to reach agreement before the record was delivered to avoid potential interlocutory disputes which may frustrate the matter and undertook to share a draft of a proposed undertaking for OUTA to consider in the meantime.
- 43 A copy of Karpowership's attorneys' email is attached marked **AA 7**.
- 44 On 7 June 2022, OUTA's attorneys responded indicating that they were not in a position to agree to Karpowership's attorneys' request that a confidentiality

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regime is agreed upon without knowing what information is sought to be kept confidential. OUTA could not agree to a blanket confidentiality agreement and requested Karpowership's attorneys to provide the information sought in OUTA's attorneys' letter of 30 May 2022. A copy of the letter is attached marked **AA 8**.

Agreement to resolve the issue of confidentiality by way of case management

45 On 9 June 2022, Karpowership's attorneys sent a letter to the parties indicating their intention to write to the Deputy Judge President (*DJP*) requesting that the reviews instituted by OUTA and GC be case managed with the objective of having them heard jointly and on an expedited basis due to the reviews having factual, procedural and legal overlaps. Karpowerships' attorneys furnished the parties with a draft letter that they intended to send to the DJP for comment. Karpowerships' attorneys further indicated that given that the parties had been unable to agree to a confidentiality regime, Karpowership proposed that this issue also be directed by the DJP. In the interim, Karpowership requested that the record only be delivered in redacted form; being the form made available to public review by NERSA. This was necessary to protect Karpowership's rights as this information qualifies for protection under PAIA, POPIA and the terms of the RMI4P and to ensure that NERSA does not breach its own obligations under these provisions. A copy of the letter is attached marked **AA 9**.

46 On 10 June 2022, GC's attorneys responded agreeing with certain aspects of Karpowership's attorneys' letter and disagreeing with others. GC's attorneys also requested that Karpowership's attorneys provide them with a draft agreement

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pertaining to the confidentiality regime. A copy of the letter is attached marked **AA 10**.

47 On 13 June 2022, OUTA's attorneys responded with a letter that they requested be placed before the DJP. In that letter OUTA's attorneys agreed with certain aspects of Karpowership's attorneys' letter and disagreed with others. OUTA persisted with its disagreement with Karpowership's attorneys' proposal regarding confidentiality and proposed that a process be followed in the following terms:

47.1 the record be provided in unredacted form and OUTA's attorneys would not disclose the record to OUTA but would retain them and discuss them only with OUTA's appointed counsel until Karpowership had identified the information it considers confidential;

47.2 once Karpowership had clearly identified the information, OUTA's attorneys/counsel would review the information together with the reasons given for the alleged confidentiality and then comment on it; and

47.3 should there be a dispute as to confidentiality of the documents/information identified and/or its inclusion in the record, a time period would be agreed between the parties within which Karpowership could apply by way of interlocutory application for the Court to rule on the confidential nature of the documents/information. The parties would further agree time periods within which further papers in the application must be filed. Pending the outcome of the application, OUTA's attorneys would only give access to the record to OUTA's appointed counsel.

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- 48 A copy of OUTA's attorneys' letter is attached marked **AA 11**.
- 49 On 15 June 2022, OUTA's attorneys sent a letter to NERSA's attorneys recording that NERSA had failed to file the record and requested NERSA to indicate when they would receive the record in order to advise OUTA and obtain further instructions. A copy of OUTA's attorneys' letter is attached marked **AA 12**.
- 50 On 15 June 2022, NERSA's attorneys sent a letter indicating that they delay in filing the record was occasioned due to the dispute that had arisen in respect of the confidential information contained therein. NERSA's attorneys were waiting for two redacted applications from NERSA so that they could file in the meantime pending directives from the DJP which NERSA's attorneys hoped to do by 17 June 2022. A copy of the email is attached marked **AA 13**.
- 51 On 15 June 2022, OUTA's attorneys responded to NERSA's attorneys taking issue with their stance and asserted that NERSA should file the unredacted record on 17 May 2022. A copy of the email is attached marked **AA 14**.
- 52 On 15 June 2022, Karpowership's attorneys sent an email reiterating that Karpowership's confidential information could not be disclosed in any form absent a suitable confidentiality regime. NERSA was obliged to maintain the confidentiality of this information and OUTA had no automatic entitlement to it. Karpowership's attorneys accordingly disagreed with the proposal in OUTA's attorneys' letter of 13 June 2022.

- 53 Karpowership's attorneys recorded that Karpowership had offered a framework for disclosure which had been confirmed as satisfactory by the Constitutional Court and attached drafts of the framework for the parties' consideration. Karpowership's attorneys reiterated that agreement on this regime did not require Karpowership to provide a list in the form requested by OUTA as it is evident from their own papers what that information related to. With that said, Karpowership's attorneys were consulting with Karpowership as far as this was considered and would communicate their instructions as soon as they were able to.
- 54 In the meantime, Karpowership's attorneys requested that NERSA only file the record in a redacted form until such time that all the parties are able to agree on a confidentiality regime. If OUTA believed that this was not in accordance with *inter alia* rule 53 or PAJA then it was open to them to pursue their rights in terms of those provisions although Karpowership's attorneys' view was that the regimes proposed achieved an appropriate middle ground.
- 55 Karpowership's attorneys attached a draft of the letter they intended to send to the DJP with changes in track. They believed it properly represented the parties' respective positions but should there be any further objections then those could be raised with the DJP at the appropriate time. A copy of the email, along with the draft confidentiality undertakings and the draft letter to the DJP are attached marked **AA 15.1**, **AA 15.2**, **AA 15.3** and **AA 15.4**.
- 56 On 17 June 2022, NERSA's attorneys filed the non-confidential Rule 53 record.

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- 57 On 20 June 2022, Karpowership's attorneys furnished a further draft letter they intended to send to the DJP. Karpowership's attorneys reiterated that the letter fairly explained the position of all the parties. If there were any other objections to the content of the letter, then those could be addressed before the DJP. Karpowership's attorneys indicated that they awaited the parties' comments on their proposed confidentiality undertakings. Copies of the email and draft letter are attached marked **AA 16.1** and **AA 16.2**.
- 58 Shortly thereafter that day, OUTA's attorneys and GC's attorneys responded indicating that they did not agree with the content of the letter Karpowership's attorneys intended to send to the DJP. Both attorneys indicated that a formal response would follow. Copies of the emails are attached marked **AA 17.1** and **AA 17.2**. OUTA's attorneys and GC's attorneys proceeded to send letters commenting on the draft letter to the DJP later that day. Copies are attached marked **AA 18**. Karpowership's attorneys responded that day indicating that these letters would be attached to Karpowership's attorneys' letter to the DJP. A copy of Karpowership's attorneys' email is attached marked **AA 19**.
- 59 Karpowership's attorneys proceeded to send the letter to the DJP that morning attaching the objection letters from OUTA's attorneys and GC's attorneys. Copies of Karpowership's attorneys' email and enclosed letter to the DJP are attached marked **AA 20.1** and **AA 20.2**.
- 60 On 4 July 2022, OUTA's attorneys sent a letter to NERSA's attorneys taking issue with NERSA redacting portions of the record delivered on 17 June 2022. OUTA's attorneys stated that OUTA did not agree to the provision of a redacted



record and in the absence of such an agreement there was no basis on which NERSA could submit a redacted record.

- 61 OUTA's attorneys thus requested NERSA to provide them with a complete and unredacted copy of the record. OUTA's attorneys indicated that OUTA was not able nor required to supplement its founding papers until NERSA filed a complete record. OUTA's attorneys then recorded that:

"Our client [OUTA] is neither able nor required to supplement its founding papers until NERSA files a complete record. We therefore assume that all parties are in agreement that the filing of our client's supplementary founding papers should be held over until the complete and unredacted record is filed, alternatively until a Case Manager has been appointed and the issue of confidentiality of the record has been resolved through the Case Management process. If this is not the case, please notify writer hereof immediately, as our client will then have no option but to launch an application to compel NERSA to file the complete record."

- 62 Thus, OUTA's position was that:

- 62.1 OUTA would not be expected to file its supplementary founding affidavit;
- 62.2 the complete record would be filed or a case manager would resolve the issue of confidentiality through the case management process;
- 62.3 if these endeavours failed, then OUTA would have no option but to launch an application to compel NERSA to file the complete record

- 63 A copy of OUTA's attorneys' letter is attached marked **AA 21**.

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64 Later that day, GC's attorneys sent a letter in which they made common cause with OUTA's attorneys regarding the further conduct of the matter i.e that GC's supplementary founding papers would be held over until the complete record was filed or a case manager resolved the issue of confidentiality. A copy of GC's attorneys' letter is attached marked **AA 22**.

65 On 7 July 2022, NERSA's attorneys responded agreeing that the filing of the supplementary papers be held over until a case manager had been appointed and the issue of the filing of the unredacted record had been resolved.

Case management meeting with the AJP

66 On 21 July 2022, GC's attorneys responded to Karpowership's attorneys' proposal. GC indicated that while GC did not agree that the Rule 53 record should remain confidential, GC was willing to agree to an interim confidentiality regime, pending judicial determination by the Court, at the hearing of the review applications, of the issue whether the disputed parts of the Rule 53 record should remain confidential or not. GC furnished a list of persons which GC required to be privy to the complete Rule 53 record, including its attorney and counsel, along with various employees of GC and GC's expert. A copy of GC's attorneys' letter is attached marked **AA 23**.

67 On 25 July 2022, the DJP (then serving as the Acting Judge President) responded to the parties and granted a meeting on 5 September 2022. A copy of the AJP's email is attached marked **AA 24**.

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- 68 On 23 August 2022, Karpowership's attorneys responded to GC's attorneys' response. Karpowership's attorneys indicated that Karpowership was prepared to agree to a confidentiality regime but would only do so with respect to GC's external counsel and attorneys. Agreeing a confidentiality regime with the other individuals identified by GC such as its employees would be counter-productive. To the extent that GC insisted on the further disclosure then Karpowership's attorneys' view was that this issue had to be directed by the AJP at the case management meeting. A copy of the email is attached marked **AA 25**.
- 69 On 29 August 2022, OUTA's attorneys addressed a letter to the AJP. The letter also enclosed an agenda for the case management meeting scheduled for 5 September 2022. As regards the Rule 53 record, OUTA's attorneys' agenda indicated that OUTA intended to request the case manager to direct that NERSA file the complete record within 10 days, failing which NERSA should be directed to file a substantive application for non-compliance with the Rules of Court within 10 days whereafter the parties would approach the case manager for purpose of setting down time periods for the filing of further papers and hearing of the application. OUTA's agenda enclosed a list of the information that was redacted in the Rule 53 record. A copy of the letter and enclosed agenda is attached marked **AA 26**.
- 70 On 2 September 2022, GC's attorneys sent the AJP their proposed agenda for the case management meeting. GC requested the case manager to direct NERSA to disclose the unredacted Rule 53 record in full to all of the individuals listed in GC's letter of 21 July 2022 subject to these persons entering into an interim confidentiality agreement (pending judicial determination by the Court, at

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the hearing of the review applications). A copy of the letter and enclosed agenda is attached marked **AA 27**.

71 On 2 September 2022, Karpowership's attorneys sent the AJP a letter setting out their stance in advance of the case management meeting. Karpowership rejected the directions requested by OUTA and GC. Karpowership maintained its position that the information was confidential and that a confidentiality regime identical to that approved by the Constitutional Court in the *Helen Suzman* decision be adopted which limited access to the confidential part of the record to the legal representatives of the parties and one independent expert which were required to sign a confidentiality undertaking embodied in a court order. Karpowership's attorneys disagreed that the proposals advanced by OUTA and GC adequately protected Karpowership's rights.

72 Karpowership's attorneys concluded that no prejudice was suffered by OUTA and GC if the above regime was adopted. The record should 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 were of the view that certain information ought to be made available on an unrestricted basis they were free to approach the Court for relief. A copy of Karpowership's attorneys' letter is attached marked **AA 28**.

73 On 5 September 2022, the parties convened a case management meeting before the AJP. I am advised by Karpowership's attorney, Ms Sarah Burford, who was present at the meeting, that Karpowership's senior counsel proposed that OUTA

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and GC specify the redacted information they want to access and who they want it to be considered by. The AJP approved this proposal. A confirmatory affidavit from Karpowership's attorney, Ms Sarah Burford, who attended the meeting will be delivered with this affidavit to confirm these facts.

- 74 On 5 September 2022, OUTA's attorneys sent a letter to NERSA's attorneys. The letter requested NERSA's attorneys to provide a proper index to the record as well as a list of portions of the record that were redacted. OUTA's attorneys required this for purposes of identifying what has been redacted and to take proper instructions from OUTA. As soon as the index had been provided, OUTA's attorneys would be in a position to revert on the way forward regarding the proposal from Karpowership pertaining to confidentiality. A copy of OUTA's attorneys' letter is attached marked **AA 29**.
- 75 The attorneys for OUTA and NERSA proceeded to dispute whether or not NERSA had furnished a proper index in compliance with its obligation to do so. This correspondence culminated in NERSA's attorneys furnishing an index and a spreadsheet containing a list of confidential information. Copies of the email, index and enclosed spreadsheet are attached marked **AA 30.1**, **AA 30.2** and **AA 31**.
- 76 The spreadsheet attached to NERSA's attorneys' email was prepared by Karpowership's attorneys. On 8 September 2022, Karpowership's attorneys furnished NERSA's attorneys with a schedule of information that Karpowership sought to keep confidential along with reasons. Copies of the email chain

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between Karpowership's attorneys and NERSA's attorneys and the spreadsheet furnished are attached marked **AA 32** and **AA 31**.

77 On 17 October 2022, OUTA's attorneys sent a letter to the parties. The letter is attached to OUTA's founding affidavit marked **FA1(a)**. The letter indicated that OUTA was not prepared to agree to a confidential regime of the sort approved by the Constitutional Court in the *Helen Suzman* decision and proposed a confidentiality regime in the following terms:

"8 We propose an agreement between the parties on the terms as set out in paragraphs 8.1 to 8.5 below:

8.1 NERSA would 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.

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- 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."*

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- 78 OUTA concluded by indicating that should Karpowership and NERSA not be amenable to the proposal and continue to withhold the complete record unless OUTA agreed to a *Helen Suzman* type confidentiality regime then OUTA would have no alternative but to institute an application to compel the provision of the complete record. A copy of OUTA's attorneys' letter is attached marked **AA 33**.
- 79 On 26 October 2022, NERSA's attorneys responded to OUTA's attorneys' letter. NERSA's attorneys stated that NERSA's position regarding the confidentiality regime remained the same. NERSA's attorneys proposed that the parties approach the DJP and have a directive issued regarding the filing of the unredacted records.
- 80 On 3 November 2022, Karpowership's attorneys responded to OUTA's attorneys' letter. The letter is attached to OUTA's founding affidavit marked **FA13**. Karpowership's attorneys disputed various matters raised in OUTA's attorneys' letter of 17 October 2022 and indicated that Karpowership would oppose OUTA's application to compel.
- 81 Despite OUTA and NERSA having made their stance clear, OUTA proceeded to take more than a month to issue a notice in terms of Rule 30A on 12 December 2022. A copy is attached to the founding affidavit marked **FA1(c)**.
- 82 OUTA's attorneys then served the current application on 23 January 2023 – some three months after Karpowership's attorneys responded to OUTA's attorneys' letter.

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A CONFIDENTIALITY REGIME IS CLEARLY JUSTIFIED

83 At the outset, I emphasise that OUTA is mistaken regarding the *onus* of proof. OUTA failed to launch its application on the basis that the information it seeks and which NERSA redacted were, in fact, not confidential.

84 Karpowership will counter-apply at the hearing of the matter for an order that a confidentiality regime be granted.

85 In what follows I proceed to:

85.1 identify the information over which Karpowership makes a claim of confidentiality;

85.2 specify the aspects of its content that would have the allegedly prejudicial effect if publicly disclosed; and

85.3 explain why or how the disclosure would have the prejudicial or harmful effect Karpowership contends for.

86 I attach a spreadsheet marked **AA 31** summarising the information over which confidentiality is claimed, as set out below, in the order in which the information features in the Rule 53 record.

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Commercial information

87 The following information is confidential because it:

87.1 constitutes commercial information, the disclosure of which would be likely to cause harm to the commercial or financial interests of Karpowership; and

87.2 constitutes information supplied by Karpowership in confidence, the disclosure of which could also reasonably be expected to put Karpowership, its subsidiary companies, or their contracting parties at a disadvantage in contractual or other negotiations or prejudice them in commercial competition.

88 The confidentiality of this information is recognised in s 36 of PAIA.

Fuel supplier information

89 Karpowership does not claim confidentiality over the identity of its fuel supplier being Karpowership SA Fuel Services (Pty) Ltd.


90 However, the contractual arrangements with Karpowership's fuel supplier and the particulars of the fuel supply arrangements at RoD p 10, 456-457 and 1154 constitute confidential information.

91 The agreements that govern the fuel supply arrangements contain confidentiality provisions that prevent disclosure of this information and recognise that the

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information relating to the contractual arrangements arising out of these agreements is commercially sensitive.

- 92 Disclosure of this information would prejudice Karpowership, its subsidiary companies, or their contracting parties by exposing them to a breach of the confidentiality provisions in the agreements; making available what is commercially sensitive information regarding their contractual terms and pricing upon which these agreements were concluded; and exposing Karpowership to litigation and, potentially, damages and claims.
- 93 If disclosed, the redacted information would reveal the details of supply agreements which could cause Karpowership's suppliers to terminate their supply contracts with Karpowership. This would prevent Karpowership from meeting its obligations under the RMI4P.
- 94 The terms and structure of Karpowership's arrangements with its suppliers are, moreover, unique from the way in which the LNG supply market has operated previously or currently. The unique arrangement was arrived at as a product of commercial negotiation for Karpowership's projects in South Africa. Karpowership's suppliers do not want the LNG supply market to know the terms of these supply contracts which set out supply volumes, delivery arrangements, credit arrangements and pricing structure and liabilities, amongst others.
- 95 The supply contracts also contain critical price sensitive information to Karpowership. This affects the way that Karpowership can package and offer an end-to-end LNG to power solution. Karpowership's desire to build a strong

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presence in South Africa coupled with the long-term nature of the RMI4P projects, means that Karpowership structured its bid with very narrow margins and very attractive terms for the South African market. If Karpowership's competitors understand how it could structure its fuel supply arrangements to allow Karpowership to offer an LNG to power solution that is attractive to an end customer, then Karpowership's competitors would copy or duplicate Karpowership's structure, thereby removing its competitive advantage.

- 96 Karpowership would also lose its negotiating and pricing capability if its future customers knew its negotiating position, which prejudices Karpowership.

Maintenance programmes and decommissioning costs

- 97 The table containing Karpowership's maintenance programme and decommissioning costs at RoD pp 11-12, 458-459 and 1155-1156 constitute confidential information.
- 98 The information comprised part of Karpowership's bid submission in the RMI4P. This information was submitted on a confidential basis and Karpowership is prohibited from disclosing this information based on various confidentiality undertakings it has given in favour of the DMRE. Disclosure of this information would amount to a breach of these undertakings and expose Karpowership to litigation and, potentially, damages.
- 99 The level of planned availability and unplanned availability of an power generation facility, is a key term under a PPA. This term provides for the transfer

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of risk from one party to another and would expose Karpowership to payment of liquidated damages if the planned or unplanned availability guarantees set out in the PPA are not achieved. Due to Karpowership's very significant experience in the operation and maintenance of Powerships and gas fired reciprocating engines, Karpowership has developed a maintenance capability which is better than the manufacturers' recommended maintenance requirements.

100 Karpowership's superior maintenance capabilities enable Karpowership to include low levels of planned and unplanned outages in the RMI4P tender as Karpowership sought to advance a competitive and cost-effective bid to secure the RMI4P project. Karpowership would not be prepared to offer these terms to either existing customers, or new customers as it would result in increased risk transfer to Karpowership and would provide information to Karpowership's competitors about the level of availability of these assets that can be achieved once a party has the level of experience and capability developed from long term operation.

101 In particular, the table at pages 1156 and 4569 of the record contain Karpowership's decommissioning costs. These table were prepared with the collaboration of Karpowership's contractors and suppliers. Disclosure of these tables could have a direct and adverse effect on third-parties that Karpowership deals with and, which could expose Karpowership to liability for damages because the costs and fees provided by these third-parties to Karpowership are specialised, secret and have only been offered for these particular projects.

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Customer profile

102 The customer profile at RoD pp 13-14, 460 and 1157 constitutes three parts:

102.1 Network connection details;

102.2 Information regarding budget quotation; and

102.3 Information regarding transmission agreement.

103 Karpowership does not claim confidentiality over the network connection details.

104 However, Karpowership's budget quotation and the information regarding the transmission agreement are highly commercially sensitive. The budget quotation, read with other confidential information, would reveal Karpowership's costs in implementing the RMI4P projects. I reiterate that the terms on which Karpowership's bid in the RMI4P were special given Karpowership's desire to enter the South African market and the long term of the PPA agreements. These terms are not general terms that Karpowership can be expected to disclose to the public at large. These terms, if disclosed, would prejudice Karpowership's relationship with suppliers; enable its competitors to gain an unfair advantage and prejudice Karpowership in commercial negotiations with its existing or new customers.

105 This information was submitted on a confidential basis and Karpowership is prohibited from disclosing this information based on various confidentiality undertakings it has given in favour of the DMRE. Disclosure of this information

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would amount to a breach of these undertakings and expose Karpowership to litigation and, potentially, damages.

106 In particular, I emphasise that a breach of the confidentiality provisions that Karpowership entered into with Eskom could lead to withdrawal or termination of Karpowership's current offer and could result in Eskom not issuing Karpowership with a new grid connection budget or agreement as Karpowership could not comply with its key confidentiality requirements.

Key terms of the PPA and the tariff structure

107 The key terms of the power purchase agreement and tariff structure at RoD p 14, 461 and 1158 are confidential. This information was submitted on a confidential basis and Karpowership is prohibited from disclosing this information based on various confidentiality undertakings it has given in favour of the DMRE. Disclosure of this information would amount to a breach of these undertakings and expose Karpowership to litigation and, potentially, damages.

108 Generally, any business activity that Karpowership undertakes with its customers (in this case the DMRE and Eskom) and counterparties requires the exchange of information that a party considers to be confidential. Karpowership does not know specifically why the DMRE and Eskom regard certain information to be confidential but respects the claim made by their counter-party to confidentiality.

109 If Karpowership is known to not keep information that its customers assert to be confidential, and which is the subject of a confidentiality agreement, then

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Karpowership's customers, along with its partners and suppliers, will be discouraged from doing business with Karpowership because they cannot rely on it to comply with its confidentiality obligations. This adversely affects Karpowership's reputation and makes it more expensive and difficult for Karpowership to do business.

110 In addition to the RMI4P requirements, the purchasing price and any other cost or tariff related information under the PPA will prejudice Karpowership in its dealings with its competitors throughout the world. The information would be used by Karpowership's competitors to compete with Karpowership not only in South Africa but also in other jurisdictions of interest to Karpowership.

111 To exemplify this point, the PPA contains certain schedules (particularly Schedules 1, 2 and 9) which contain Karpowership's technical know-how and information and pricing/tariff. Together, this amounts to commercially sensitive information whose disclosure would reveal the profitability of Karpowership's projects. I reiterate that the terms on which Karpowership bid in the RMI4P were special given its desire to enter the South African market and the long term of the PPA agreements. These terms are not general terms that Karpowership can be expected to disclose to the public at large which would prejudice Karpowership's relationship with suppliers; enable its competitors to gain an unfair advantage and prejudice Karpowership in commercial negotiations with its existing or new customers.

112 I attach, marked **AA 34**, a copy of the confidentiality undertaking given by Karpowership in respect of the Coega Project. The undertakings given in respect

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of the Richards Bay and Saldanha Bay projects are identical and accordingly not attached but will be made available to the court at the hearing of this matter should this court require sight of them.

113 The confidentiality undertaking contains the following significant provisions:

113.1 Karpowership acknowledged that it had and would continue to receive confidential information from the DMRE, which information it undertook to keep strictly private and confidential (paragraph 3.2);

113.2 the undertakings given:

113.2.1 extended not only to information received from the DMRE but also to the fact and commercial content of Karpowership's bid submission and any commercial transaction which may flow therefrom (paragraphs 3.3.2 and 3.3.3);

113.2.2 continue until the signature by Karpowership of a wide range of project related documentation (not all of which have yet been concluded) or until Karpowership is released from the undertakings (which has not occurred) (paragraph 3.5); and

113.3 most importantly, an acknowledgment by Karpowership that the undertakings given by it are so significant that the DMRE could not be compensated, in the event of a breach thereof by Karpowership, by way of monetary damages and that Karpowership would be exposed, amongst other things, to interdictory or specific performance relief in the hands of the DMRE, for any such breach or anticipated breach.

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114 In summary, Karpowership contends that the content of AA 34 confirms the rigorous nature of the undertakings given by it and the duty imposed on Karpowership to ensure compliance with those undertakings. No discretion is granted to Karpowership to interpret or seek in any way to deviate from the undertakings given.

Financial information

115 Karpowership's financial information at RoD pp 15-16, 463-464 and 1159-1160 is confidential and commercially sensitive. It is absolutely fundamental to Karpowership's business as it explains all of the revenues and costs relating to its business; the confidential financing arrangements that Karpowership plans to enter into with lending institutions; and the cash flow of the projects along with the return that Karpowership was willing to accept given the term of the PPAs and the fact that Karpowership regarded South Africa as a key market in which it wanted to develop its business.

116 Disclosure of Karpowership's financial information will prejudice Karpowership in its dealings with its competitors throughout the world. The information would be used by Karpowership's competitors to compete with Karpowership not only in South Africa but also in other jurisdictions of interest to Karpowership.

117 For example, the data reflected in pages 15, 463 and 1159 of the record is highly confidential. If this information is disclosed, Karpowership will lose its market share and its ability to conclude profitable projects.

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118 I have explained why such information cannot be disclosed. I reiterate that the terms on which Karpowership bid in the RMI4P were special given its desire to enter the South African market and the long term of the PPA agreements. These terms are not general terms that Karpowership can be expected to disclose to the public at large. If disclosed, they would prejudice Karpowership's relationship with suppliers; enable its competitors to gain an unfair advantage and prejudice Karpowership in commercial negotiations with its existing or new customers.

119 This information was submitted on a confidential basis and Karpowership is prohibited from disclosing this information based on various confidentiality undertakings it has given in favour of the DMRE. Disclosure of this information would amount to a breach of these undertakings and expose Karpowership to litigation and, potentially, damages. I refer to the consequences of Karpowership breaching these undertakings which I have set out earlier in this affidavit.

Human resources information

120 Karpowership's human resource information contained at RoD pp 17-21, 465-468 and 1161-1165 is confidential.

121 The information comprises a trade secret. Karpowership's ability to build its technology and know-how in constructing and operating floating power stations and its ability to structure and deliver complex LNG and gas power projects in locations around the world is due to the skills and experience of its work force, the structure of the organisation and the recruitment of skilled staff who can operate in such a complex environment.

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122 Karpowership's business model is unique, and if this information is disclosed, Karpowership's business model could be copied by others to its obvious prejudice. Competitors would understand the individual skills and capabilities needed to offer Karpowership's projects; the depth of the organisational structure; and the resources needed to deliver such complex endeavours, as well as critical personal information which would allow Karpowership's competitors to attract and poach Karpowership's key staff to develop internal capacities to compete with Karpowership. This would also result in Karpowership suffering from increased inefficiency and cost in its business from the loss of key staff, as well as allow Karpowership's competitors to undermine its competitive advantage.

Broad based black economic empowerment

123 Karpowership's BEE ratios and supporting documentation, which contains detailed BEE percentages, at RoD pp 26, 473-475 and 1170 amounts to commercially sensitive information that pertain to the profitability of the project. The information also provides third parties with insight into Karpowership's business model and how Karpowership operates its Powerships.

124 The information is confidential and amounts to a commercial trade secret which, if publicly disclosed, would result in Karpowership's business model being copied by others to its obvious prejudice.

125 Karpowership generally tends not to commit to local ownership and, when it does, its ratios are not comparable to those Karpowership offered in South Africa.

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These terms were special and cannot be made generally public as it would prejudice Karpowership's relationship with suppliers; enable its competitors to gain an unfair advantage and prejudice Karpowership in commercial negotiations with its existing or new customers.

DMRE letter of appointment

126 The DMRE's letter of appointment at RoD p 28, 476 and 1171-1172 is confidential as Karpowership is prohibited from disclosing this information based on various confidentiality undertakings it has given in favour of the DMRE. Disclosure of this information would amount to a breach of these undertakings and expose Karpowership to litigation and, potentially, damages.

NERSA's report on Karpowership Richard's Bay

127 In determining Karpowership Richard's Bay's application for a generation license NERSA produced a report at RoD pp 55-107. The report contains the following confidential information.

128 The fourth respondent's shareholding structure [RoD p 63]. The names of the fourth respondent's shareholders amount to publicly available information. However, the shareholding ratios constitute commercially sensitive information that was shared with NERSA on a confidential basis in accordance with the requirements of the ERA and the RMI4P. The ratios and supporting documentation, which contains detailed BEE percentages, amounts to commercially sensitive information that pertain to the profitability of the project. The information also provides third parties with insight into Karpowership's

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business model and how Karpowership operates its Powerships. The information is confidential and amounts to a commercial trade secret which, if publicly disclosed, would result in Karpowership's business model being copied by others to its obvious prejudice.

129 A summary of the fourth respondent's fuel supply agreement [RoD p 66]. I have already explained why these agreements are confidential and how their disclosure prejudices Karpowership. The summary should be kept confidential for the same reasons.

130 A summary of the fourth respondent's financial information [RoD 66-67]. I have already explained why the financial information is confidential and how its disclosure prejudices Karpowership. The summary should be kept confidential for the same reasons.

131 A summary of the fourth respondent's tariffs [RoD 67-70]. I have already explained why the tariff structure is confidential and how its disclosure prejudices Karpowership. The summary should be kept confidential for the same reasons. In addition, the information regarding the pricing structure provided by Karpowership's suppliers is commercially sensitive and a result of negotiations between Karpowership and its suppliers. Disclosure of this information, which Karpowership provided to NERSA in confidence, would place it, its subsidiary companies, or their contracting parties at a disadvantage in contractual or other negotiations or prejudice them in commercial competition if the information were to not be kept confidential.

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132 A summary of the fourth respondent's economic information (including BEE information) [RoD 70-71]. I have already explained why the economic information is confidential and how its disclosure prejudices Karpowership. The summary should be kept confidential for the same reasons.

133 A summary of the fourth respondent's PPA [RoD pp 71-72]. I have already explained why the PPA and its terms are confidential and how its disclosure prejudices Karpowership. The summary should be kept confidential for the same reasons.

134 A summary of the fourth respondent's technical information [RoD pp 72-73]. This information amounts to trade secrets and its disclosure would prejudice Karpowership from a technical point of view. Some of the technical information amounts to the know-how of the technology being delivered by Karpowership. For example, Karpowership's heat rate and availability factor are very specific to its business model. A competitor could correlate these details to commercially sensitive outcomes, including understanding how Karpowership operates its floating power plans. This model is unique. If Karpowership's competitors had this information, they would be able to easily compete with Karpowership in any jurisdiction.

NERSA's economic development information on Karpowership Saldanha Bay

135 The economic development information pertaining to the third respondent at RoD 523-554 is confidential. This information was submitted on a confidential basis and Karpowership is prohibited from disclosing this information based on various

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confidentiality undertakings it has given in favour of the DMRE. Disclosure of this information would amount to a breach of these undertakings and expose Karpowership to litigation and, potentially, damages.

136 In addition, the information concerning the third respondent's costs constitutes sensitive commercial information and the third respondent's trade secrets. They also reveal the identity of the third respondent's key suppliers and the terms of the agreements between them.

137 Disclosure of this information would prejudice Karpowership, its subsidiary companies, or their contracting parties by exposing them to a breach of the confidentiality provisions in the agreements; making available what is commercially sensitive information regarding their contractual terms and pricing upon which these agreements were concluded; and exposing Karpowership to litigation and, potentially, damages claims.

Calculation of payments document

138 The calculation of payments document at RoD 385-417 constitutes confidential information.

139 This information was submitted on a confidential basis and Karpowership is prohibited from disclosing this information based on various confidentiality undertakings it has given in favour of the DMRE. Disclosure of this information would amount to a breach of these undertakings and expose Karpowership to litigation and, potentially, damages.

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NERSA's reasons for decision

140 In determining Karpowership's applications, NERSA produced reasons for its decision on:

140.1 Karpowership Richard's Bay's application for a generation license [RoD pp 421-446];

140.2 Karpowership Saldanha Bay's application for a generation license [RoD pp 555-582];

140.3 Karpowership Coega's application for a generation license [RoD pp 1240-1268].

141 The reasons document contains the following confidential information.

142 Company shareholding [RoD p 427, 561, 1246]. I have already explained why company shareholding structure is confidential and how its disclosure prejudices Karpowership. The summary should be kept confidential for the same reasons.

143 Summary of fuel supply agreement [RoD p 438, 573-576, 1259]. I have already explained why these agreements are confidential and how their disclosure prejudices Karpowership. The summary should be kept confidential for the same reasons.

144 Summary of financial information [RoD p 438-439, 555-556, 1260-1261]. I have already explained why the financial information is confidential and how its

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disclosure prejudices Karpowership. The summary should be kept confidential for the same reasons.

145 Summary of tariffs [RoD p 440-443, 575-579, 1240-1241, 1261-1265]. I have already explained why the tariff structure is confidential and how its disclosure prejudices Karpowership. The summary should be kept confidential for the same reasons.

146 Summary of economic information (including BEE information) [RoD p 443-444, 579, 1265-1266]. I have already explained why the economic information is confidential and how its disclosure prejudices Karpowership. The summary should be kept confidential for the same reasons.

147 Summary of PPA [RoD p 444-445, 579-581, 1266-1267]. I have already explained why the PPA and its terms are confidential and how its disclosure prejudices Karpowership. The summary should be confidential for the same reasons.

148 Summary of technical information [RoD p 445-446, 581-582, 1267-1268]. I have already explained why the technical information is confidential and how its disclosure prejudices Karpowership. The summary should be kept confidential for the same reasons.

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Personal information

149 The following information is confidential because it constitutes personal information about a third party. The confidentiality of this information is recognised in s 34 of PAIA.

150 The personal information, including name, telephone number and email address of Karpowership's contact person at RoD pp 3, 7, 54, 448, 453, 493, 1147, 1151 constitutes personal information. The names and identity number of Karpowership's current directors at RoD p 4, 449 and 1148 also constitutes personal information.

SEQUENTIAL RESPONSE

151 Against the background of the above, I now respond to averments made in the individual paragraphs of the founding affidavit.

152 Where I do not specifically deal with a contention made by OUTA, that contention must be regarded as being disputed by Karpowership.

153 **Ad paragraph 1**

153.1 I note these contentions.

154 **Ad paragraph 2**

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154.1 I deny that the deponent has personal knowledge of all of the contentions in the founding affidavit. I identify where this is the case in the sequential response below.

154.2 I deny that all of the contentions in the founding affidavit are true and correct.

155 Ad paragraphs 3 and 4

155.1 I note these contentions.

156 Ad paragraph 5

156.1 I dispute that OUTA has the requisite standing to pursue these proceedings.

156.2 In par 16 to 20 of its founding affidavit in the main application, OUTA claims standing on the basis of its asserted interest in the promotion and advocacy of human rights and democracy. It identifies objectives in clauses 3.1 and 3.2.1 of its memorandum of incorporation (MOI) that it relies upon to claim standing in these proceedings, but fails to identify how either are triggered by the decisions in question.

156.3 OUTA's case on standing boils down to the allegation that OUTA has standing to launch review proceedings where *"the legitimacy of decisions that affect the taxpayers' rights and the public interest taken by NERSA, a public entity, is challenged"*.

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156.4 However, this is not only not stated in either clause 3.1 or 3.2.1 of OUTA's MOI but is so broad that it would effectively entitle OUTA to challenge any decision taken by a public entity which ignores established principles that circumscribe the limits of legal standing in judicial review proceedings under PAJA and the principle of legality.

156.5 OUTA's asserted interest is too remote to confer OUTA with standing to bring these proceedings to impugn NERSA's decisions and, now, compel production of the record.

156.6 Further legal submissions will be made disputing OUTA's standing at the hearing.

157 Ad paragraphs 6 to 11

157.1 I admit these contentions.

158 Ad paragraphs 12 to 17

158.1 I note these contentions.

159 Ad paragraph 18

159.1 I admit that NERSA filed a redacted record in the review application.

159.2 NERSA's decision to do so was entirely appropriate, having regard to the confidential nature of the information contained in the record.

159.3 NERSA did not require any prior agreement with OUTA or condonation to do so.

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160 Ad paragraph 19

160.1 I admit that Karpowership's legal representatives endeavoured to reach agreement with OUTA regarding the status of confidential documents.

160.2 The proposal advanced by Karpowership's legal representatives was not "very restrictive" but was entirely appropriate, as demonstrated above. There is nothing unusual about a confidentiality regime being restricted to a party's legal representatives and independent experts.

161 Ad paragraph 19.1

161.1 I dispute these contentions.

161.2 The rights in Rule 53 are not unlimited. The Court will weigh an applicant's rights against the countervailing public interest which may require that the confidentiality of information be maintained. This is a balancing exercise that necessarily requires a consideration of competing interests, including that of Karpowership.

161.3 Karpowership's representatives thus spent extensive time and resources attempting to engage with OUTA's representatives to agree to a fair and reasonable confidentiality regime. These attempts, which were entirely appropriate and responsible, failed.

161.4 Karpowership did not "*unilaterally decide which parts of the record should or should not be treated as confidential*", "*dictate the process from there*" or "*curtail [the rights in Rule 53] at will*". It merely exercised its right to make a claim of confidentiality.

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162 Ad paragraph 19.2

162.1 I dispute these contentions.

162.2 OUTA puts up no evidence for how the confidentiality regime proposed by Karpowership precludes OUTA's legal representatives from taking instructions from their client.

162.3 There is nothing unusual about a confidentiality regime being limited to a parties' legal representatives and independent experts.

162.4 I maintain that a confidentiality regime in the terms proposed by Karpowership is entirely appropriate, particularly given the prejudice and harm to Karpowership if such a regime were not to be put in place.

163 Ad paragraph 19.3

163.1 I dispute these contentions.

163.2 Karpowership does not dictate to NERSA how it should perform its functions.

163.3 Karpowership is entitled to assert its rights to confidentiality and communicate its stance to NERSA.

164 Ad paragraph 19.4

164.1 I note OUTA's admission that the proper course is for the parties to first attempt to reach agreement on the status of confidential documentation. That is exactly what Karpowership attempted to do. Prior to NERSA

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producing the record, and as early as on 24 May 2022, Karpowership's attorneys already informed the parties that it would be making a claim to confidentiality and proposed that the parties reach agreement on a suitable confidentiality regime. The letter is attached to the founding affidavit marked **FA3**.

164.2 The letter was followed by extensive engagements between the parties which included Karpowership sending NERSA a detailed excel spreadsheet setting out each document over which a claim of confidentiality was made and the basis for the claim. If OUTA sought further clarity on its content, it was incumbent on OUTA to request that clarity.

164.3 The parties and the DJP then agreed at the case management meeting of 5 September 2020, that OUTA's legal representatives would identify the documents they disputed were confidential. OUTA was then furnished with an index to the record and a list of documents over which confidentiality was claimed and the reason for the claim.

164.4 OUTA failed to perform this analysis but resorted to instituting the present application.

164.5 In fact, the extensive engagements between the parties and, now, the alternative relief sought by OUTA recognises that the documents that were delivered in redacted form may be of a confidential nature that should be the subject of a confidentiality regime.

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164.6 The remainder of these contentions are disputed. The filing of an unredacted record while these processes took place has the potential to entirely defeat the purpose of attempting to agree a confidentiality regime in the first place. Likewise, any application to court for its sanction of a confidentiality regime would be premature while the parties attempted to reach agreement on the status of confidential documents. Now that these attempts have failed, Karpowership counter-applies for an appropriate confidentiality regime.

164.7 If anything, the fact that NERSA filed the record, albeit redacted in certain respects demonstrates a *bona fide* attempt by it to comply with the requirements of Rule 53.

164.8 The facts thus show that Karpowership did not “*take the law into their own hands*” and an allegation to that effect is simply scurrilous.

165 Ad paragraph 20

165.1 I admit that there is presently a stalemate between the parties.

165.2 The remainder of these contentions are disputed for the reasons I have already set out.

166 Ad paragraphs 21 and 22

166.1 I note these contentions.

166.2 I have responded to OUTA’s “with prejudice” proposal in its letter of 17 October 2022.

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166.3 I dispute that OUTA complied with the agreement reached between the parties at the case management meeting of 5 September 2022.

167 Ad paragraph 23

167.1 I admit that Karpowership rejected OUTA's proposal in its attorneys' letter of 3 November 2022.

167.2 I have explained why OUTA's proposed confidentiality regime is unsuitable.

168 Ad paragraph 24

168.1 I admit that Karpowership does not consent to the disclosure of the confidential information contained in the Rule 53 record in the absence of a confidentiality regime.

168.2 Karpowership motivated for this and put up a confidentiality regime that it regarded to be suitable. In doing so, Karpowership is exercised its rights. It did not "*seek to dictate the process and determine the content of the record*" or not to "*yield in any way*".

169 Ad paragraph 25

169.1 These contentions are disputed.

169.2 There is no "*violation of the constitutional objectives of transparency and accountability*" nor a disregard "*for the provisions of the rules of court as well as for the court*". Rule 53 is not unlimited. An applicant's rights must

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be weighed against the countervailing public interest which may require that the confidentiality of information be maintained. This is a balancing exercise that necessarily requires a consideration of competing interests, including that of Karpowership.

170 Ad paragraphs 26 and 27

170.1 These contentions are noted. I note that the Rule 30A notice fails to indicate which portions of the redacted record OUTA disputes as being of a non-confidential nature.

171 Ad paragraphs 28 to 31

171.1 I admit these contentions.

172 Ad paragraph 32

172.1 On 22 September 2021, NERSA approved the applications made by the third, fourth and fifth respondents to operate generation facilities in terms of s 7 of the ERA.

172.2 On 29 October 2021, NERSA published its reasons for these decisions.

172.3 OUTA fails to provide any explanation for the steps it took after receiving NERSA's reasons in order to enable this Court to determine if OUTA complied with its obligation in s 7(1) of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA) to institute these proceedings without

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unreasonable delay and not later than 180 days of the date when OUTA became aware of NERSA's decisions and the reasons for it.

173 Ad paragraphs 33 to 37

173.1 I note these contentions.

173.2 OUTA fails to indicate that at the case management meeting of 5 September 2020, the parties and the DJP agreed to identify the documents they disputed were confidential. OUTA was then furnished with an index to the record and a list of documents over which confidentiality was claimed and the reason for the claim.

173.3 OUTA failed to perform this analysis but resorted to instituting the present application.

174 Ad paragraph 38

174.1 I note these contentions.

174.2 Karpowership submitted the spreadsheet to NERSA. I have explained the circumstances in which this was done earlier in this affidavit.

174.3 The redactions were appropriate given that the record contained Karpowership's confidential information.

175 Ad paragraph 39

175.1 I dispute these contentions.

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175.2 OUTA puts up no evidence for how the confidentiality regime proposed by Karpowership precludes OUTA's legal representatives from taking instructions from their client.

175.3 There is nothing unusual about a confidentiality regime being limited to a parties' legal representatives and independent experts.

175.4 I maintain that a confidentiality regime in the terms proposed by Karpowership is entirely appropriate, particularly given the prejudice and harm to Karpowership if such a regime were not to be put in place.

176 Ad paragraphs 41 to 42

176.1 I repeat that the parties first attempted to reach agreement on the status of confidential documentation. There were extensive engagements between the parties which included Karpowership sending NERSA a detailed excel spreadsheet setting out each document over which a claim of confidentiality was made and the basis for the claim. The parties and the DJP then agreed at the case management meeting of 5 September 2020, that OUTA's legal representatives would identify the documents they disputed were confidential. OUTA was then furnished with an index to the record and a list of documents over which confidentiality was claimed and the reason for the claim. OUTA failed to perform this analysis but resorted to instituting the present application.

176.2 In fact, the extensive engagements between the parties and, now, the alternative relief sought by OUTA recognises that the documents that were

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delivered in redacted form may be of a confidential nature that should be the subject of a confidentiality regime.

176.3 The remainder of these contentions are disputed. The filing of an unredacted record while these processes took place has the potential to entirely defeat the purpose of attempting to agree a confidentiality regime in the first place. Likewise, any application to court for its sanction of a confidentiality regime would be premature while the parties attempted to reach agreement on the status of confidential documents. Now that these attempts have failed, Karpowership counter-applies for an appropriate confidentiality regime.

176.4 If anything, the fact that NERSA filed the record, albeit redacted in certain respects demonstrates a *bona fide* attempt by it to comply with the requirements of Rule 53.

176.5 Karpowership did not dictate the terms of a confidentiality arrangement.

177 Ad paragraphs 43 to 45

177.1 Karpowership does not accept that the opinions of Dr Grové Steyn and Mr Adam Roff are relevant or correct and will address them in its answering affidavit in the review application.

177.2 Karpowership's proposed confidentiality regime entitles independent experts to access this information in order to furnish their opinion, albeit subject to a confidentiality regime.

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177.3 OUTA's contention that it intends to rely on an independent expert opinion thus takes the matter no further.

178 Ad paragraphs 46 to 52

178.1 I note these contentions.

178.2 Karpowership does not accept that OUTA's contentions are relevant or correct and will address them in its answering affidavit in the review application.

178.3 Karpowership's proposed confidentiality regime entitles OUTA's legal representatives to access this information and prepare a supplementary founding affidavit, albeit subject to a confidentiality regime.

178.4 OUTA's contention that it intends to rely on this information thus takes the matter no further.

179 Ad paragraph 53

179.1 I dispute these contentions for the reasons already stated.

180 Ad paragraph 54

180.1 I admit these contentions.

181 Ad paragraph 55

181.1 I dispute these contentions.

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181.2 The parties and the DJP agreed at the case management meeting of 5 September 2020, that OUTA's legal representatives would identify the documents they disputed were confidential. OUTA was then furnished with an index to the record and a list of documents over which confidentiality was claimed and the reason for the claim.

181.3 OUTA failed to perform this analysis but resorted to instituting the present application.

182 Ad paragraphs 56 to 58

182.1 I admit that Karpowership's attorneys sent Annexure "FA9".

182.2 I dispute the remainder of these contentions.

182.3 These contentions will be addressed in argument on Karpowership's behalf.

183 Ad paragraphs 59 to 60

183.1 Karpowership's attorneys did not purport to exclude independent experts from accessing the confidential record. I refer to the correspondence I have summarised above, including the letters of 24 May 2022 and 3 November 2022.

184 Ad paragraph 61

184.1 I dispute that OUTA could not, using the record delivered by NERSA, make progress with the discussions. It is clear that the information provided by



NERSA was sufficient for OUTA to make several proposals regarding the status of confidential documentation prior to receipt of the list of redacted items received on 12 September 2022. I refer to OUTA's letter dated 29 August 2022 as an example of this.

184.2 Regardless, OUTA's representatives undertook at the case management meeting of 5 September 2020 to identify the documents they disputed were confidential. OUTA was then furnished with an index to the record and a list of documents over which confidentiality was claimed and the reason for the claim. OUTA has since failed to perform this analysis but elected instead to resort to litigation.

185 Ad paragraphs 62 and 63

185.1 I deny that the spreadsheet is confusing.

185.2 In any event, I have elaborated on its content earlier in this affidavit.

186 Ad paragraphs 64 to 67

186.1 OUTA misses the point. The reference to the provisions of PAIA and POPIA is not an invocation of those sections but reflects a statutory recognition that the categories of information specified therein are, by their nature, confidential.

187 Ad paragraph 68

187.1 I deny that the content of the spreadsheet attached to the founding affidavit marked **FA2** contains an "*insufficient and generic justification*".

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187.2 The document was more than sufficient to enable OUTA to conduct the exercise it undertook to perform at the case management meeting of 5 September 2022. OUTA cannot, having failed to do so, now claim that the spreadsheet was inadequate.

187.3 I have already elaborated as to why the information OUTA seeks is confidential.

188 Ad paragraphs 69 and 70

188.1 I note these contentions.

188.2 NERSA is best placed to address what its attorney sought to convey.

189 Ad paragraph 72

189.1 I dispute these contentions. I have set out the grave prejudice that will befall Karpowership is a confidentiality regime is not adopted.

189.2 OUTA's engagements with NERSA were in the context of OUTA's obligations arising from the case management meeting of 5 September 2022.

189.3 I have already elaborated as to why the information OUTA seeks is confidential.

190 Ad paragraph 73

190.1 I dispute these contentions.

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191 Ad paragraphs 74 to 75

191.1 I note these contentions.

192 Ad paragraph 76

192.1 I dispute that the proposal would not have caused prejudice to Karpowership.

192.2 The proposed confidentiality regime was viewed unsuitable for various reasons.

192.3 The individuals proposed by OUTA to be privy to the confidential Record included members of OUTA. At this juncture, Karpowership had already noted its objection with OUTA to such persons being privy to the unredacted record. This proposal evidences that OUTA was not, as it claims, attempting to reach an amicable solution between the parties on the confidentiality regime, but attempting to force NERSA and Karpowership into agreeing to a confidentiality regime over which NERSA had no control.

192.4 The proposed confidentiality regime allowed for OUTA to appoint additional independent experts at will, with no mechanism compelling OUTA to first seek the other parties' consent for OUTA to appoint any additional independent experts. This therefore implied OUTA was free to appoint any third party as an 'expert' to be privy to the confidential record, without any need to justify the necessity of any additional independent expert(s).

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192.5 The proposed procedure of essentially envisaged multiple sets of affidavits to be perused by NERSA and Karpowership's attorneys. To review and comment on a 'draft' supplementary founding affidavit, only to again review a 'final' supplementary founding affidavit, results in a duplication of efforts and the incurrence of additional legal fees. It is inevitable that NERSA and Karpowership would have concerns regarding the nature of sensitive information being exposed or inferred in the supplementary founding affidavit. However, the proposal did not provide for OUTA to act in accordance with the concerns raised by Karpowership or NERSA and amend its supplementary founding affidavit accordingly.

192.6 Finally, clause 8.5 of the proposed regime states that if the parties could not agree as to whether a document should be deemed confidential or not, the parties should then approach a judge or the court at a closed preliminary hearing for the matter to be argued. There are several issues with this proposal alone. This presumes that there will be only one document for which confidentiality will be contested, which is highly unlikely to be the case. Preliminary hearings are costly for all parties involved, and will compound the stagnation of the main matter. Furthermore, should a document be deemed confidential by the presiding judge, this will therefore require the amendment of the supplementary founding affidavit. This further amendment will therefore require another round of reviews by NERSA and Karpowership's attorneys. There is also no appeal mechanism (which would also compound delays) if any of the parties disagreed with the ruling made by the judge or the court.

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193 Ad paragraph 77

193.1 I note these contentions.

194 Ad paragraph 78

194.1 I note these contentions which NERSA is best placed to respond to.

195 Ad paragraph 79

195.1 I dispute these contentions.

195.2 NERSA was rightly concerned with the violation of Karpowership's rights, given that it was Karpowership's confidential information that was contained in the record and Karpowership had in fact asserted a claim of confidentiality over that information.

196 Ad paragraph 80

196.1 I note these contentions which NERSA is best placed to respond to.

197 Ad paragraph 81

197.1 I note these contentions.

197.2 I have already addressed the correspondence exchanged with OUTA.

198 Ad paragraph 82

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198.1 The confidentiality regime sought by Karpowership provides for legal representatives and independent experts to access confidential information.

198.2 I do not accept that OUTA's employees require access to the confidential information. OUTA provides no indication as to why or how OUTA's employees are "*able and required to meaningfully contribute to OUTA's review application*". No indication is provided as to why these individuals require access to Karpowership's confidential information or why legal representatives and independent experts would not be able to adequately represent OUTA's interests in the litigation.

198.3 I repeat that there is nothing unusual about a confidentiality regime being restricted to a party's legal representatives and independent experts.

199 Ad paragraph 83

199.1 I dispute these contentions.

199.2 I have already refuted the contentions that Karpowership "*displays a dictatorial attitude*". This is not borne out by the parties' engagements and Karpowership's attempts to engage the parties regarding an appropriate confidentiality regime.

200 Ad paragraphs 84 to 85

200.1 I dispute these contentions.

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200.2 Karpowership is not being “*the judge in its own cause*” nor is it “*attempt[ing] to unilaterally take over the role of the Court and bend the process to its will*”.

200.3 Karpowership’s legal representatives spent significant time and resources in a *bona fide* endeavour to reach agreement with OUTA regarding the status of confidential documents. OUTA then failed to comply with the agreement between the parties and the DJP at the case management meeting on 5 September 2022.

201 Ad paragraphs 86 to 87

201.1 I dispute these contentions.

201.2 OUTA’s contentions are contradicted by the letter sent by its own attorneys after the case management meeting on 5 September 2022 wherein OUTA’s attorneys requested NERSA’s attorneys to provide a proper index to the record as well as a list of portions of the record that were redacted. OUTA’s attorneys required this for purposes of identifying what has been redacted and to take proper instructions from OUTA. As soon as the index had been provided, OUTA’s attorneys would be in a position to revert on the way forward regarding the proposal from Karpowership pertaining to confidentiality. Thereafter, on 17 October 2022, OUTA’s attorneys sent a letter proposing a confidentiality regime akin to that employed in *SANRAL* be adopted.

201.3 OUTA’s attorney’s letters thus confirm Karpowership’s version of what transpired at the case management meeting of 5 September 2022.

202 Ad paragraph 88

202.1 I dispute these contentions.

202.2 Karpowership is not "*attempting to dictate the process*".

202.3 Karpowership's legal representatives spent significant time and resources in a *bona fide* endeavour to reach agreement with OUTA regarding the status of confidential documents. OUTA then failed to comply with the agreement between the parties and the DJP at the case management meeting on 5 September 2022.

202.4 OUTA is mistaken regarding the *onus* of proof. OUTA failed to launch its application on the basis that the documents it seeks and which it identified in its founding papers were, in fact, not confidential. It is not for Karpowership to make out such a case.

203 Ad paragraph 89 and 94

203.1 I dispute these contentions.

203.2 Rule 53 is not unlimited. An applicant's rights must be weighed against the countervailing public interest which may require that the confidentiality of information be maintained. This is a balancing exercise that necessarily requires a consideration of competing interests, including that of Karpowership.

203.3 The public distribution of Karpowership's confidential information in disregard of its rights will discourage other international companies from

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investing and participating in processes such as the RMI4P. The attraction of international investment and preservation of confidential information serves the public interest and the South African public at large.

204 Ad paragraph 90

204.1 I dispute these contentions. OUTA is mistaken regarding the *onus* of proof.

OUTA failed to launch its application on the basis that the documents it seeks and which it identified in its founding papers were, in fact, not confidential.

205 Ad paragraph 91

205.1 I dispute these contentions which I have already addressed in this affidavit.

205.2 Karpowership is not attempting to *"dictate the process"* or *"unilaterally decide who can or cannot 'meaningfully' contribute to the matter and who may or may not have access to the record"*.

206 Ad paragraphs 92 and 93

206.1 I dispute these contentions which I have already addressed in this affidavit.

206.2 They will be addressed further by Karpowership's legal representatives in argument.

207 Ad paragraph 96

207.1 I dispute these contentions which I have already addressed in this affidavit.

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207.2 As is demonstrated in paragraphs 192.1 to 192.6 above, the confidentiality regime proposed by OUTA was wholly inappropriate in respect of protecting Karpowership's confidential information.

208 Ad paragraphs 97 to 99

208.1 I dispute these contentions.

208.2 I have already shown OUTA's attempts to malign Karpowership to be without factual substance earlier in this affidavit.

208.3 OUTA's application is precipitous and disregards the parties' agreement reached at the case management meeting of 5 September 2022.

208.4 Karpowership is legitimately exercising its rights, as well as complying with the legal obligations it assumed during the RMI4P proceedings.

208.5 There is no basis for a punitive costs order against Karpowership.

209 Ad paragraph 100

209.1 OUTA has no genuine legal interest in these proceedings and, in pursuing this application, reneged on the agreement its representatives agreed to at the case management meeting of 5 September 2022.

209.2 The application the application should be dismissed and Karpowership's counter-application be granted, with costs.

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WHEREFORE Karpowership prays that the application be dismissed and Karpowership's counter-application be granted, with costs.

MEHMET KATMER

THUS SIGNED AND SWORN TO before me at Sandton on this the 28th day of March ~~February~~ 2023 by the deponent who acknowledges that he knows and understands the contents of this affidavit; that it is the truth to the best of his knowledge and belief and that he has no objection to taking the prescribed oath and regards the same as binding on his conscience and the administration of the oath complied with the Regulations contained in Government Gazette No. R1258 of 21 July 1972, as amended.

COMMISSIONER OF OATHS

EX OFFICIO:

FULL NAMES:

PHYSICAL ADDRESS:

DESIGNATION:

Boitumelo Rammala
The Central, 96 Rivonia Road
Sandton, Johannesburg, 2196

Commissioner of Oaths
Ex-Officio / Practising Attorney R.S.A.

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

CASE NO: 23339/2022

In the matter between:

**ORGANISATION UNDOING TAX ABUSE
NPC**

Applicant

and

**THE NATIONAL ENERGY REGULATOR
OF SOUTH AFRICA**

First Respondent

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

Second Respondent

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

Third Respondent

**KARPOWERSHIP SA RICHARDS BAY (RF)
(PTY) LTD**

Fourth Respondent

KARPOWERSHIP SA (PTY) LTD

Fifth Respondent

**SECOND TO FIFTH RESPONDENTS' ANSWERING AFFIDAVIT:
NOTICE OF COUNTER-APPLICATION**

TAKE NOTICE THAT at the hearing of the matter the second to fifth respondents will make application for the following relief:

- 1 The relief sought by the applicant in the main application is dismissed with costs, such costs to include the costs of two counsel.

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- 2 The first respondent shall make available to the applicant's legal representatives the record of proceedings under the above case number subject to, and in accordance with, the confidentiality regiment attached marked Annexure "A".
- 3 The applicant is ordered to pay the costs of the counter application, such costs to include the costs of two counsel.
- 4 Further and/or alternative relief.

TAKE NOTICE FURTHER THAT the accompanying affidavit of **MEHMET KATMER**, together with the annexures thereto, will be used in support of the relief sought herein.

TAKE NOTICE FURTHER THAT the second to fifth respondents have appointed the offices of **PINSENT MASONS SOUTH AFRICA INC** at the below mentioned address, at which they will accept notice and service of all process and documents in this application.

TAKE NOTICE FURTHER THAT if the applicant intends opposing the relief sought it is required to:

- 1 notify the second to fifth respondents' attorneys in writing within five days of service of this counter-application;
- 2 appoint in such notification an address referred to in Rule 6(5)(b) at which they will accept notice and service of all documents in these proceedings; and

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- 3 file their answering affidavits, if any, within 15 days of filing their notices of intention to oppose.

DATED AT _____ ON THIS THE ____ DAY OF MARCH 2023.

PINSENT MASONS SOUTH AFRICA INC
Second to fifth respondents' attorneys

To:
THE REGISTRAR
High Court of South Africa
Gauteng Division, Pretoria

And to:
JENNINGS INCORPORATED
Applicant's Attorneys

Service by hand and by email

And to:
PRINCE MUDAU & ASSOCIATES
First Respondent's Attorneys

Service by hand and by email

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ANNEXURE “A” – CONFIDENTIALITY REGIME**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA****CASE NO: 23017/2022**

In the matter between:

**ORGANISATION UNDOING TAX ABUSE
NPC**

Applicant

and

**THE NATIONAL ENERGY REGULATOR
OF SOUTH AFRICA**

First Respondent

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

Second Respondent

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

Third Respondent

**KARPOWERSHIP SA RICHARDS BAY (RF)
(PTY) LTD**

Fourth Respondent

KARPOWERSHIP SA (PTY) LTD

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

Eighth Respondent

DRAFT ORDER

IT IS ORDERED THAT:

- 1 In this order, the following expressions shall bear the following meanings and related expressions shall bear corresponding meanings:

- 1.1 **"Applicant"** means the Organisation Undoing Tax Abuse NPC, the applicant in the Review Application;
- 1.2 **"Confidential Information"** means information that first to fifth respondents assert was submitted in confidence; and/or is confidential to one or more of them, has a particular economic value, and is not generally available to or known by others, and includes the information set out in annexure **AA 31** to the second to fifth respondents' answering affidavit dated 28 March 2023
- 1.3 **"Confidentiality Undertaking"** means a confidentiality undertaking which is substantially in the form of Annexure "X" hereto;
- 1.4 **"Legal Representatives"** means the counsel and attorneys of record (including correspondent attorneys) representing the Applicant or any of the Respondents and such other parties that may be granted leave to intervene in the proceedings who have signed the Confidentiality Undertaking;
- 1.5 **"Independent Experts"** means expert witnesses who provide independent assistance to the Court by way of



objective, unbiased opinion in relation to matters within their expertise uninfluenced as to form or content by the exigencies of the litigation and who have signed the Confidentiality Undertaking;

1.6 **"Permitted Parties"**

means:

1. the Judge(s) of the Pretoria High Court presiding over the Review Application and their staff;
2. the Registrar of the Pretoria High Court and his or her staff;
3. the Judges of the Court presiding over any appeal which may be brought in relation to the Review Application and their staff, and the Registrar and staff of such court;
4. the Legal Representatives;
5. the Independent Experts;
6. owners of the Confidential Information who shall be permitted access only to their own confidential information and not that of the other Parties;
7. such other persons as may be authorized, with prior leave of the court;



- 1.7 **"Pleading"** means any affidavit, any annexure to an affidavit or any other pleading filed by the Applicant, the Respondents and/or any other party in the Review Application;
- 1.8 **"Review Application"** means the review application currently pending before the Pretoria High Court under case number 23339/2022;
- 1.9 **"Record"** means the record of proceedings as required to be furnished in terms of Uniform Rule of Court 53 in the Review Application, and includes confidential and non-confidential information in any form;
- 1.10 **"Respondents"** means the respondents in the Review Application.
- 2 When dispatching the Record in terms of Rule 53, the first respondent shall dispatch both:
- 2.1 a non-confidential version of the Record (**"the Non-confidential Record"**); and
- 2.2 a confidential version of the Record (**"the Confidential Record"**).
- 3 The first respondent shall dispatch the Record as contemplated in paragraph 2 above within 15 (fifteen) days of the date of this order.

- 4 The Non-confidential Record will contain all documents forming part of the Record, save for the Confidential Information which shall be expunged therefrom.
- 5 Any Pleading filed by or on behalf of the Applicant or any of the Respondents will be filed and served in two versions, namely:
 - 5.1 a confidential version in which reference is made to the Confidential Information, which references shall be marked "confidential" (**"the Confidential Pleadings"**); and
 - 5.2 a non-confidential version from which all references to the Confidential Information have been expunged.
- 6 No person other than a Permitted Party shall have access to the Confidential Record and the Confidential Pleadings.
- 7 The Registrar shall keep the Confidential Record and the Confidential Pleadings separately and shall not disclose them to any person save for a Permitted Party.
- 8 At any hearing of the Review Application (and any appeal arising therefrom), the Applicant and the Respondents shall utilise their best endeavours to procure that where any argument requires disclosure of the Confidential Information and upon the request by counsel for a ruling to this effect by the Court, only Permitted Parties shall be present in the Court during such disclosure of the Confidential Information.

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- 9 Should circumstances require, any of the Applicant and/or the Respondents and/or any party that may be subsequently admitted to the proceedings may apply to the Court for an amendment to this Order.
- 10 Should a dispute emerge between the parties regarding the interpretation or effect of this Order and should the parties be unable to resolve such dispute, any party may on notice to the other parties, have the right to apply to a Judge in chambers for a ruling on the issue.
- 11 This Order is itself is not confidential.

BY ORDER OF THE COURT

THE REGISTRAR

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ANNEXURE "X" – CONFIDENTIALITY UNDERTAKING

I, the undersigned:

do hereby state that:

1 I am _____ with registered address at _____.

1.1 I am _____ in the the review application currently pending before the Pretoria High Court under case number 23339/2022 (*the Review Application*).

2 After signature of this undertaking, _____ will be provided with access to certain information which is confidential to one or more of the Respondents in the Review Application.

3 Having regard to the fact that the Confidential Information is proprietary to one or more of the Applicant and Respondents, has a particular economic value, is not generally available to or known by others, _____ understands the necessity of protecting the Confidential Information in the manner contemplated in this undertaking.

4 _____ hereby unconditionally and irrevocably undertakes as follows:

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- 4.1 _____ will treat the Confidential Information as strictly confidential;
- 4.2 Without limiting the generality of this undertaking, _____ will not (in any manner or form, or to any extent whatsoever) divulge the Confidential Information or permit it to be divulged to any person except the Permitted Parties as defined in the order of the Pretoria High Court dated _____;
- 4.3 Save for the purpose of use in the course of the Review Application (including any appeal), _____ shall not copy the Confidential Information or any portion thereof or permit it to be copied (in any manner or to any extent) nor shall _____ make any notes, summaries or annotations of the Confidential Information or permit such notes, annotations or summaries to be made;
- 4.4 Upon completion of the Review Application (including any appeal), _____ shall continue to keep confidential all Confidential Information in their possession, including without limitation, all notes (including notes made in electronic form), summaries and annotations made by _____ and Confidential Information which was made available to _____ in electronic form.
- 5 These undertakings are given by me, _____, on behalf of _____ to each of the Respondents.

Signed at **SANDTON** on this the _____ day of **MARCH** 2023.

NAME: _____

As witnesses:

1. _____

2. _____

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