IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case no: 23017/2022

In the application to compel between:

ORGANISATION UNDOING TAX ABUSE NPC **(Registration no: 2012/064213/08)**	**Applicant**
and	
THE NATIONAL ENERGY REGULATOR OF SOUTH AFRICA	**First Respondent**
KARPOWERSHIP SA COEGA (RF) (PTY) LTD **(Registration no: 2020/754336/07)**	**Second Respondent**
KARPOWERSHIP SA SALDANHA BAY (RF) (PTY) LTD **(Registration no: 2020/754347/07)**	**Third Respondent**
KARPOWERSHIP SA RICHARDS BAY (RF) (PTY) LTD **(Registration no: 2020/754352/07)**	**Fourth Respondent**
KARPOWERSHIP SA (PTY) LTD **(Registration no: 2019/537869/07)**	**Fifth Respondent**

IN RE: THE MAIN REVIEW APPLICATION BETWEEN:

ORGANISATION UNDOING TAX ABUSE NPC **(Registration no: 2012/064213/08)**	**Applicant**
and	
THE NATIONAL ENERGY REGULATOR OF SOUTH AFRICA	**First Respondent**

KARPOWERSHIP SA COEGA (RF) (PTY) LTD (Registration no: 2020/754336/07)	**Second Respondent**
KARPOWERSHIP SA SALDANHA BAY (RF) (PTY) LTD (Registration no: 2020/754347/07)	**Third Respondent**
KARPOWERSHIP SA RICHARDS BAY (RF) (PTY) LTD (Registration no: 2020/754352/07)	**Fourth Respondent**
KARPOWERSHIP SA (PTY) LTD (Registration no: 2019/537869/07)	**Fifth Respondent**
MINISTER OF MINERAL RESOURCES AND ENERGY N.O.	**Sixth Respondent**
MINISTER OF FORESTRY, FISHERIES, AND THE ENVIRONMENT N.O.	**Seventh Respondent**
ESKOM HOLDINGS (SOC) LTD (Registration no: 2002/015527/30)	**Eighth Respondent**

APPLICANT'S REPLYING AFFIDAVIT IN THE APPLICATION TO COMPEL PRODUCTION OF THE FULL RECORD AND ITS ANSWERING AFFIDAVIT IN THE COUNTER APPLICATION

I, the undersigned,

ANDRI JENNINGS

do hereby make oath and say:

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

2. I am the attorney of record of the applicant in this matter being the ORGANISATION UNDOING TAX ABUSE NPC ("**OUTA**"). I deposed to the founding affidavit and depose to this affidavit on the instruction of OUTA. As a result of my aforesaid involvement, I have personal knowledge of the facts deposed to herein which are, to the best of my knowledge and belief, both true and correct.

3. Submissions of a legal nature are made in accordance with advice received by the applicant and will be expanded upon at the hearing of the matter.

4. This affidavit is OUTA's -

   4.1. replying affidavit to the answering affidavits filed by, respectively, the first respondent ("**NERSA**") and the second to fifth respondents (collectively referred to as "**Karpowership**") in the application to compel; and

   4.2. answering affidavit in opposition to the counter-application brought by Karpowership wherein it seeks to impose a very restrictive confidentiality regime in respect of the documents to be included in the record which OUTA seeks to compel. OUTA's stance is that such a restrictive confidentiality regime is not warranted in this case.

5. In this affidavit, I shall first reply to the allegations in NERSA's answering affidavit and thereafter answer to the allegations in support of the counter application and reply to Karpowership's answering affidavit. This affidavit is accordingly structured as follows:

a) *Ad seriatim* reply to NERSA's answering affidavit.

b) *Ad seriatim* response to the first part of Karpowership's answering affidavit contained in paragraphs 1 to 150 thereof ("Part I"), which contains Karpowership's version of events and reasons advanced for the confidentiality as alleged. This part of the affidavit also serves to support Karpowership's counter-application.

c) *Ad seriatim* reply to the second part of Karpowership's answering affidavit contained in paragraphs 151 to 209 thereof ("Part II"), which contains Karpowership's sequential response to my founding affidavit.

A. *AD SERIATIM* REPLY TO NERSA'S ANSWERING AFFIDAVIT:

Ad paragraph 1 (including sub-paragraphs):

6. I deny that the allegations contained in NERSA's answering affidavit are true and correct for reasons that will appear more fully below.

Ad paragraph 2:

7. I deny that the applicant *"made up"* any allegations and that the facts deposed to in my founding affidavit are *"misconstrued"*. I shall deal with specific allegations of this nature in reply to the paragraphs where they appear.

Ad paragraph 3 (including sub-paragraphs):

8. I take note of the structure of NERSA's answering affidavit but do not admit the correctness of the contents of these paragraphs for the reasons set out below. I specifically deny the correctness and the appropriateness of the headings in paragraphs 3.2 and 3.3.

Ad paragraphs 4 to 9 (including sub-paragraphs):

9. I do not deny the background provided by NERSA in these paragraphs although it has little relevance to the present application. I also do not deny that NERSA is required to act transparently and independent of political influence, with accountability, with integrity, with efficiency, and in the public interest. NERSA is of course also bound to the Constitution and all other laws including the Promotion of Administrative Justice Act 3 of 2000 ("**PAJA**").

Ad paragraph 10:

10. I admit that NERSA must execute its mandate as regulator impartially and in the public interest, but I dispute the assertion that *this application* ought to be viewed with reference to NERSA's mandate as provided for in the enabling legislation. What is in issue in this application, which is one to compel

production of the record considered by NERSA in taking the decisions subject to the review proceedings, is NERSA's compliance with the rules of court.

11. I specifically deny that *"NERSA has to consider competing interests"* when it comes to producing the record in the review application. Such a balancing of competing interests falls within the purview of the court's function. NERSA cannot appoint itself as adjudicator to decide whose interests should prevail in selecting documents which should form part of the record as it has done in the present instance. Rather, it has a duty to comply with the rules of court.

Ad paragraphs 11 to 22:

12. I deny that the application is an abuse of the court process (as alleged in para 11). It behoves no argument that where one party fails to comply with the rules of court, another party may bring an application to compel compliance with the rules.

13. I also deny that there is any merit in the allegation that the issue is "pending determination under case management" (as alleged in para 18). The doctrine of *lis pendens* finds no application in these circumstances. A legal dispute like the present one is not "determined" in a case management process. Rather, the process is managed.

14. In any event, NERSA's version in these paragraphs is incorrect. The facts are as follows:

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14.1. It is correct that OUTA stated in para 4 of annexure FA6 that it had no objection to the matter being referred for case management. The agreement by OUTA to refer the matter to case management stems from the anticipated volume of the documents to be filed and the fact that two parties (OUTA and Green Connection) have instituted review proceedings to review and set aside NERSA's decision to award generation licences to Karpowership. All the parties involved have instructed at least two counsel in the main review application. OUTA took the view that the matters warrant the appointment of a case manager to facilitate an effective hearing.

14.2. Karpowership's position was similar. The second paragraph of the cover email addressed by Karpowership's attorney to the offices of the DJP on 20 June 2022 (**Caselines at 019-131**) reads:

> *"Two separate review applications have been instituted by the Organization Undoing Tax Abuse NPC ("OUTA") and the Green Connection NPC ("GREEN CONNECTION") respectively seeking to inter alia set aside a decision by the National Energy Regulator of South Africa ("NERSA") to grant generation licenses to Karpowership. We have prepared the attached correspondence for the attention of the DJP humbly requesting a meeting* ***to discuss the possible case management and joint hearing of these reviews as well as an expedited hearing date****. Our summary of the reviews and the motivations for our request are set out in the letter.* (Emphasis added)

14.3. The Honourable Justice Ledwaba DJP acceded to the parties' request and convened a meeting on 5 September 2022. The meeting was, however, derailed by the last-minute proposal by Karpowership as referred to in paragraphs 54 and 55 of my founding affidavit as none of the parties at the time had had an opportunity to take instructions.

14.4. The meeting was thus adjourned without a case manager having been appointed and without any of the procedural aspects in the main application having been addressed.

15. It is submitted that the purpose of referring the matter to case management was never, and could never be, to resolve legal disputes between the parties which require a hearing in open court, but to facilitate or manage the hearing of the matter.

16. Insofar as the dispute about the record is concerned,

16.1. the parties indicated to the Honourable Justice Ledwaba DJP at the meeting on 5 September 2022 that they would attempt to resolve the *impasse* about the record;

16.2. it is common cause that the parties could not do so and reached a stalemate regarding production of the record;

16.3. it thus became apparent that OUTA had to bring this application since a case management judge would not resolve the interlocutory dispute over

the record in a case management meeting. He or she could only issue directives to facilitate the hearing of such an application;

16.4. I respectfully disagree that the Honourable Justice Ledwaba DJP issued any directives. I specifically deny that OUTA is precluded from approaching this court by any such directive. OUTA understood the Honourable Justice Ledwaba to have indicated that the parties *could* revert to him if they failed to reach agreement and if they required directives (typically about filing of papers and timelines);

16.5. it was, with respect, unnecessary in the circumstances for OUTA to revert to Justice Ledwaba and insist that a case management judge be appointed only for such a judge (or Justice Ledwaba) to issue procedural directives for OUTA to bring this application which it had to bring, and which it could bring, in terms of the rules of court. It would only have served to further delay the matter;

16.6. I initially requested a recording of the 5 September 2022 meeting from the offices of the DJP on 22 November 2022 but received no response. After receipt of Karpowership's answering affidavit on 28 March 2023 wherein certain allegations were made as to what transpired at the meeting, I again requested a recording on 3 April 2023. After several failed attempts to locate the recording, I contacted the official transcribers on 12 April 2023 to request a transcript of the meeting. The email together with an urgent request sent to the transcribers on 12 April 2023 is attached as annexure **"RA1"**. After several emails and

telephone calls to follow up on the progress on the transcription, it was finally provided on 9 May 2023 and is hereto as annexure **"RA2"**.

17. I accordingly -

17.1. deny the version put forward by NERSA regarding the purpose of case management in this matter and the contention that the application is premature;

17.2. deny the correctness of NERSA's argument that OUTA is precluded from commencing these interlocutory proceedings to compel production of the record because a meeting was held with the Honourable Ledwaba DJP on 5 September 2022 and that OUTA requires a directive "that allows for the institution of these proceedings". This is even more so because all the parties agree that there is a stalemate regarding the production of the record as appears from paragraph 17 of NERSA's answering affidavit;

17.3. submit that OUTA has the right to approach this Court for a ruling and to have the application heard in open court. It is with respect not the role of a case manager to decide disputes that require a hearing in open court.

18. The remaining allegations contained in these paragraphs are denied insofar as they do not correspond with what I have stated in my founding affidavit and herein above.

Ad paragraphs 23 to 29:

(i) NERSA's alleged policy and guidelines

19. This section of NERSA's affidavit stands under the heading "*NERSA is bound by its policy and guidelines on the treatment of confidential information submitted to it*".

20. NERSA did not, however, identify or attach those policies and guidelines to its answering affidavit. As a result OUTA could not respond thereto in any meaningful way.

21. I was consequently instructed to request these documents. On 6 March 2023, my offices served a notice in terms of Rule 35(12) and (14) on NERSA's attorneys wherein NERSA was called upon to make available the policy and guidelines referred to in paragraph 23 of its answering affidavit for inspection (**Caselines at 018-2 – 018-4**).

22. NERSA filed a response to OUTA's Rule 35(12) and (14) notice on 13 March 2023 (**Caselines at 020-2 – 020-4**), wherein it stated that "*the First Respondent hereby replies to the Applicant's notice in terms of Rule 35(12)9 and (14) by filing herewith the following:*

"1. Form A: Request for Treatment of Confidential Information

2. Section 8(9)(a) of the National Energy Regular Act."

23. Attached to NERSA's response, under point 1 (**Caselines at p 020-5 – 020-9**), is a copy of a blanket application form i.e., an uncompleted form. Under point 2, a copy of the whole National Energy Regulator Act, 40 of 2004 ("NERA") (**Caselines at 020-10 – 020-20**) is attached. I attach a copy of the application form provided under point 1 as **"RA3"**.

24. Insofar as point 2 is concerned, the NERA is clearly a statute and is not "*a NERSA policy or guidelines*". Section 8(9)(a) of NERA, to which specific reference is made in NERSA's response to the Rule 35(12) and (4) notice, does not assist as is apparent from the wording thereof which provides as follows:

"Any meeting of the Energy Regulator must be open to the public unless the quorate meeting passes a resolution to the effect that, for the part of the meeting concerned, the information to be discussed during that part of the meeting would create a record that would in turn oblige the Energy Regulator to refuse access to that information in terms of the Promotion of Access to Information Act, 2000 (Act No 2 of 2000)."

25. Insofar as point 1 is concerned, a blanket application form could, at best, be the result of the implementation of a policy or guideline.

26. It therefore appears that NERSA does not have a policy or guidelines pertaining to confidentiality other than the "application process" in terms of this form, which is dealt with under the next heading. If it had, it would have provided it.

(ii) Karpowership's *request* or *motivation* or *application* and NERSA's *determination* thereof

27. NERSA further states in this part of its affidavit that "*in terms of NERSA's policy and guidelines, Karpowership has* ***motivated*** *for certain parts of its information*

to be treated as confidential". "*The* ***request*** *was based on and substantiated in terms of the provisions of the Electricity Regulation Act, 2006 and the Promotion of Access to Information Act, 2000.*" "*The* ***motivation*** *has been well considered by NERSA prior to [its]* ***determination***."

28. When this part of the affidavit was read with the blanket application form received pursuant to the request in terms of Rule 35(12), it became apparent that Karpowership may have applied, in writing, for the confidential treatment of certain information that it submitted to the Energy Regulator as contemplated in the blanket application form attached by NERSA (under point 1 above) (**Caselines at 020-5 – 020-9**). I refer in this regard to the form itself which contains the following instructions:

"*1. This form must be used for all applications for the confidential treatment of information submitted to the Energy Regulator.*

2. Please note that this form has four sections (A, B, C and D).

3. All applications must be based on and substantiated in terms of the relevant provisions of

(a) the Electricity Regulation Act, 2006 (Act No. 4 of 2006);

(b) the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000); or

(c) any other appropriate legislation.

4. All applications must be accompanied by a detailed motivation supporting the application.

5. You must clearly indicate and highlight which information in your submission(s) is confidential as the Energy Regulator will not accept general claims of confidentiality of entire documents.

6. All information submitted to the Energy Regulator without this application shall be treated as not confidential and will be made available to the public.

7. The completed form with supporting documentation must be delivered to the Energy Regulator ...".

29. NERSA's answering affidavit is silent, however, on whether Karpowership completed the application form referred to above and if so, what information they sought to keep confidential. NERSA also did not attach Karpowership's completed application form with the detailed motivation and other supporting documentation which must have accompanied it, nor did it attach NERSA's "determination". These documents were also not attached to Karpowership's answering affidavit (which is dealt with below). They were also omitted from the record.

30. OUTA accordingly instructed me to file a second Rule 35(12) and (14) notice to NERSA to request copies of -

30.1. the whole of the "*motivation*" and "*request*" that Karpowership submitted to NERSA and to which reference is made in paragraphs 23, 24 and 25 of its answering affidavit (which should thus include the completed application form with the motivation and other supporting documentation); and

30.2. NERSA's "*determination*" of the motivation (i.e., its decision if any), to which reference is made in paragraph 25 of its answering affidavit.

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31. NERSA responded to the Rule 35(12) and (14) notice on 9 May 2023 and stated that it attached two documents: "*1. Form A: Request for Treatment of Confidential Information*"; and "*2. Determination: Request for Treatment of Confidential Information*".

32. Scrutiny of the documentation submitted in terms of Rule 35 shows that a number of purported requests for confidential treatment were made by Karpowership and that NERSA appears to have granted them. NERSA's response to OUTA's second Rule 35 request was filed on Caselines **(at 022-7 – 022-66).** I attach it hereto as annexure **"RA4"**. A short description of each document in the order in which it was presented is provided below.

32.1. The following seven documents which were provided seem to fall under NERSA's first heading *"Form A: Request for Treatment of Confidential Information"*:

32.1.1 A "*REQUEST FOR CONFIDENTIAL TREATMENT OF INFORMATION SUBMITTED TO THE ENERGY REGULATOR*" by the second respondent, Karpowership SA Coega **(Caselines at 022-1 – 022-16)**. NERSA requires that this request be accompanied by a declaration under oath as is evident from the form. The request concerned is neither dated nor is there a declaration under oath.

32.1.2 A letter dated 20 April 2021 addressed to NERSA by the second respondent, Karpowership SA Coega, with the subject line *"SUBMISSION OF ADDITIONAL INFORMATION AND*

CONFIDENTIAL INFORMATION – APPLICATION FOR AN ELECTRICITY GENERATION LICENCE IN TERMS OF THE ELECTRICITY REGULATION ACT, 2006 (ACT NO 4 OF 2006) – KARPOWERSHIP SA COEGA (RF) PROPRIETARY LIMITED" **(Caselines at 022-17 – 022-21)**.

32.1.3 A letter dated 21 May 2021 addressed to NERSA by the second respondent, Karpowership SA Coega, with the subject line *"SUBMISSION OF ADDITIONAL INFORMATION AND CONFIDENTIAL INFORMATION – APPLICATION FOR AN ELECTRICITY GENERATION LICENCE IN TERMS OF THE ELECTRICITY REGULATION ACT, 2006 (ACT NO 4 OF 2006) – KARPOWERSHIP SA COEGA (RF) PROPRIETARY LIMITED"* **(Caselines at 022-22 – 022-26)**.

32.1.4 A letter dated 31 May 2021 addressed to NERSA by the fourth respondent, Karpowership SA Richards Bay, with the subject line *"SUBMISSION OF ADDITIONAL INFORMATION AND CONFIDENTIAL INFORMATION – APPLICATION FOR AN ELECTRICITY GENERATION LICENCE IN TERMS OF THE ELECTRICITY REGULATION ACT, 2006 (ACT NO 4 OF 2006) – KARPOWERSHIP SA RICHARDS BAY (RF) PROPRIETARY LIMITED"* **(Caselines at 022-27 – 022-31)**.

32.1.5 A *"REQUEST FOR CONFIDENTIAL TREATMENT OF INFORMATION SUBMITTED TO THE ENERGY REGULATOR"* by the fourth respondent, Karpowership SA Richards Bay **(Caselines at 022-32 – 022-37)**. NERSA requires that this

request be accompanied by a declaration under oath as is evident from the form. The request concerned is neither dated nor is there a declaration under oath.

32.1.6 A letter dated 7 April 2021 addressed to NERSA by the third respondent, Karpowership SA Saldanha Bay with the subject line *"CONFIDENTIAL INFORMATION REQUEST"* **(Caselines at 022-38)**; and

32.1.7 A letter dated 31 May 2021 addressed to NERSA by the third respondent, Karpowership SA Saldanha Bay, with the subject line *"SUBMISSION OF ADDITIONAL INFORMATION AND CONFIDENTIAL INFORMATION – APPLICATION FOR AN ELECTRICITY GENERATION LICENCE IN TERMS OF THE ELECTRICITY REGULATION ACT, 2006 (ACT NO 4 OF 2006) – KARPOWERSHIP SA SALDANHA BAY (RF) PROPRIETARY LIMITED"* **(Caselines at 022-39 – 022-44)**.

32.2. The following five documents which were also provided seem to fall under NERSA's second heading *"Determination: Request for Treatment of Confidential Information"*:

32.2.1 A recommendation dated 18 October 2021 from Mr Zingisa Mavuso, described as *"Executive Manager: ELR"* to Mr Nhlanhla Gumede, described as *"Full-Time Regulator Member: Electricity Regulation"* with the subject line *"REQUEST FOR CONFIDENTIAL TREATMENT OF CERTAIN INFORMATION CONTAINED IN THE ENERGY REGULATOR'S DECISION AND REASONS FOR*

DECISION FOR KARPOWERSHIP COEGA (RF) (PTY) LTD'S APPLICATION FOR A GENERATION LICENCE" **(Caselines at 022-45 – 022-47)** together with annexure "A" with the heading *"TABLE OF ANALYSIS OF KARPOWERSHIP SA COEGA (RF) (PTY) LTD'S REQUEST FOR CONFIDENTIAL TREATMENT INFORMATION"* **(Caselines at 022-48 – 022-51)**.

It is apparent that the recommendation requires approval and signatures of 3 different individuals (**see Caselines at 022-47)**. It is, however, neither signed, approved or dated.

32.2.2 A recommendation dated 18 October 2021 from Mr Zingisa Mavuso, described as *"Executive Manager: ELR*" to Mr Nhlanhla Gumede, described as *"Full-Time Regulator Member: Electricity Regulation*" with the subject line *"REQUEST FOR CONFIDENTIAL TREATMENT OF CERTAIN INFORMATION CONTAINED IN THE ENERGY REGULATOR'S DECISION AND REASONS FOR DECISION FOR KARPOWERSHIP SA RICHARDS BAY (RF) (PTY) LTD'S APPLICATION FOR A GENERATION LICENCE"* **(Caselines at 022-52 – 022-54)** together with annexure "A" with the heading *"TABLE OF ANALYSIS OF KARPOWERSHIP SA RICHARDS BAY (RF) (PTY) LTD'S REQUEST FOR CONFIDENTIAL TREATMENT INFORMATION"* **(Caselines at 022-55 – 022-59)**.

32.2.3 A recommendation dated 18 October 2021 from Mr Zingisa Mavuso, described as *"Executive Manager: ELR*" to Mr Nhlanhla Gumede, described as *"Full-Time Regulator Member: Electricity*

Regulation" with the subject line *"REQUEST FOR CONFIDENTIAL TREATMENT OF CERTAIN INFORMATION CONTAINED IN THE ENERGY REGULATOR'S DECISION AND REASONS FOR DECISION FOR KARPOWERSHIP SA SALDANHA BAY (RF) (PTY) LTD'S APPLICATION FOR A GENERATION LICENCE"* **(Caselines at 022-60 – 022-62)** together with an annexure "A" with the heading *"TABLE OF ANALYSIS OF KARPOWERSHIP SA SALDANHA BAY (RF) (PTY) LTD'S REQUEST FOR CONFIDENTIAL TREATMENT INFORMATION"* **(Caselines at 022-63 – 022-66)**.

33. It appears from these documents read with the allegations in the answering affidavit that -

33.1. NERSA has devised a pro forma form, apparently as a matter of "policy", in terms of which an applicant for a license can apply for the confidential treatment of documents submitted in support of its license application, purportedly in terms of the Promotion of Access to Information Act 2 of 2000 ("PAIA");

33.2. Karpowership lodged a number of such "applications" (as appears from **"RA4"**), but none of which were made under oath as is required by NERSA's own form or "policy"; and

33.3. The "applications" were granted by NERSA save that the decision in respect Coega is not signed and therefore seems not to have been approved.

34. Both NERSA and Karpowership rely on this "policy", "motivation" and "determination" as reasons for resisting OUTA's application for production of the record in terms of Rule 53. It is submitted that there is no merit in this approach, and that it stands to be rejected by the court for the reasons set out below.

(i) PAIA does not apply to the present proceedings which are review proceedings

35. The main application is a review application of NERSA's decision to grant generation licenses to Karpowership. The procedure for such a review application is prescribed by Rule 53 of the Uniform Rules of Court. Under Rule 53 as read with the applicant's notice of motion, NERSA must make the record of proceedings available. It is not for NERSA as a party in the review application to decide whether documents in the record will likely cause harm to Karpowership's alleged commercial interests or put it at some other form of disadvantage whether in terms of PAIA or otherwise.

36. Inasmuch as NERSA (or Karpowership) relies on PAIA, it is pointed out that section 7 thereof provides that it does not apply to a record of a public body:

(i) if that record is requested for purposes of civil proceedings;

(ii) if it is requested after the commencement of such civil proceedings; and

(iii) the production of that record is provided for in any other law (as it is, in the present case, in Rule 53).

37. It is submitted that NERSA therefore cannot competently -

37.1. under the guise of it being "policy", render section 36 of PAIA applicable to the present (civil) proceedings;

37.2. disregard the provisions of Rule 53 and unilaterally (or after consultation with Karpowership) decide to file a heavily redacted record without the permission of the court or the applicants in the review proceedings (in both the OUTA and Green Connection applications);

37.3. justify its conduct in this regard by relying on its own determination or decision in respect of applications by Karpowership which are unlawful and invalid for the reasons set out in the next paragraph.

(ii) NERSA's policy and determination are unlawful and invalid

38. The above mentioned "determination" by NERSA is not authorised by the enabling legislation:

38.1 Neither the Promotion of Access to Information Act 2 of 2000 ("PAIA") nor the Electricity Regulation Act (i) contemplates an application whereby an applicant for a license can "apply" for a kind of guarantee or undertaking by NERSA that documents furnished by an applicant in support of a license application will be treated as confidential or (ii) confers a power on NERSA to "determine" such an application.

38.2 NERSA's "policy" and "determination" are therefore not authorised by law and liable to be set aside in terms of section 6(2)(a) of the Promotion

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of Administrative Justice Act 3 of 2000 (PAJA) alternatively in terms of the principle of legality.

39. NERSA has failed to act independently and impartially:

39.1. NERSA is an organ of state and regulatory authority subject to the provisions of the Constitution of South Africa and the applicable legislation. In fact, as NERSA confirms in paragraph 8 of its answering affidavit, transparency, accountability and acting in the public interest are three of the cornerstones of its mandate. Entities that submit applications to NERSA are or should be aware thereof and are also bound to comply with the applicable legal principles.

39.2. NERSA has conducted itself in this matter by strongly siding with Karpowership and unilaterally delivering a heavily redacted record. It is submitted that NERSA has not acted independently and impartially and that it has attached far greater weight to Karpowership's alleged commercial interests than the public interest. Its attempt to act as adjudicator on the question of which party's interests should be given preference belies its independence as a regulator.

40. OUTA will to the extent necessary seek a declaration and/or a review and setting aside of these determinations as being unlawful or invalid.

(iii) NERSA is not precluded by Karpowership's application" or its own "determination" to comply with Rule 53

41. In any event, in terms of the undated and uncommissioned forms provided by NERSA in response to OUTA's second Rule 35 request, Karpowership informed NERSA that certain information was commercially sensitive in terms of the Promotion of Access to Information Act, 2002 ("PAIA"). The relevant part of the forms (referred to paragraphs 32.1.1 and 32.1.5 above) read:

"The applicant hereby informs NERSA that the following information contained in the Decision and Record of Decision is of a commercially sensitive nature in terms of the provisions of the Promotion of Access to Information Act, 2000 (PAIA) and therefore should not be made available for public inspection" (**Caselines at 022-14 and 022-35 respectively**).

42. NERSA's determination gives the context (**Caselines at 022-45**) which is that that Karpowership requested a determination of confidentiality *"before the RfD is posted on the NERSA website*". The request and the determination thus pertained to the posting of documents on the NERSA website. (I mention in passing that NERSA took the decisions to grant the generation licences on 21 September 2021, the confidentiality "determination" was made on 18 to 26 Oktober 2021 and the granting of the licences to Karpowership was published on 29 October 2021.)

43. NERSA is thus not precluded by the terms of either the application or the determination from making the allegedly confidential documents available in

these proceedings in terms of Rule 53 *alternatively* in terms of the confidentiality regime prayer for by OUTA in the alternative.

44. The remaining allegations contained in these paragraphs are denied insofar as they do not correspond with what I have stated in my founding affidavit and herein above.

Ad paragraphs 37 and 38:

45. I deny the allegations contained in these paragraphs for the reasons set out in paragraphs 12 to 18 above in response to paragraphs 11 to 20 of the answering affidavit, and insofar as they do not correspond with what I have already stated in my founding affidavit and herein above.

Ad paragraph 42:

46. I note that NERSA does not dispute the assertion in paragraph 18 of my founding affidavit that it filed a heavily redacted record without having any agreement in place with OUTA that the record could be redacted and without condonation having been requested by or granted to NERSA for deviating from the provisions of Rule 53(1)(b) as read with OUTA's Notice of Motion.

Ad paragraph 44:

47. I deny the allegations contained in this paragraph and find it unsettling that NERSA can state under oath that *"it is not in dispute that some of the information so required is confidential."*

48. It is indeed in dispute. OUTA has not conceded the alleged confidentiality of any information contained in the record.

Ad paragraphs 44 to 49:

49. I deny the allegations contained in these paragraphs and reject the position taken here by NERSA (for the first time since commencement of the review proceedings) that *"a confidentiality regime in exclusion of the Applicant's experts must be entered".*

50. The attempt to justify such exclusion by alleging that the experts are not objective because they were *"involved in the drawing of the founding papers"* is baseless.

51. OUTA's experts are expert witnesses in the normal sense and were consulted prior to the launching of the application. Their preliminary opinion was set out in OUTA's founding affidavit in the review application.

52. There is with respect no basis for the suggestion that the applicant's experts are not objective simply because they have already been consulted and *"the only way to ensure their objectivity is to be excluded from the confidentiality regime."* This baseless approach supported by unsubstantiated and vexatious allegations about the experts is rejected.

Ad paragraphs 50 to 54:

53. I deny that the provisions of PAIA are applicable in the review proceedings as stated above.

54. I also deny that NERSA has provided any "policy and guidelines" *alternatively* any lawful policy or guidelines which would entitle it to keep Karpowership's information confidential for the reasons set out above.

55. The remainder of the allegations contained in these paragraphs are denied insofar as it does not correspond with what I have already stated above.

Ad paragraphs 57 and 58:

56. I deny the allegations contained in these paragraphs and refer the Honourable Court to what I have already stated above about the alleged premature filing of this application. Rule 53 of the Uniform Rules read with the applicant's notice of motion requires NERSA to deliver the record and OUTA is entitled to approach this Court for the relief sought in circumstances where NERSA has failed to comply with the provisions of Rule 53.

Ad paragraph 59:

57. I deny that the advice received, or the procedure followed by OUTA is incorrect.

Ad paragraph 61:

58. I have dealt in detail with the allegation that there is a *"pending case management meeting"* in reply to paragraphs 11 to 22 of the answering affidavit above and accordingly deny it for the reasons set out above. As indicated above, it is likely that once the present application for interim relief in respect of the production of the record has been disposed of the parties will approach the

DJP again to appoint a case manager to streamline the process of filing papers and to set a date for the hearing of the main application.

Ad paragraph 64:

59. As stated above, NERSA failed to attach the motivation that Karpowership submitted to NERSA or its consideration thereof to its answering affidavit. The documents were only obtained by OUTA in response to a Rule 35(12) / (14) request. I have dealt with these documents in detail and refer the court to what I have stated above in reply to paragraphs 23 to 29 of the answering affidavit.

60. This paragraph illustrates that NERSA impermissibly took it upon itself to decide what should be excluded from the record and what not, in an unauthorized and biased manner.

Ad paragraph 70:

61. The reference by NERSA to section 10 of the ERA in this paragraph bears no relevance to what is stated in paragraphs 46 to 53 of my founding affidavit, as this section refers to registration with NERSA and does not deal with the granting of generation licences.

62. It is of concern, however, that NERSA holds the view that financial information does not need to be certified for a licence to be issued. Although the exact meaning ascribed by NERSA to the word *"certified"* is unclear, NERSA cannot fulfil its statutory obligations as referred to in paragraphs 47 to 49 of my

founding affidavit unless it ensures that the financial information provided to it by applicants for licences is correct.

Ad paragraph 71:

63. I deny the allegations contained herein. This will be argued in full at the hearing of the main application.

Ad paragraph 72:

64. It is not clear, with respect, what NERSA is trying to convey in this paragraph. To the extent that NERSA is implying that the correct procedures were followed in the granting of the generation licences, it is disputed. This will be fully argued at the hearing of the main review application.

Ad paragraph 74:

65. I deny that there was a directive issued when the meeting held on 5 September 2022 was adjourned. If this was indeed the case, such a directive would have been in writing and would have been circulated by way of email to all parties by the offices of the DJP, as is the practice.

66. The meeting was adjourned for the reasons set out in paragraph 55 of my founding affidavit as confirmed by the transcription of the meeting (**"RA2"**). Any allegations to the contrary are denied.

Ad paragraphs 75 and 76:

67. As indicated in these paragraphs, I maintain that a further case management meeting was not required at that stage (being on 13 September 2022). This letter, however, must be read in conjunction with my letter of 28 October 2022 attached as **"FA12"** to my founding affidavit (**Caselines at 014-46 – 014-48**) where I indicated that the failure by the parties to provide a clear answer to OUTA's **"with prejudice"** proposal of 17 October 2022 would be followed by an application to compel.

68. Karpowership's attorney responded by email to all the parties on 3 November 2022 (annexure **"FA13"** to my founding affidavit; **Caselines at 014-49**). The first sentence of the email reads as follows:

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

69. Therefore, on 3 November 2022, it was clear to all involved that the parties had reached a stalemate and that an application to compel would be inevitable. At no point after this, or after the Rule 30A notice was served on 12 December 2022, did either NERSA or Karpowership demand that the matter first be referred back for case management before an application to compel could proceed, although it was the prerogative of any of the parties to approach the offices of the DJP during this period for a further meeting.

70. OUTA was not obliged to waste any further time in arranging another meeting with the DJP when it was clear that a stalemate had been reached over the production of the record. OUTA had the right to approach the Honourable Court

to resolve the dispute in open court and obtain a ruling. All allegations to the contrary are denied.

Ad paragraph 78:

71. The deponent's allegation in this paragraph that he bears no knowledge of the contents of paragraph 57 of my founding affidavit, is misplaced as I alleged there that it is evident from the *Helen Suzman* decision that confidentiality will only in truly deserving and exceptional circumstances be seen as a basis for non-disclosure.

Ad paragraphs 80, 81 and 82:

72. These paragraphs contain bare denials to which I cannot meaningfully reply save to deny it.

Ad paragraphs 83, 84 and 85:

73. Prior to NERSA's response to OUTA's second Rule 35 request on 9 May 2023, NERSA had not divulged the request from Karpowership to keep certain information confidential, nor had it provided its determination of that request, or the *"policy and guidelines"* on which it relies. It is in any event denied that such policy or guidelines could lawfully entitle NERSA to unilaterally decide which information should be excluded from the Rule 53 record, in defiance of its obligations under Rule 53 as read with the applicant's notice of motion.

Ad paragraph 87:

74. It is noted that NERSA has sought to meet the allegations in paragraph 68 of my founding affidavit with a bare denial. It will be argued that NERSA cannot substantiate the position taken by it.

Ad paragraphs 89, 90 and 91:

75. I never understood the spreadsheet to be a discussion document. OUTA requested a list of information that was deemed by NERSA to be confidential, and NERSA provided the spreadsheet which is attached as annexure **"FA2"** to my founding affidavit. It was disclosed in Karpowership's answering affidavit dealt with below that the spreadsheet was prepared by it (Karpowership) and not by NERSA.

76. As stated in my founding affidavit and as is apparent from the spreadsheet itself, it was so unclear and confusing that no meaningful input was possible. However, OUTA thereafter made a counter proposal, "**with prejudice",** on 17 October 2022 indicating that OUTA required the complete record. It subsequently became clear that the parties had reached a stalemate and that an application to compel was inevitable.

Ad paragraphs 93, 94 and 95:

77. I deny the allegations contained in these paragraphs and refer the Honourable Court to what I have already stated about further case management meetings above. The dispute about the production of the record, with respect, does not

fall to be resolved by a Case Manager but by a judge sitting in open court. Further case management meetings about this issue would with respect have served no purpose.

Ad paragraphs 97 and 98:

78. I deny the allegations contained herein and refer the Honourable Court to what I have already stated above regarding case management.

Ad paragraph 99:

79. The statement in my founding affidavit that NERSA has not previously expressed any position regarding confidentiality is again met with a bare, unsubstantiated denial, even though NERSA had the opportunity here to explain to the court what its previous position was (if any). This reinforces OUTA's belief that NERSA is not truly independent and impartial.

Ad paragraphs 101 and 102:

80. It is not for NERSA to cast aspersions on the independence of experts, and I reject the allegations that OUTA's experts lack independence and/or objectivity and *"participated at a greater length in the preparation of the founding affidavit."*

81. OUTA was entitled to consult expert witnesses and to present their evidence in its founding affidavit. The fact that experts were consulted prior to the drafting of the founding affidavit and that their preliminary opinion was incorporated therein, has no bearing on the independence and objectivity of the experts. NERSA's allegations in this paragraph are, with respect, far-fetched.

82. Notably, Karpowership takes no issue with the independence of OUTA's appointed experts in its answering affidavit.

83. The allegations contained in these paragraphs are accordingly denied insofar as it does not accord with what I have stated above.

Ad paragraphs 105, 106 and 107:

84. I deny the allegations contained in these paragraphs insofar as it does not correspond with what I have already stated in my founding affidavit and herein above.

Ad paragraph 108:

85. I admit that the court retains a discretion regarding the appropriate costs order. I repeat in this regard what I have stated about costs in paragraphs 97 to 100 of my founding affidavit. Any allegations to the contrary are denied.

***AD SERIATIM* REPLY TO PART 1 OF KARPOWERSHIP'S ANSWERING AFFIDAVIT**

Ad paragraphs 1 to 4:

86. I deny that the allegations contained in Karpowership's answering affidavit are true and correct, and further deny that there is any merit in the opposition to the application to compel production of the record for the reasons set out in my founding affidavit and in this affidavit.

Ad paragraph 5:

87. I deny that the confidentiality regime proposed by OUTA as alternative to the main relief requested in prayer 1 of the Notice of Motion is *"inelegant and flawed"*. As indicated in my founding affidavit, the proposed regime is premised on what offered a practical and reasonable solution to the stalemate between the parties in the matter of ***Cape Town City v South African National Roads Authority and Others 2015(3) SA 386 (SCA)***.

Ad paragraphs 6 and 7:

88. I deny the allegations contained herein. The approach Karpowership has taken throughout, and which is also evident from its answering affidavit and counter application, has been to insist that the parties agree to the strict confidentiality regime it proposes. At no point has Karpowership truly been willing to move from its position. It has insisted throughout, and still insists, unreasonably, that OUTA's employee representatives (as opposed to its legal representatives) should be excluded from having access to the record at all. In fact, at one point Karpowership suggested that not only OUTA's employee-representatives but also OUTA's experts should be denied access to the record, as mentioned in paragraphs 58 to 60 of my founding affidavit, although it seems it longer holds this view. (The position to exclude OUTA's experts is now taken by NERSA, and was addressed above.) The allegations that Karpowership has made *"extensive endeavours"* and that this was done *"in good faith"* to find common ground or narrow down the issues in dispute are not borne out by the facts and are denied.

4

Ad paragraph 8:

89. I deny the version put forward by Karpowership about what transpired at the meeting of 5 September 2022 and refer the Honourable Court to the transcription attached as **"RA2"**.

90. It is also noted that NERSA (whose representatives also attended the meeting) does not share the version offered by Karpowership in its answering affidavit.

91. At the time when the case management meeting was held a list of documents had not been provided. The parties agreed that, once such a list was provided (which was only done on 12 September 2022), they would attempt to resolve the issues amicably.

92. OUTA reacted to this list by making the "with prejudice" offer on 17 October 2022 in which it identified that it sought to complete record on the basis set out in the offer. The "with prejudice" proposal was OUTA's attempt to resolve the matter in a practical and reasonable way without the necessity for costly litigation regarding the record. It was rejected out of hand.

93. Karpowership's attorneys acknowledged that an application to compel was accordingly inevitable in their letter dated 3 November 2022 (annexure "FA13" to my founding affidavit), as follows: "*given the position that has been communicated by the applicants, it seems that an application to compel, at least from OUTA, is now inevitable*".

94. They, in fact, invited OUTA to bring an application to compel in the same letter, as follows: "*Our client cannot disclose its confidential information to individuals who are not external legal representatives or independent experts – absent an order compelling it do so. It is apparent that this is the essence of the impasse and, as a result, our client will await the application to compel – which, needless to say, it will oppose.*"

95. The remaining allegations are denied.

Ad paragraph 9:

96. I deny the allegations contained herein and refer in this regard to paragraphs 19 to 19.4 of the founding affidavit **(Caselines at 0137 – 013-9)**. Full legal argument in this regard will be advanced on behalf of OUTA at the hearing of the matter.

Ad paragraphs 10 and 11:

97. I note Karpowership's intention to apply for the relief in the notice of counter application but deny that it makes out a proper case for the relief it seeks and that it is entitled to the relief requested therein.

Ad paragraphs 12 to 20:

98. I do not have knowledge of the shareholding as alleged and do not deny it for purposes of this application, but I deny that Karpowership's bid complied with all legal requirements.

4 PD

Ad paragraph 21:

99. I admit the allegations in this paragraph.

Ad paragraph 22 to 24:

100. The allegations about the confidentiality of certain documents and/or information in these paragraphs are too vague for OUTA to respond thereto in any meaningful way, especially when taking into account that OUTA has not had sight of any of the documents allegedly containing confidential information. I accordingly do not admit that confidential information was submitted to NERSA and also specifically deny that Karpowership has made out a case for the confidentiality of any specific document or information. By way of example, I deny that, for example, BEE undertakings and ratios can be confidential or form *"part of Karpowership's technical know-how"* as alleged in paragraph 23.5.

101. In addition to the aforesaid denials, I deny that the present application falls to be determined in terms of the Promotion of Access to Information Act 2 of 2000 ("PAIA"). OUTA has a procedural right, and NERSA has an obligation to make the record available, under Rule 53 as read with the notice of motion in the review application irrespective of whether the record contains documents or information which may be refused lawfully by an information officer under chapter 4 of the PAIA.

102. The review application is brought against the backdrop of section 217 of the Constitution which provides that when an organ of state, such as NERSA, contracts for goods or services, it must do so in accordance with a system which

4

is fair, equitable, transparent, competitive and cost-effective. Where Karpowership is seeking to do business with an organ of state in South Africa, ultimately funded by the South African taxpayer, it is bound to these principles.

Ad paragraph 25 and 26:

103. I admit that NERSA approved the applications of the second, third and fourth respondents for generation licences on 22 September 2021 and published its reasons on 29 October 2021. However, I deny that there were sufficient grounds for granting the applications and that the reasons provided by NERSA were sufficient. Consequently, the review application was instituted by OUTA.

Ad paragraphs 27 and 28:

104. OUTA instituted its review application within a reasonable time and within the 180 days allowed for by section 7(1) of PAJA. The attempt to create atmosphere in these paragraphs by suggesting that OUTA somehow lacked diligence is rejected.

Ad paragraphs 29 and 30:

105. I admit that Karpowership filed a notice of intention to oppose the review application on 20 May 2022 and further admit that the letter attached as **"AA1"** to Karpowership's answering affidavit was received by my offices on 24 May 2022.

106. As mentioned in paragraph 19 of my founding affidavit and is evident from **"AA1"**, the proposal by Karpowership entailed that only the legal

representatives and experts would have access to the record and only once they had signed a strict confidentiality undertaking. OUTA's employee-representatives who provide the instructions would be excluded from the list of people having access to the record and consequently also barred from having access to those affidavits or parts of affidavits where such documents or information are dealt with. They would in consequence also be barred from attending the court proceedings, as some of the alleged confidential documents or information would be addressed in the affidavits and in the arguments presented to the court.

107. This would lead to a situation where OUTA would be expected to supplement its papers and have the matter argued in court without being able to provide instructions to its legal representatives and without having access to the court papers or being able to attend the proceedings. Despite being the applicant in the review proceedings, they would effectively be excluded and would have to rely solely on how the legal representatives and the experts decide to deal with the information contained in the record instead of furnishing instructions to them. This would be highly undesirable and prejudicial to OUTA.

108. Thus, at the time the letter attached as annexure **"AA1"** was sent, Karpowership expected OUTA's legal representatives and experts to sign a blanket confidentiality agreement which would see the applicant itself (OUTA) being denied access and without identifying the documents and/or information which Karpowership intended to exclude, and without laying any basis for the confidentiality of such documents.

109. It is submitted that OUTA's response in its letter of 30 May 2022 (attached as **"AA3"** to the answering affidavit under reply) was not unreasonable in any way.

Ad paragraph 31:

110. I deny the allegations contained herein. When OUTA engaged on the issue of confidentiality and made a reasonable "with prejudice" counter offer pertaining to a confidentiality regime, both Karpowership and NERSA failed to engage in any meaningful way. Karpowership never provided an *"open platform"* for discussion as alleged but instead insisted, and still insists, on the strict proposed confidentiality proposed by it.

111. It is evident that there was never truly a willingness to negotiate, as the many letters exchanged between the parties' attorneys illustrate. Karpowership's opposition to this application and the counter-application, where the strict confidentiality regime is again sought, serves as proof of Karpowership's unyielding attitude.

Ad paragraph 32:

112. The document attached as annexure **"AA2"** to Karpowership's application pertains to the Green Connection application. Neither I nor anyone from my offices was copied on the correspondence which appears to have been exchanged between NERSA's attorneys, Karpowership's attorneys and Green Connection's attorneys. I therefore have no knowledge of these allegations but deny that they bear any relevance to the present application.

Ad paragraphs 33 and 34:

113. I admit the letters referred to in these paragraphs were sent and received.

Ad paragraph 35:

114. The deponent's statement in paragraph 35 that OUTA's stance is "*perplexing given that it is the information contained in the documentation that is confidential*" is not understood. Paragraph 2 of my email of 30 May 2022 reads:

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

115. To the extent necessary, I deny that there is anything perplexing about the stance adopted by OUTA. To the contrary, in paragraph 35 of its answering affidavit, Karpowership agrees that information sought to be confidential should be identified.

Ad paragraph 36:

116. The allegations contained herein are admitted to the extent that the communications referred to herein involved OUTA and falls within my personal knowledge.

Ad paragraph 37:

117. I take note of the allegations contained herein but deny that Karpowership's view is correct or relevant. This view was never shared by OUTA, as has been repeatedly communicated.

118. The statement that OUTA's founding affidavit in the review application *"already identified the information Karpowership considered confidential"* is not understood but, to the extent necessary, it is denied.

119. I deny also that it is proper for Karpowership to "assist" the decision-maker in any way in complying with its obligations under the court rules in respect of the compilation of the record. NERSA ought to be independent.

Ad paragraph 38:

120. I deny that the founding affidavit in the review application contained confidential information. The import of this allegation is not understood.

Ad paragraphs 39 and 40:

121. Neither I nor anyone from my offices was copied on the correspondence referred to in these paragraphs and attached as annexure **"AA5"**. This appears to be correspondence that was exchanged between the attorneys for Karpowership and Green Connection in the Green Connection application.

122. As pointed out in paragraph 37 of my founding affidavit, the review application brought by Green Connection bears no relevance to the present interlocutory

application. OUTA and Green Connection do not share attorneys or experts. It is therefore unclear why Karpowership would attach several letters that its attorneys exchanged with Green Connection's attorneys (to the exclusion of OUTA and/or its legal representatives) to this application.

123. In any event, I deny the correctness of Karpowership's views set out in the letter.

Ad paragraph 41:

124. I admit that I sent the email attached as **"AA6"** on 6 June 2022, as at the time I had not yet had the courtesy of a reply to my email of 30 May 2022 (**"AA3"**).

Ad paragraphs 42 and 43:

125. The allegations contained herein give the wrong impression since I was not copied on Karpowership's email of 3 June 2022, as is evident from **"AA5"**.

126. I admit that I received the email from Karpowership's attorneys dated **6** June 2022 (attached as **"AA7"**), I but deny the correctness of the content thereof.

127. From the correspondence it is clear that Karpowership adopted the stance that it did not need to provide OUTA with details of the information that it sought to keep confidential *"as it was evident from OUTA's founding affidavit what the information pertained to."* This is with respect unhelpful and incorrect. I deny that OUTA could have guessed what information NERSA and Karpowership sought to have kept confidential before the record or an index to the record was provided.

Ad paragraph 44:

128. I admit that I sent the letter attached as **"AA8"** on 7 June 2022, wherein I reiterated that OUTA could not agree to a blanket confidentiality agreement without knowing what information Karpowership sought to keep confidential. I submit that the response was imminently reasonable in the circumstances.

Ad paragraphs 45 to 65:

129. I admit that the letters attached as annexures **"AA9"** to **"AA22"** were exchanged between the parties, Green Connection, and the offices of the DJP in the period 9 June 2022 to 7 July 2022, but deny the correctness of the assertions made, inferences drawn and position taken by Karpowership's attorneys in these letters and reiterate OUTA's position as set out in my letters.

Ad paragraphs 66 and 68:

130. The letters referred to in these paragraphs pertain to Green Connection and its debate with Karpowership about the confidentiality regime. It does not pertain in any way to the present application where OUTA is the applicant and Green Connection is not a party. They accordingly bear no relevance to this application. In any event, I deny the correctness of Karpowership's views set out therein.

Ad paragraphs 67 to 72 (excluding 68):

131. I admit that the letters referred to in these paragraphs were exchanged and admit that Karpowership rejected the agenda that was proposed by OUTA.

132. The correspondence referred to in paragraphs 71 and 72 was sent on Friday 2 September at 16:14. My offices close at 15:00 on Fridays and as mentioned in paragraph 55 of my founding affidavit, the letter only came to my attention on the morning of Monday 5 September 2022 shortly before the start of the meeting. It was clear at the meeting that the other parties (NERSA and Green Connection) were also caught off guard by Karpowership's proposal and the last-minute allegations that were made in the letter as described in paragraphs 54 to 57 of my founding affidavit.

133. I pause to point out that it later became evident, upon proper perusal of the letter and the *Helen Suzman* matter referred to therein, that it was incorrect to suggest that the regime proposed by Karpowership was "approved" in *Helen Suzman.* In any event, the facts in the present matter are very different to those in *Helen Suzman.* Full legal argument in this regard will be advanced on behalf of OUTA at the hearing of the matter.

134. I further deny the correctness of the allegations made and the conclusions drawn by Karpowership's attorneys in the letter of 2 September 2022.

135. All the correspondence referred to by Karpowership (as confirmed in the letter of 2 September 2022) serve to confirm that it never budged on its stance that the strict confidentiality regime it seeks should be adopted. Karpowership was never truly open to accepting anything other than its own terms.

136. In fact, upon scrutiny of the letter of 2 September 2022 and as pointed out in paragraphs 58 and 59 of my founding affidavit, the regime suggested in this letter sought to restrict access to the record even further, by now limiting such

access to the legal representatives only and even excluding OUTA's experts, a stance which Karpowership apparently no longer hold.

137. OUTA through its counsel therefore indicated that it required an opportunity to peruse the last-minute proposal that was made by Karpowership and also that it would attempt to resolve the matter without the need for further judicial intervention. This led to an adjournment of the meeting before the Honourable Ledwaba DJP.

138. OUTA made its "with prejudice" offer on 17 October 2022 in this spirit.

Ad paragraph 73:

139. I deny that the Honourable Justice Ledwaba DJP "*approved*" any one of the parties' positions. I reiterate that the meeting on 5 September 2022 was adjourned to allow the parties to find, if they could, an amicable solution on the issue of confidentiality.

140. After receipt of the confusing spreadsheet (attached as annexure "**FA2**" to my founding affidavit) from NERSA, and since no constructive feedback was received to OUTA's "with prejudice" proposal made on 17 October 2022, it became apparent that no number of letters or meetings would resolve the issue. Further attempts to write letters or attend meetings with the Honourable Ledwaba DJP would only serve to delay the process. OUTA took the view that the only way in which this matter could be resolved would be for it to be argued in open court and for the parties to obtain a judgment. Karpowership in its letter

of 3 November 2002 ("**FA13"** to my founding affidavit) also saw it in this way at the time.

141. I point out that Karpowership indicated that a confirmatory affidavit from Ms Sarah Burford would be filed with the answering affidavit, confirming her version of what happened at the meeting. No such affidavit has been filed.

142. In this regard I refer to the copy of the transcript of the meeting before the honourable justice Ledwaba DJP attached as "**RA2**".

Ad paragraphs 74 and 75:

143. I admit that the correspondence referred to in these paragraphs and attached as **"AA29"**, **"AA30"** and **"AA31"** were exchanged.

Ad paragraph 76:

144. I take note that Karpowership's attorneys prepared a schedule **("AA31"**) for NERSA, which NERSA in turn furnished to OUTA. This casts serious doubt on NERSA's independence as regulator in this matter.

145. I deny that the spreadsheet was helpful and that the reasons advanced in support of confidentiality in the spreadsheet are valid. I refer the Honourable Court in this regard to what I have stated in paragraphs 62 to 71 of my founding affidavit about the spreadsheet.

146. In addition, as stated above, sections 34 and 36 of PAIA (used on the spreadsheet as justification for the alleged confidentiality) are not applicable in

the current court proceedings which are, instead, regulated *inter alia* by Rule 53 of the Uniform Rules of Court.

Ad paragraphs 77 and 78:

147. I admit the allegations contained herein insofar as they correspond with the letter attached as **"FA1"** to my founding affidavit.

148. I specifically indicated in paragraphs 2 and 3 of the letter (**"FA1"**) that the confidentiality regime referred to in the *Helen Suzman* case (but which was in fact granted in the *Bridon* case and not in the *Helen Suzman* case) is unduly restrictive and should only be imposed in extremely limited circumstances. It is not justified in the present matter.

Ad paragraphs 79 and 80:

149. I admit that the correspondence referred to in these paragraphs were exchanged. NERSA's indication that its position regarding the confidentiality regime remained the same was surprising as NERSA had not, up to that point, taken any position *vis-à-vis* OUTA regarding a confidentiality regime.

Ad paragraphs 81 and 82:

150. I deny that the time periods within which the Rule 30A notice was served and the subsequent application was brought were unreasonable.

150.1. Karpowership's letter is dated 3 November 2022.

150.2. It was near the end of the year and consultations had to be scheduled with OUTA's legal representatives which had limited availability. The Rule 30A notice was delivered as soon as reasonably possible on 12 December 2022.

150.3. Thereafter, the Court was in recess for a month.

150.4. OUTA's application was delivered on 23 January 2022, in the week after recess had ended.

151. The allegation that OUTA's application was served *"some three months after Karpowership's attorneys responded to OUTA's attorney's letter"* thus does not give the full picture and appears to be an unwarranted attempt to insinuate lack of diligence on OUTA's side for which there is no basis.

Ad paragraph 83:

152. I deny at the outset that the confidentiality regime proposed by Karpowership is justified.

153. I further deny the allegations contained in this paragraph and reject the view held by Karpowership that the applicant in these review proceedings bears the onus of proving that certain information in the record is *not* confidential. If this were indeed the position, it would open the door to abuse and corruption.

Ad paragraphs 84, 85 and 86:

154. I take note of the allegations contained herein but deny that it has made out a proper case for the relief requested in the counter-application.

155. I further deny that the spreadsheet (which appears to be the same as the one attached as **"FA2"** to my founding affidavit) is of assistance and refer the Honourable Court to what I have stated in paragraphs 62 to 71 of my founding affidavit in this regard.

Ad paragraphs 87 to 150:

156. The extensive yet vague allegations contained in these paragraphs do not sustain the case for the counter relief that Karpowership, as the applicant in the counter application, seeks. It is submitted that no case is made out for the relief sought because it depends solely on the say-so of Karpowership. Neither OUTA nor the Court has had sight of the alleged confidential documents and/or information and, as a result,

156.1. OUTA as the respondent, is unable to respond meaningfully to these paragraphs; and

156.2. the court would be unable to assess the factual and legal bases of the assertions.

157. This difficulty is, with respect, adequately addressed by OUTA's "with prejudice" proposal mentioned above, as also prayed for in the alternative in paragraph 2 of the notice of motion. OUTA's proposal also limits any dispute about the

confidentiality to documentation or information on which it would seek to rely in its supplementary founding affidavit i.e., to relevant documents / information. Karpowership in its counter application, on the other hand, would have this court make a blind determination (i.e., without having seen and considered the relevant documents or information) as well as a blanket determination (i.e., without having regard to whether OUTA would in fact seek to rely on the documents or information concerned).

158. By way of example: Karpowership alleges that there is personal information and human resources information contained in the record that is confidential. The likelihood of OUTA seeking to rely on any of this information in its supplementary founding affidavit is very low, so that there is little reason to argue over it at this stage. It may never become an issue. Karpowership should not be allowed, however, with respect, to preclude OUTA from having access to the whole record to determine whether specific documentation or information is relevant or not for purposes of supplementing the founding affidavit as it is entitled to do under Rule 53, and after having furnished its legal representatives with proper instructions in respect of the supplementary founding affidavit.

159. By way of further example, it simply cannot be correct that all financial information is *"confidential and commercially sensitive"*, and accordingly to be excluded from the record where it is a constitutional requirement that organs of state which contract for goods and services must *inter alia* do so cost-effectively and where Karpowership seeks to do business with the DMRE and Eskom (which, according to Karpowership, are its customers) to the tune of an amount in excess of R200 billion over 20 years, ultimately to be paid for by the South

African public. Such disclosures may be optional in other parts of the world where Karpowership conducts business, but it cannot, with respect, circumvent the requirements of transparency, competitiveness, cost-effectiveness and public accountability in contracting with the South African government and/or public and/or state-owned entities such as NERSA and Eskom.

160. It is further unfathomable that, if NERSA is required by law to comply with certain requirements, as mentioned in paragraphs 47 to 49 of my founding affidavit, it will not be in the public interest to assess in these review proceedings whether this has been done to ensure accountability. This will not be possible if OUTA is not given access to the documentation and/or information in the record relevant to these requirements, at least on the basis set out in OUTA's "with prejudice" proposal.

161. To the extent that it is possible to do so without having sight of the documents concerned, I deny that any of the reasons advanced by Karpowership in these paragraphs constitute *"special circumstances"* sufficient to justify such a restrictive confidentiality regime as the one that Karpowership seeks to impose.

AD SERIATIM REPLY TO PART II OF KARPOWERSHIP'S ANSWERING AFFIDAVIT

162. I now turn to deal with Part II of Karpowership's answering affidavit that contains the sequential responses to my founding affidavit in paragraphs 151 to 209 thereof. I will reply to the allegations contained in these paragraphs only where strictly necessary. Where I fail to deal with specific paragraphs, it should be

4 PD

deemed to be denied insofar as it does not correspond with what I have stated in my founding affidavit or herein above.

Ad paragraph 156:

163. I deny the allegations contained in this paragraph. I refer in this regard to paragraphs 16 to 20 of OUTA's founding affidavit in the main review application **(Caselines at 002-8 – 002-10)**, where the following is stated under the heading "STANDING" and which is repeated here for the sake of convenience:

"16. OUTA derives its standing to bring this application from section 33 read with section 38 of the Constitution of the Republic of South Africa, Act 108 of 1996 ("the Constitution").

16.1 Section 33(1) of the Constitution guarantees the right to lawful, reasonable, and procedurally fair administrative action to everyone. As will be more fully set out below, it is the applicant's case that this right is infringed.

16.2 Section 38 of the Constitution deals with the enforcement of rights and reads:

'Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are:

a) *anyone acting in their own interest;*

b) *anyone acting on behalf of another person who cannot act in their own name;*

c) *anyone acting as a member of, or in the interest of, a group of class of persons;*

d) *anyone acting in the public interest;*

e) *an association acting in the interest of its member." (Emphasis added)*

17. *OUTA has further been approved as a public benefit organisation in terms of section 30(1) of the Income Tax Act 58 of 1962, with its principal objective as set out in clause 3.1 of its Memorandum of Incorporation ("MOI") as:*

'…the promotion and advocacy of human rights and democracy in South Africa through the advancement and protection of rights, values and principles enshrined in the Constitution of the Republic of South Africa.'

18. *Clause 3.2 of OUTA's MOI continues to define its objectives. In particular, clause 3.2 provides:*

'3.2 In particular the Company shall, through conducting Activities, focus on-

3.2.1 promoting Taxpayer's rights by –

3.2.1.1 legitimately challenging the unlawful squandering, maladministration and/or corrupt use of Government Funding; and

3.2.1.2 legitimately challenging laws, policies and regulations which are irrational or ineffective for their intended purposes."

19. In order not to cause unnecessary prolixity of the papers I do not attach the complete and voluminous MOI and mission statement of OUTA, but only the relevant pages dealing with OUTA's objectives as annexure ***"FA5"****.*

20. OUTA accordingly has the requisite locus standi to launch review applications such as the present one where the legitimacy of decisions that affect the taxpayers' rights and the public interest taken by NERSA, a public entity, is challenged.

164. OUTA's standing is therefore clearly established in the review application. It follows that such standing is extended to these interlocutory proceedings. I further state in paragraph 51 of my founding affidavit that the projected cost of the Karpowership projects is estimated to be in excess of R200 billion, which will impact South African taxpayers. This is not disputed by either NERSA or Karpowership in their respective affidavits. OUTA is entitled to launch review

applications where it seeks to hold public entities accountable on behalf of its members and in the public interest.

165. Notably, NERSA, as decision-maker and party from whom the record is requested, does not take issue with OUTA's *locus standi* in its answering affidavit.

166. Karpowership also launched a counter-application wherein it seeks an order against OUTA.

167. It is submitted that the belated questioning of OUTA's standing is without any merit.

168. Further argument on the issue of standing will be advanced on behalf of OUTA at the hearing of the matter.

Ad paragraphs 159.2 and 159.3:

169. I deny the allegations contained herein. Rule 53 does not provide for the filing of a redacted record at the will of the public entity from whom the record is sought or at the behest of one of the parties. If it believed that there were grounds to deviate from the rules of court, NERSA should have sought condonation and shown good cause but it has failed to do so. Instead, Karpowership seeks to impose a confidentiality regime which would place the burden on OUTA's legal representatives (without the involvement of OUTA itself) to show that certain documents and/or information are not confidential. I deny that there is any basis for such an approach to be followed.

Ad paragraph 160.2:

170. I deny the content hereof. It is highly unusual and only in extraordinary circumstances (not present here) that an applicant itself as the instructing party is not granted access to the record, but that such access is restricted to legal representatives and experts.

171. I further point out that NERSA, as the party from whom the record is sought, does not take issue with OUTA's access to the record. NERSA is merely challenging access to the record for OUTA's experts, although this challenge is also without merit as illustrated in my reply above to NERSA's answering affidavit.

172. Karpowership opposes access to the record for the applicant, and NERSA opposes access to the record for the applicant's experts. Between the respondents they therefore seek to deny the applicant and/or their experts to have access to the record, which will result in the legal representatives having to assume the role of applicant and/or experts and legal representatives in the review proceedings without instructions from the applicant and/or without input from the applicant's experts.

173. This will place OUTA's legal representatives in an untenable position which is, with respect, unwarranted. Indeed, it is absurd. It will also greatly prejudice OUTA as it will be unable to receive proper advice on all the relevant information and will not be able to provide informed instructions.

Ad paragraph 161 (including sub-paragraphs):

174. I deny the allegations contained herein and refer the Honourable Court to what I have stated above regarding Karpowership's demand that OUTA signs the restrictive confidentiality regime that it proposed. The suggested regime is, with respect, not *"fair and reasonable"*.

Ad paragraph 162 (including sub-paragraphs):

175. I deny the allegations contained herein. I fail to understand how Karpowership can contend that *"OUTA puts up no evidence for how the confidentiality regime proposed by Karpowership precludes OUTA's legal representatives from taking instructions from their client"* where the confidentiality regime proposed by Karpowership will prevent the legal representatives from disclosing any purportedly confidential information to their client, OUTA.

176. In turn, OUTA will not be able to give its legal representatives instructions on those parts of the record to which it is not allowed access. Ultimately, OUTA will not be allowed to have access to its own application. These facts speak for themselves.

177. The allegation by Karpowership in paragraph 162.3 that *"There is nothing unusual about a confidentiality regime being limited to a parties' legal representatives and independent expert"* is incorrect. It is, in fact, highly unusual when regard is had to the applicable authorities. Further legal argument in this regard will be advanced on behalf of OUTA at the hearing of the matter.

Ad paragraph 163 (including sub-paragraphs):

178. I deny the allegations contained herein. The very fact that Karpowership's attorneys had to prepare a spreadsheet for NERSA identifying the parts of the record which should be marked confidential, and that NERSA then forwarded it to OUTA, supports OUTA's belief expressed in paragraph 19.3 of my founding affidavit that NERSA is not truly independent and impartial. Karpowership's admission in its answering affidavit that its attorneys drafted the spreadsheet ineluctably leads to the conclusion that Karpowership also "assisted" NERSA in redacting the record.

Ad paragraph 164 (including sub-paragraphs):

179. I deny the allegations contained herein insofar as it does not correspond with what I have stated in my founding affidavit and herein above.

180. Karpowership throughout attempts to place an undue burden on OUTA to disprove the confidentiality of documents or to request clarity on documents or to conduct an analysis of a purported list of documents. This is not a burden that an applicant in review proceedings bears or should bear.

181. Moreover, OUTA indicated in its "with prejudice" proposal that it requires access to all the documents. As an applicant in review proceedings, it has a procedural right to the complete record and to select the relevant information on which it seeks to rely in supplementing its founding affidavit.

182. It is noteworthy that Karpowership admits in paragraph 164.6 of its answering affidavit that all attempts to reach agreement on the status of the confidential documents have failed, and as a result it has instituted a counter-application. It is clear from the allegations contained herein that this matter is not capable of resolve without the intervention of a Court.

Ad paragraph 165:

183. I take note of Karpowership's admission that there is presently a stalemate between the parties. Further negotiations and/or meetings with the Honourable Ledwaba DJP would not resolve it.

184. The remaining content is denied.

Ad paragraph 166.2 and 166.3:

185. I deny that OUTA has received any meaningful response from Karpowership to the "with prejudice" proposal. Karpowership's position all along has been that the parties must agree to its restrictive confidentiality proposal. Throughout the negotiations, Karpowership has not moved from this position, and it is repeated in its counter-application. This fact belies the picture Karpowership tries to paint in the answering affidavit that it is a reasonable and accommodating party willing to negotiate and compromise.

186. I have further already dealt with what transpired at the meeting of 5 September 2022 and deny the contents of these paragraphs insofar as they do not correspond with what I have already stated above. OUTA indicated in its "with

prejudice" proposal on 17 October 2022 that it required access to all the documents and was willing to make such access subject to the confidentiality regime it in turn suggested. Karpowership rejected this and correctly concluded that an application to compel had become inevitable.

Ad paragraph 167.2:

187. I deny that Karpowership has offered a proper explanation as to why OUTA's proposed confidentiality regime is unsuitable.

Ad paragraph 168.2:

188. I deny the allegations contained herein. The common cause facts and correspondence show that Karpowership has throughout attempted to dictate the terms on which the record is to be provided by NERSA.

Ad paragraph 169 (including sub-paragraphs):

189. I deny the allegations contained herein insofar as they do not correspond with what I have stated in my founding affidavit. Rule 53 does not allow for one party to dictate the process. NERSA is obliged to uphold the constitutional objectives of transparency and accountability in its actions, and to comply with the provisions of Rule 53 read with the notice of motion which oblige it to provide the record in review proceedings.

Ad paragraph 170.1:

190. There was no obligation on OUTA to indicate in its Rule 30A notice which portions of the redacted record OUTA disputes as being of a non-confidential nature. This allegation again demonstrates that Karpowership is attempting to shift the *onus* to the applicant in the review proceedings to prove why certain information is *not* confidential. There is no basis for such an approach.

Ad paragraph 172.3:

191. OUTA brought its review application within a reasonable time and within the 180 days allowed for by section 7(1) of PAJA. No case has been made out, or can be made out, that it unreasonably delayed.

Ad paragraphs 173.2 and 173.3:

192. The parties undertook to seek an amicable resolution of the dispute about the record. I repeat what I have already stated about the meeting of 5 September 2022. OUTA was subsequently furnished with a spreadsheet and it, in turn, made a **"with prejudice"** proposal. It is common cause that no agreement could be reached. It therefore brought the present application. Karpowership's attorneys recognised as much in their letter of 3 November 2022 (**"FA13"**).

193. Save as set out above, the contents of these paragraphs are denied.

Ad paragraph 174.3:

194. I deny that the redactions were appropriate.

Ad paragraph 175 (including sub-paragraphs):

195. I deny the allegations contained herein and repeat what I have already stated above. OUTA will be prejudiced if it, as applicant in the review application, is not granted access to the record.

Ad paragraph 176 (including sub-paragraphs):

196. The allegations contained herein are denied insofar as they do not correspond with what I have already stated in my founding affidavit and herein above.

Ad paragraph 177 (including sub-paragraphs):

197. I deny that OUTA's experts' opinions are irrelevant or incorrect, but this aspect will be addressed in the main application.

198. Importantly, however, Karpowership acknowledges that OUTA's experts are independent and that they should be granted access to the record. This refutes NERSA's unwarranted allegations that OUTA's experts lack independence simply because they were consulted prior to the launching of the review application.

Ad paragraphs 178 and 179 (including sub-paragraphs):

199. I deny the allegations contained herein insofar as they do not correspond with what I have stated in my founding affidavit and herein above.

Ad paragraph 181 (including sub-paragraphs):

200. As already indicated, I dispute Karpowership's version of what happened at the meeting of 5 September 2022, where I was present, and refer the Honourable Court to the transcription attached as **"RA2"** read with paragraph 55 of my founding affidavit.

201. In its "with prejudice" offer of 17 October 2022, OUTA has indicated that it requires access to all documents in the record, and that it would be willing to enjoy such access under the confidentiality regime proposed in that offer. Although the allegations that OUTA would conduct an analysis of the list of documents provided to it and identify the documents it requires are denied and unsupported by the transcription, OUTA has indeed indicated which documents it requires access to, being the complete record. As applicant in the review application OUTA is entitled to access to the complete record.

Ad paragraphs 182 and 183 (including sub-paragraphs):

202. I deny the allegations contained herein insofar as they do not correspond with what I have already stated in my founding affidavit and herein above.

Ad paragraph 184:

203. I deny the allegations contained herein insofar as they do not correspond with what I have already stated in my founding affidavit and herein above.

Ad paragraph 185:

204. I maintain that the spreadsheet is confusing and deny that the belated attempts by Karpowership to offer further explanations regarding the content of the spreadsheet in its answering affidavit are of much assistance.

Ad paragraph 186:

205. I deny that OUTA *"misses the point"*. It is clear from the spreadsheet that sections 34 and 36 of PAIA was invoked to justify the alleged confidentiality, but which sections are not determinative of the documents which must be included in the record of proceedings in a review application. I also deny the correctness of the deponent's allegation that the categories of information specified therein are by their nature confidential.

Ad paragraph 187 (including sub-paragraphs):

206. I deny the allegations contained herein insofar as they do not correspond with what I have already stated in my founding affidavit and herein above.

Ad paragraphs 189 and 190 (including sub-paragraphs):

207. I deny the allegations contained herein insofar as they do not correspond with what I have already stated in my founding affidavit and herein above.

Ad paragraph 192 (including sub-paragraphs):

208. I deny the allegations contained herein insofar as they do not correspond with what I have already stated in my founding affidavit and herein above.

209. I specifically deny that OUTA seeks or sought to *"force NERSA and Karpowership into agreeing to a confidentiality regime over which NERSA had no control"*. In any event, the suggestion that NERSA should have control over the confidentiality regime in the context of a review application is misplaced.

210. The "with prejudice" proposal aimed to find an amicable solution which would accommodate the concerns of all the parties as far as possible. I repeat that acceptance thereof would not prejudice either NERSA or Karpowership.

211. Should OUTA at a later stage elect to duly appoint further experts, they would be subject to the same confidentiality restrictions. I point out in passing that NERSA and Karpowership did not, however, accept the proposed regime subject to the matter of appointment of further experts only. It rejected it in its totality.

212. Karpowership's allegations in paragraphs 192.5 and 192.6 about how the proposed confidentiality regime would operate in practice are misconstrued and appear to be an attempt to create as much confusion about it as possible.

213. The sketching of possible scenarios in paragraph 192.6 is far-fetched, with respect, especially if regard is had to the wording of clause 5.8 of the "with prejudice" proposal. It does not presume that *"there will be only one document*

for which confidentiality will be contested", neither does it envisage that the supplementary affidavit will have to be amended if certain information is deemed by the presiding judge to be confidential. It makes provision that in such an event (if a judge finds that the supplementary affidavit contains confidential information), such judge can order that the review application be dealt with in a closed hearing instead of in open court.

214. The "with prejudice" proposal was made by OUTA as a practical solution that would address the concerns of all the parties as far as possible. I maintain that it would not cause prejudice to either NERSA or Karpowership.

Ad paragraph 195 (to include sub-paragraphs):

215. I deny the allegations contained herein insofar as they do not correspond with what I have already stated in my founding affidavit and herein above.

Ad paragraph 198 (to include sub-paragraphs):

216. OUTA is the applicant in the review application. OUTA is the party that gave the instruction to initiate the proceedings and appoint the experts. The suggestion by Karpowership that OUTA (through its employees dealing with the matter) is not able and required to meaningfully contribute to the review application is baseless.

217. An applicant in motion proceedings is entitled to participate in the proceedings brought by it, to depose to affidavits, to provide proper instructions, to obtain considered advice from its legal representatives, and to assess whether its

legal representatives and experts adequately represent its interests. None of this can be done if OUTA is not given access to the same information that its legal representatives and experts have access to. If OUTA's employee representatives may not see any of the allegedly confidential information, who will depose to OUTA's further affidavits?

218. I accordingly deny any allegations contained in these paragraphs that do not correspond with what I have already stated in my founding affidavit or herein above.

Ad paragraph 199 (including sub-paragraphs):

219. I deny the allegations contained herein insofar as they do not correspond with what I have already stated in my founding affidavit and herein above.

Ad paragraph 200 (including sub-paragraphs):

220. I deny the allegations contained herein insofar as they do not correspond with what I have already stated in my founding affidavit and herein above. Insisting that OUTA consent to such a restrictive confidentiality regime without entertaining any other proposals does not point to *"a bona fide endeavour to reach agreement with OUTA regarding the status of confidential documents."*

Ad paragraph 201 (including sub-paragraphs):

221. I deny the allegations contained herein insofar as they do not correspond with what I have already stated in my founding affidavit and herein above.

222. Since it is common cause that the parties have now reached a stalemate and that the negotiations between the parties have failed, it serves little purpose to dwell at length on the meeting before the Honourable Ledwaba DJP on 5 September 2022.

223. OUTA, as applicant in the review application, together with its legal representatives and experts, require access to the full record, at the least, on the basis set out in its "with prejudice" proposal. Karpowership and NERSA refuse to provide such access and insist, instead, on the confidentiality regime proposed by Karpowership. No amount of correspondence, lists, or meetings will resolve this stalemate. A court needs to pronounce on the dispute.

Ad paragraph 202 (including sub-paragraphs):

224. I deny the allegations contained herein insofar as they do not correspond with what I have already stated in my founding affidavit and herein above.

Ad paragraph 203 (including sub-paragraphs):

225. I deny the allegations contained herein insofar as they do not correspond with what I have already stated in my founding affidavit and herein above.

Ad paragraphs 204 to 209:

226. The allegations contained in these paragraphs are mainly a repetition of allegations contained earlier in Karpowership's answering affidavit and with which I have already dealt.

227. The content is accordingly denied insofar as it does not correspond with what I have already stated in my founding affidavit and herein above.

Conclusion:

228. In the premises it is submitted that Karpowership has failed to make out a proper case in support of its counter-application and that it should be dismissed with costs such costs to include the cost of two counsel.

229. OUTA persists with the relief as requested in its Notice of Motion with the costs to include the cost of two counsel.

DEPONENT

Signed and sworn before me at Pretoria on this 23rd day of MAY 2023 after the deponent declared that she knows and understands the content of this declaration, has no objection to taking the prescribed oath and considers the prescribed oath to be binding on her conscience. There has been compliance with the requirements of the Regulations contained in Government Gazette R1258, dated 21 July 1972 (as amended).

COMMISSIONER OF OATH

FULL NAMES:
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