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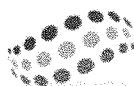
**v**

**THE NATIONAL ENERGY REGULATOR OF SOUTH AFRICA  
AND SEVEN OTHERS**

<u>GT NUMBER:</u>	GT25612
<u>CASE NO:</u>	23017/2022
<u>RECORDED AT:</u>	PRETORIA
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Date: 05-05-2023

The Clerk of the Court: Registrar of the High Court;  
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**PROBLEMS WITH THE TRANSCRIPTION: 23017/2022**

With reference to the record of proceedings, the following problems were experienced on the audio on 05-09-2022

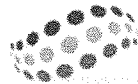
1. Incorrect grammar typed verbatim.
2. Unknown names typed phonetically.
3. Microphones unclear, due it being a virtual recording of a case management meeting connectivity issues cause some problems with audibility. Refer to [indistinct] throughout record of transcription.

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**PROCEEDINGS HELD 5 ON SEPTEMBER 2022**

COURT: Good morning.

MR BABAMIA: Good morning judge.

MS GILDENHUYS: Good morning judge. How are you?

COURT: I am trying to survive.

MR HATHORN: Morning judge.

MR MAKGATE: Morning judge.

COURT: Good morning, good morning. My building next to me has just caught fire, the Law Society building.

10 MS GILDENHUYS: Oh, goodness.

COURT: So I am just trying to be sure that the fire will not affect our building here, the court building but be that as it may let us proceed with the meeting. This is the, are there two cases numbers, 23017/2022 and 23339/2022. Okay, who is appearing for who in the matter, let us start there?

MS GILDENHUYS: Good morning judge. We are here for the applicant in case number 23017, that is the OUTA case. I appear with my learned friend, Sonica Mentz.

COURT: Your surname, sorry counsel?

20 MS GILDENHUYS: I am Gildenhuis, Jannet Gildenhuis and I appear with Ms Mentz and we are instructed by Jennings.

COURT: Okay.

MR HATHORN: Good morning Deputy Judge President. I am Peter Hathorn and I appear with Caroline Rogers for the Green Connection, the applicant in the second case,

4 (M)

23339/2022.

COURT: Yes?

MR MAKGATE: Good morning judge. I am Tshepang Makgate. I am being led by Advocate Mokoena SC. We appear for NERSA in both matters. Unfortunately he is not available due to prior commitments and he has sent his apologies.

COURT: Okay.

MR BABAMIA: Good morning judge, Jawaid Babamia, I  
10 appear together with Mr Ty Scott. Mr Scott is not present this morning. I appear for the three Karpowership entities in both cases, both the Green Connection case and the OUTA case.

COURT: Green Connection and OUTA. Ms Peter Hathorn.

MR HATHORN: That is correct.

COURT: Yes, I also hear Mr Babamia saying that he is appearing for Green Connection.

MR BABAMIA: No, no, judge. Sorry, I may have said that. You may have misunderstood me. I appear for the three  
20 Karpowership entities in both cases, the case ...[indistinct] Green Connection.

COURT: Oh, I understand, I understand now. Okay, let us proceed with our meeting. Who will start?

MS GILDENHUYS: Thank you judge. I can start because we are for the, call it the first set of applicants. Judge went



sent through an agenda on 29 August with three discussion points on the agenda.

COURT: Yes.

MS GILDENHUYS: They were, the first one about the consolidation or a joint hearing and that seems to have been sorted out now between the parties. I believe everybody agrees that the two matters should be heard jointly and not consolidated.

COURT: Okay.

- 10 MS GILDENHUYS: But I am sure my learned friends will indicate if they do not agree with that submission. The second point has to do with the rule 33 record M'Lady and it seems that there is an impasse between the parties on that point.

The background very briefly is that NERSA made available a redacted record without there being an agreement in place in other words the parties did not agree to such a redacted record being made available and if I might be permitted it has been redacted quite dramatically.

- 20 Amongst other things all the financial information of whatever nature has been excluded from the rule 33 record. It is most definitely not limited to the redaction of, for example trade secrets.

That appears from Annexure A to the agenda which was a very high level list ...[indistinct] of redacted



information but be that as it may M'Lady we then received on Friday evening apparently, although it only came to our attention this morning unfortunately, we were provided with a letter from Pinsent Masons who is the attorneys for Karpowership.

As I said unfortunately my attorney was not available over the weekend and only, this letter only came to her attention this morning but what the letter now sets out in respect of the rule 33 record is a confidentiality regime akin to that adopted by the Constitutional Court in the *Helen Suzman* decision.

Now judge our attitude at this stage unfortunately is complicated because we have not been able to obtain instructions. The regime that they propose might not be objectionable in itself, in a nutshell it is that the record be made available to the legal representatives of the parties and one independent expert each appointed by each party to assist then in determining which parts of the record are confidential and which parts are not confidential but at that point already it is clear that that would mean further costs and both the sets of applicants in this matter are non-profit organisations so the additional costs we would have to get an instruction from our clients on that score.

COURT: Yes?

MS GILDENHUYS: And there are further details which



might have to be sorted out in as far as the proposal is that each party appoints an independent expert.

Something that comes to mind is that the three Karpowership entities would have to be seen as one party and then it seems that the idea is that the confidential version be reserved to permitted persons and we would insist that our financial experts, the Meridian Economics be provided with at least the financial information in order to advise our client so M'Lady in a nutshell I think what we are  
10 proposing at this stage is that this meeting, because we have not been able to get an instruction and we cannot conclusively tell Your Ladyship at this stage what our attitude is that perhaps the meeting should be stood down for the parties to obtain instructions because our client would need to instruct us for example whether the attitude should be that Karpowership and NERSA should nonetheless motivate this order that they now seek.

It appears to me that they would not be entitled as a right to this confidentiality regime without in any way  
20 motivating the stance. As at this moment we have not received a single motivation other than a paragraph saying that the information is confidential and that it relates to, for example proprietary trade secrets which seems to us to be insufficient, the motivation to entitle them to the order that was made in the *Helen Suzman* case but my request to Your

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Ladyship would then be that subject to what my colleagues say that the matter, that this meeting be reconvened at a later stage when we have obtained instructions. Thank you M'Lady.

COURT: Okay, thank you. Yes, you have heard gentlemen what Advocate Gildenhuis said. Do you have any problem, objection to that?

MR HATHORN: Judge President we are in a position where the letter might have been sent, my attorney is indicating  
10 that she has received the letter. We have not had an opportunity to consider the letter and certainly not an opportunity to get instructions with regard to it so we would support the request that the matter stand down in order to obtain instructions.

COURT: Advocate Babamia?

MR BABAMIA: Judge, I understand the letter was sent at 4 o'clock on Friday but that is neither here nor there, I have no difficulty if my learned friends require some time to consider it.

20 Can I make the following suggestion because this is an impasse between the parties and I agree with both my learned colleagues, OUTA and Green Connection that it is premature to determine a time for the hearing of this matter while all of us are quite anxious on having this matter heard until this impasse is resolved.

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Can I make the following suggestion? Can the parties or rather the counsel from the OUTA and Green Connection camp indicate what documents they would like and by whom they would like it to be seen.

By way of example Ms Gildenhuys mentioned that she would like certain financial information being seen by Meridian.

Now that is an example that we can consider and of course you know, there would be no need for a fight in  
10 respect of something like that if we know what type of financial information that arises from the record.

Perhaps the best way to go about dealing with this is for the parties to exhaust further exchanges and to the extent that there still remains an impasse in respect of those exchanges then the issue in dispute between the parties becomes a very narrow one.

COURT: I think maybe because of the letter that they say they have just received you will discuss the issue that you have raised and Maga, is it Makgale or Makgate?

20 MR MAKGATE: Makgate, -te [spelt], yes. Judge let me first deal with the issue of consolidation. We have since taken instruction from client regarding the consolidation of matters and the attitude adopted is that these matters need to be dealt with separately considering that the applications were brought separately and in the event ...[intervenes]

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COURT: I understood Advocate Gildenhuis to be saying not consolidate but that they be heard together. There is a difference between the two.

MR MAKGATE: Oh, I thought they were talking consolidation. If ever they say they will be heard together we will still take instruction in that regard because at the moment our instruction ...[indistinct] insofar as consolidation is concerned.

May we be given an opportunity that when we  
10 reconvene at a later stage we can then express our client's position regarding ...[intervenes]

COURT: You can discuss it amongst yourselves before you come to me so that when we hold another meeting I know exactly what is the position of each party but am I right Advocate Gildenhuis, you spoke about matters being heard together, not consolidation?

MS GILDENHUIS: Indeed judge. That is what I thought the agreement was between the parties.

COURT: Yes.

20 MS GILDENHUIS: Because no one has raised an objection.

COURT: So it seems we do not have any choice. We will just have to adjourn this meeting for parties to sort out whatever you need to sort out. Preferably please come to me when you have tried to sort out the issues so that I can

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manage what the parties could not sort out and we can also just agree on the suitable date of hearing.

MR MAKGATE: Thank you.

MS GILDENHUYS: Thank you.

MR HATHORN: Thank you judge.

COURT: Thank you, so the meeting is adjourned until I am contacted again to arrange another management meeting. Thank you.

MR HATHORN: Deputy Judge President can I request that  
10 we adjourn till this time next Monday if that would be suitable to yourself so that would give us a week to exchange correspondence and then we do not have to approach the Court and arrange for a further case management meeting but we have got a week to try and come to an arrangement between ourselves?

COURT: So you need about a week to, do you want us to adjourn this meeting to a specific date or just let me, we agree in principle that you will sort them out in a week and come back to me again?

20 MR HATHORN: My proposal would be that if we could adjourn to Monday morning next week if that is suitable to yourself and the parties then that would give us a timeframe within which to try and sort it out amongst ourselves?

COURT: I do not have my diary with me. I would suggest that see what is it that you can do and then if you need a



meeting earlier let me know. I will see how can I squeeze you because I know that I am full and the next week is the last week of the term but I will see how can I accommodate all the parties.

MR HATHORN: Thank you Deputy Judge President.

MR MAKGATE: Thank you judge.

COURT: Thank you.

MS GILDENHUYS: Thank you judge.

MR BABAMIA: Thank you.

10 COURT: Right, you are excused.

COURT ADJOURNS

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