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**

FILING NOTICE

DOCUMENT FILED: **APPLICANT'S HEADS OF ARGUMENT**

APPLICANT'S CHRONOLOGY

SIGNED AT PRETORIA ON THIS 31st DAY OF JANUARY 2024.

JENNINGS INCORPORATED
Attorneys for Applicant
56 JEROME ROAD
LEOPARD COURT
GROUND FLOOR
LYNNWOOD GLEN
PRETORIA
Tel: 012 110 4442
Email: andri@jinc.co.za; delia@jinc.co.za
Ref: A JENNINGS/OUT015

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

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

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

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

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

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case no: 23017/2022

In the matter between:

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

IN RE: THE MAIN 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 HEADS OF ARGUMENT:
INTERLOCUTORY APPLICATION TO COMPEL PRODUCTION OF RULE 53 RECORD

"Parties who participate in tender bids particularly in the public sector where public funds are involved, must be prepared to be transparent and play open cards when tender decisions in their favour are challenged. It cannot be right to impede a challenge by hiding behind confidentiality privilege..." [1]

---

1 ***Palm Stationery Manufacturers (Pty) and Meli Data Matrix Solutions (Pty) Ltd Joint Venture v Acting Head of Department: Mpumalanga Department of Education*** 2019 JDR 2462 (MN), per Legodi JP, para 22 at p 7.

INDEX

PART A: INTRODUCTION

1. This is an interlocutory application to compel the production of a complete review record in terms of rule 30A(2) as read with the notice of motion in the review proceedings and rule 53(1)(b) of the Uniform Rules of Court. The first respondent (**NERSA**) has delivered a heavily redacted record pursuant to the claim by the second to fifth respondents (collectively and separately referred to as **Karpowership**) that a host of documents in the record are confidential and may not be disclosed to the applicant (**OUTA**). The background to the dispute and the nature of the issues are briefly set out in this paragraph.[2]

2. OUTA launched a review application in terms of the Promotion of Administrative Justice Act 3 of 2000 (**PAJA**) read with rule 53 out of the above honourable court on 26 April 2022 for the review and setting aside of a decision by NERSA to grant generation licences to the second to fourth respondents (**the review application**). The licences authorise them to generate electricity by way of three floating storage and regasification units generally referred to as "powerships".

3. The review application is opposed by NERSA and Karpowership. It is common cause between OUTA and NERSA that the matter is of national importance.[3]

4. The record that NERSA must despatch in terms of rule 53(1)(b) as read with the notice of motion in the review application fell due on 19 May 2022.

---

2 The background to this application is set out in founding affidavit in the application to compel, paras 13 to 27 at 013-4 to 013-10. The founding, answering and replying affidavits in the application to compel will be referred as "FA", "AA" ("NERSA AA" and "KPS AA") and "RA" respectively. References to pages numbers are to the Caselines pagination.

3 FA para 89 at 013-41 read with NERSA AA para 105 at 017-30.

5. On 24 May 2022, prior to receipt of the record, Karpowership's attorneys proposed in correspondence that a "*confidentiality regime be agreed before the record is distributed*".[4] The proposal was made on the assumption that the record would include "*certain confidential regarding (its) client" and "in order to control the disclosure of information*". The proposal entailed that Karpowership would redact or exclude all of its allegedly confidential information and include it in a separate confidential record which would only be accessible to the judge and, subject to confidentiality undertakings, to the respective legal representatives. OUTA itself would not have access thereto. All affidavits which rely on the confidential information would be subject to the same arrangement and a closed hearing. This essentially remains Karpowership's position to date and is now the subject of the relief sought in its counter application. It seeks definitive relief without the applicant or the court having seen the redacted documents.

6. OUTA refused to agree to it without knowing what information Karpowership who, incidentally, was not the party from whom the record was requested, wanted to keep confidential and the reasons therefor. It advised the other parties' attorneys accordingly, including NERSA's attorneys.[5]

7. NERSA nonetheless proceeded, on 17 June 2022, to file a heavily redacted record in accordance with Karpowership's wishes. One example would suffice:

---

4 FA para 39 at 013-14; FA3 at 014-15.

5 FA para 41 at 013-15 to 013-16 read with the referenced annexures.

7.1 In OUTA's review application, the cost implications of the powership project over the anticipated 20-year contract period take centre stage.[6]

7.2 OUTA, relying on section 2 of the Electricity Regulation Act 4 of 2006 ("the ERA") and regulations 9 and 10 of the 2011 Electricity Regulations on New Generation Capacity,[7] contends in the review application that NERSA has a statutory obligation to ensure value for money and cost effectiveness for the end user when awarding electricity generation licences.

7.3 OUTA engaged the services of two independent experts from Meridian Economics in the review application in this regard. OUTA referred to their opinion in the present application to highlight material issues arising in the review application and to illustrate the relevance of the financial information that has been omitted from the redacted record.[8]

7.4 The experts' opinion raises serious questions about the cost-effectiveness of the anticipated 20-year project period and its adverse climate impacts. OUTA accordingly alleges in its founding affidavit in the present application that:[9]

> *"Moreover, from OUTA's founding affidavit* [in the review application] *it is evident that the enormous projected costs of the Karpowership projects over a period of 20 years (estimated by OUTA to be in excess of R200 billion) will*

---

6 FA para 43 to 45 at 013-17 to 013-22, read with OUTA's founding affidavit in the main review application at 002-1 to 002-49.

7 FA para 46 to 49 at 013-22 to 013-25.

8 FA para 45 at 013-21 to 013-22.

9 FA para 51 at 013-25.

have an impact on South Africa taxpayers, and whether there was a proper cost consideration is one of the great concerns with the award of the generation licences."

7.5 Despite the financial information clearly being relevant to the review application, the projected costs of the 20-year project and whether it is value for money have been kept secret: all information about charge rates and tariffs was redacted from the rule 53 record; and all information as to how the fluctuation in the Dollar/Rand exchange rate over the next 20 years was dealt with in the decision-making process was also redacted.[10]

7.6 The applicant is entitled to assess the financial information that served before the decision maker and it is entitled to supplement its case in the review application on the basis thereof. Such an assessment cannot be conducted if the projected costs of the 20-year project is kept secret.

8. OUTA's review application was subsequently referred to case management by agreement. At a case management meeting with the Deputy Judge President held on 5 September 2022, the parties undertook to attempt to find an amicable solution regarding the contents of the record.

9. To this end, and without conceding that the record was partially confidential, OUTA made a counter proposal on 17 October 2022, with prejudice, based on the confidentiality regime that was employed in ***Cape Town City v South***

---

10 FA para 50 at 013-26.

Africa National Roads Authority and Others.[11] It was rejected out of hand by both NERSA and Karpowership.

10. It is common cause that the parties reached a stalemate regarding the contents of the record.

11. OUTA accordingly delivered a notice in terms of Rule 30A on 12 December 2022[12] and, failing compliance with it, instituted the application to compel ("the application") on 23 January 2023. NERSA and Karpowership oppose the application and have filed answering affidavits. The sixth to eighth respondents in the main review application are not participating in the present application.

12. NERSA prays that the application be dismissed. Its stance is that[13] NERSA as regulator has a mandate and a duty to protect all the confidential information disclosed to it and that it will be acting contrary to its own policy and guidelines, absent any confidentiality regime having been concluded, by disclosing any of the allegedly confidential information of Karpowership to a third party. NERSA thus relies on (a) its alleged policies and guidelines and (b) the provisions of the Promotion of Access to Information Act 2 of 2000 (**PAIA**) to keep parts of the record secret.

13. It will be shown below that NERSA's stance is misplaced for the following reasons, which are more fully set out below.

---

11 2015 (3) SA 386 (SCA).

12 At 011-1 to 011-5.

13 NERSA AA paras 27 to 29 at 017-16.

13.1 These are review proceedings. An applicant in review proceedings is in principle entitled to the complete record. It is the applicant's right to decide on which parts thereof it wishes to rely, and to supplement its founding papers accordingly in terms of rule 53(4).

13.2 The decision maker, NERSA, has a duty in terms of rule 53(1)(b) and in terms of the Constitution, 1996 to disclose the full record to the applicant in review proceedings. It does not have the right or power to refuse full disclosure or to impose conditions.

13.3 The provisions of PAIA do not apply in these proceedings and, even if they did, information which is confidential under PAIA is not necessarily confidential for purposes of the rule 53 record.

13.4 If NERSA were of the view that it had grounds to refuse full disclosure of the record, it should have applied to court for condonation and shown that it is in the interest of justice for the court to condone its non-compliance with the provisions of rule 53(1)(b). Instead of doing so, however, it took the law in its own hands and, siding with Karpowership, decided that the documentation was confidential for purposes of the record and would not be furnished in compliance with rule 53(1)(b) as read with the notice of motion. It is submitted that this decision was not for NERSA to make but for the court.

13.5 As will be shown below, NERSA accordingly failed to disclose a defence to the present application.

14. Karpowership's stance in respect of the relief sought in prayer 1 is that OUTA has an onus, but has failed, to make out a case that the documents they seek as part of the record are *not* in fact confidential and seeks a dismissal of OUTA's application. It counter applies for an order imposing the confidentiality regime it formulated.[14]

15. As shown below, Karpowership's submissions about the onus are baseless. OUTA has shown that NERSA failed to comply with rule 53(1)(b). If Karpowership wished to raise a defence in this application that there is no non-compliance or that the non-compliance is excusable, it must make out such a case. In addition, the relief sought by Karpowership in prayer 2 of the counter application is premised on a concession that the full record must be disclosed in terms of rule 53(1)(b) but subject thereto that a confidentiality regime must be imposed. Where Karpowership is the applicant for such relief in the counter application, there is no doubt that it has the onus to prove that the documents concerned warrant such special treatment.

16. Both in the case of OUTA's prayer 1 relief and Karpowership's counter relief (prayer 2), the court will to a lesser or greater degree be called upon to make a definitive finding on whether NERSA and/or Karpowership have made out a proper case that the redacted documents are deserving of being protected from public disclosure by a confidentiality regime. Because the redacted parts of the record have not been disclosed to OUTA and are not before the court, leaving only Karpowership's say-so that they are confidential, this court can only reach such a decision with reference to the onus. OUTA respectfully contends for the

---

[14] See notice of counter application at 021-1 to 021-3, with annexures at 019-69 at 019-80.

reasons set out in part B below that the court should find that the respondents have failed to make out a case that justifies a departure from the default position of full disclosure and should order full disclosure.

17. Should the court in its discretion decline to make a definitive order in the present application on such basis, OUTA would seek an order for the alternative relief contained in prayer 2 of OUTA's notice of motion, which is in line with the *"with prejudice"* offer it made in October 2022. This will allow for the record to be treated as confidential on a provisional basis, for purposes of moving forward with the review application until a later stage when a court can make a definitive decision, if necessary, in respect of the confidentiality of specific documents.

18. Practically, the alternative relief entails that OUTA's two representatives, its legal representatives and independent experts would be granted access to the unredacted version of the record subject to signing confidentiality undertakings. OUTA will then prepare its supplementary founding affidavit(s). If any of the allegedly confidential documents or information should be relied upon by OUTA, it shall give the respondents 10 days' notice from date of service of the affidavits on them to object thereto by listing all information or documents to which they object together with the reasons for the objection, before filing the supplementary affidavit(s) at court by any means. Should the respondents object to the use of any specific document or documents in public proceedings, any party may approach the court in a closed hearing to decide such dispute.

19. It is submitted that the above approach will focus and limit the disputes about confidentiality. There may be large parts of the record that OUTA does not wish to rely upon and which will thus be of no further relevance. Such information

will continue to be treated as confidential. Disputes about relevant documents can be referred to and decided by another court which would have the advantage of having the disputed documents before it.

20. The main disputes are addressed in parts B and C below. NERSA and Karpowership have also raised a number of other disputes which, it is submitted, are peripheral and unmeritorious. They will be dealt with in part D below.

21. Where quoted texts or parts thereof are underlined or in bold font for emphasis, such emphases are our own.

PART B: THE RELIEF SOUGHT BY OUTA IN PRAYER 1

The content and purpose of Rule 53(1)(b)

22. OUTA seeks an order in prayer 1 of the notice of motion[15] compelling NERSA to comply with rule 53(1)(b) as read with the notice of motion in the review proceedings by making a complete, unredacted record available to it within 10 days of the granting of the order.

23. NERSA has a duty in terms of rule 53(1)(b) of the Uniform Rules of Court as read with the notice of motion in the review application to make the record of the proceedings sought to be set aside available. Rule 53(1)(b) under the heading **"Reviews"** provides as follows:

> *"(1) Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer preforming judicial, quasi-judicial or administrative functions shall be by*

---

15 At 012-1.

way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairperson of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected –

(a) ...

(b) calling upon the magistrate, presiding officer, chairperson or officer, as the case may be, to despatch, within fifteen days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as he or she is by law required or desires to give or make, and to notify the applicant that he or she has done so."

24. In ***Jockey Club of South Africa v Forbes***[16] the Appellate Division per Kriegler AJA stated the following regarding the purpose of rule 53:

"...The primary purpose of the Rule is to facilitate and regulate applications for review. On the face of it the Rule was designed to aid an applicant, not to shackle him..."

"...The purpose of Rule 53 is not to protect the 'decision-maker' but to facilitate applications for review and to ensure their speedy and orderly presentation. Such benefits which it may confer on a respondent, in contradistinction to those ordinarily enjoyed by a respondent under Rule 6, are incidental and minor. It confers real benefits on the applicant, benefits which he may enjoy if and to the extent needed in his particular circumstances."

25. The position was confirmed by the Constitutional Court in ***Helen Suzman Foundation v Judicial Services Commission***[17] as follows:

"[13] The requirement in rule 53(1)(b) that the decision maker file the record of decision is primarily intended to operate in favour of an applicant in review proceedings. It helps to ensure that review proceedings are not launched in the dark. The record enables the applicant and the court fully and properly to assess the lawfulness of the decision-making process. It allows the applicant to interrogate the

---

16 1993 (1) SA 649 (A) at pp 661 and 662.

17 2018 (4) SA 1 (CC) at para 13.

decision and, if necessary, to amend its notice of motion and supplement its grounds for review."

26. It is thus settled law that the rule operates primarily for the benefit of an applicant in review proceedings to the extent needed in particular circumstances.

The role and importance of rule 53(1)(b) in the constitutional context

27. Rule 53(1)(b) has assumed an important role in the constitutional era, of giving effect to section 34 of the Constitution, 1996.

28. Section 34 of the Constitution under the heading **"Access to courts"** provides as follows:

> *"34 Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."*

29. In ***Democratic Alliance v Acting National Director of Public Prosecutions***[18] the Supreme Court of Appeal, per Navsa JA, held that a court cannot perform its constitutionally entrenched review function without the record. He endorsed rule 53 of the Uniform Rules of Court as a tool to give effect to section 34 of the Constitution, as follows:

> *"[37] In the constitutional era courts are clearly empowered beyond the confines of PAJA to scrutinise the exercise of public power for compliance with constitutional prescripts. That much is clear from the Constitutional Court judgments set out above. It can hardly be argued that, in an era of greater transparency, accountability and access to information, a record of decision related to the exercise of public power that can be reviewed should not be made available, whether in terms of rule 53 or by courts exercising their inherent power to regulate their own process. Without the record a*

---

[18] 2012 (3) SA 486 (SCA) para 37.

court cannot perform its constitutionally entrenched review function, with the result that a litigant's right in terms of s 34 of the Constitution to have a justiciable dispute decided in a fair public hearing before a court with all the issues being ventilated, would be infringed."

30. In ***Helen Suzman Foundation v Judicial Services Commission,***[19] the Constitutional Court per Madlanga J, writing for the majority, confirmed and applied the above-mentioned findings of the SCA as appears from the following passages of the judgment:

"[15] The filing of the full record furthers an applicant's right of access to court by ensuring both that the court has the relevant information before it and that there is equality of arms between the person challenging a decision and the decision-maker. Equality of arms requires that parties to the review proceedings must each have a reasonable opportunity of presenting their case under conditions that do not place them at a substantial disadvantage vis-à-vis their opponents. This requires that —

> *'all the parties have identical copies of the relevant documents on which to draft their affidavits and that they and the court have identical papers before them when the matter comes to court'."*

"[58] ...Of relevance for present purposes is the right of access to court contained in s 34 of the Constitution. It is axiomatic that this is the right sought to be advanced by rule 53. As we have seen from Democratic Alliance, without a record, a court cannot perform its review function properly. And that constitutes an infringement of the right of access to court. This must also be true of a truncated record; the JSC record from which a recording of the deliberations has been excised answers that description.

[59] In addition, there is a real risk of a review applicant's right under s 34 being infringed when she or he has been denied access to material that might have assisted her or his case. The unfairness lies in the fact that the applicant may have been hampered in the formulation and prosecution of her or his case. Put differently, she or he may have been prevented from making the best possible case..."

---

19 2018 (4) SA 1 (CC) at paras 58 to 59.

31. Madlanga J specifically held, in para 58 quoted above, that the provision of a truncated record similarly constitutes an infringement of the right of access to court. The scope of the rule is dealt with more fully in the next paragraph.

The scope of rule 53(1)(b)

32. In the *Helen Suzman* judgment, the content of the rule 53 record was specifically considered. Madlanga J writing for the majority of the Constitutional Court stated the following (omitting the footnotes):

> *"[17] What forms part of the rule 53 record? The current position in our law is that — with the exception of privileged information — the record contains all information relevant to the impugned decision or proceedings. Information is relevant if it throws light on the decision-making process and the factors that were likely at play in the mind of the decision-maker. Zeffertt & Paizes make a comment on the exclusion of evidence on the grounds of privilege. That comment must surely be of relevance even to the exclusion of privileged information from a rule 53 record. After all, the content of a rule 53 record is but evidentiary in nature. The authors say that in the case of privileged information, the exclusion is based on the recognition that the general policy that justice is best served when all relevant evidence is ventilated may, in some cases, be outweighed by a particular policy that requires the suppression of that evidence. The fact that documents contain information of a confidential nature 'does not per se in our law confer on them any privilege against disclosure'."*

33. In ***Public Protector v South African Reserve Bank***[20] the Constitutional Court again examined the purpose and scope of a record in rule 53 review proceedings and stated the following:

> *"[185] The Public Protector was, however, required to produce a full and complete record of the proceedings under review in terms of rule 53 of the Uniform Rules of Court. This included 'every scrap of paper throwing light, however indirectly, on what the proceedings were, both procedurally and evidentially.' An essential purpose of this*

---

20 2019 (6) SA 253 (CC) para 185.

obligation is to enable a court to perform its constitutionally entrenched review function. This gives effect to the rights of the parties under s 34 of the Constitution to have justiciable disputes decided in fair public hearings with all the issues being ventilated. It also safeguards parties' ability to enforce their rights under s 33 of the Constitution to administrative action that is lawful, reasonable and procedurally fair. The record was essential to enable the reviewing applicants to understand what occurred during the investigation that led to the impugned remedial action and to equip the court to ensure the proper administration of justice in the case."

Grounds for excluding documentation from a rule 53 record

34. The usual grounds for excluding information or documentation from the record are irrelevance and privilege.[21]

34.1 Relevance is assessed as it relates to the decision sought to be reviewed, not the case pleaded in the founding affidavit because the review grounds may be supplemented.

34.2 There is no closed list of what may constitute privilege but there has to be a legally cognisable basis therefor.[22]

35. NERSA thus has a constitutional duty to make the full record available to OUTA in terms of rule 53 unless it can show that specific documents fall to be excluded because they are irrelevant or that there is a legally cognisable basis for claiming that they are privileged.

36. NERSA does not claim that they are irrelevant. It relies on (a) its alleged policies and guidelines and (b) the provisions of PAIA to keep parts of the record secret. We deal with these contentions in turn below.

---

21 ***Helen Suzman*** *supra* paras 17 and 22.

22 ***Helen Suzman*** *supra* paras 24, 27 and 52.

NERSA's reliance on its policy and guidelines to keep parts of the record secret

37. In its answering affidavit, NERSA relies on its policy and guidelines to justify non-disclosure.[23] It failed, however, to provide any details or attach any documents to its answering affidavit in support its allegations in this regard.

38. This prompted OUTA to serve a notice in terms of rule 35(12) and (14) on NERSA's attorneys wherein NERSA was called upon to make available for inspection the policy and guidelines referred to in its answering affidavit.[24]

39. In response, NERSA provided a blanket application form with the heading *"Application for confidential treatment of information submitted to the Energy Regulator"*[25] and a copy of the National Energy Regulator Act, 40 of 2004. Neither of these documents constitute an internal NERSA *"policy"* or *"guidelines"*. It therefore appears that NERSA does not have a written policy or guidelines as alleged in its answering affidavit. It would have been provided if it existed.[26]

40. After receipt of the documents referred to above, OUTA served a further notice in terms of rule 35(12) and (14) on NERSA to request the motivation that was submitted by Karpowership to it to keep certain information confidential and any determinations that NERSA may have made in this regard.[27]

---

23 NERSA AA para 23 to 29 at 017-15 to 017-16.

24 RA para 21 at 024-14.

25 RA para 23 at 024-15 read with annexure "RA3" at 025-17 to 025-21.

26 RA para 24 to 26 at 024-15.

27 RA para 30 at 024-17.

41. The documents provided by NERSA in response to OUTA's second request in terms of rule 35(12) and (14)[28] show that Karpowership lodged several 'applications' to treat information as confidential. None of these were under oath as required by NERSA's own application form. It seems that these requests were acceded to by NERSA save in respect of Coega which is not signed.[29]

42. It is submitted that NERSA cannot rely on non-existent policies and guidelines to support its non-disclosure of information as part of the rule 53 record. It can also not rely on information furnished on a form completed by a tenderer where the information on the form is not under oath despite being required to be under oath by the form and thus the policy itself.

43. In any event, even where an organ of state has internal policies and guidelines pertaining to confidential treatment of information pursuant to PAIA (assuming such policies or guidelines are found to exist), it does not follow that the information is also confidential for purposes of compiling a record in review proceedings and may be withheld from an applicant. We refer in this regard to the dicta by Madlanga J in ***Helen Suzman*** discussed more fully under the next paragraph.

NERSA's reliance on PAIA as ground for confidentiality of parts of the record

---

28 Annexure "RA4" to OUTA's RA at 025-22 to 025-81.

29 RA para 33 at 024-22.

44. In addition to its *"policy and guidelines"*, NERSA relies on the provisions of PAIA in support of its position not to disclose the redacted information as part of the rule 53 record.[30]

45. Reliance is also placed on the provisions of PAIA as reasons for confidentiality in the spreadsheet that was provided by NERSA to OUTA on 12 September 2022.[31]

46. Section 7(1) of PAIA expressly provides that PAIA does not apply to the record of a public body or a private body if that record is requested for the purpose of civil proceedings, if it is requested after commencement of the civil proceedings, and if the production of or access to that record for the purpose of civil proceedings is provided for in any other law. Section 7(1) thus finds application in the present matter because review proceedings are civil proceedings, the record was requested after commencement thereof and the production of the record is required by rule 53 and section 34 of the Constitution.

47. It is accordingly submitted that PAIA finds no application in the present proceedings and cannot be invoked to treat parts of the record as confidential in these proceedings.

48. Justice Madlanga writing for the majority of the Constitutional Court in the ***Helen Suzman*** judgment furthermore considered the impact of the PAIA provisions in the context of an argument in support of withholding the deliberations of the

---

30 NERSA AA paras 52 and 53 at 017-21.

31 Annexure "FA2" to OUTA FA at 014-14.

JSC from an applicant seeking the record of proceedings in a review application. He held that:[32]

48.1 PAIA and rule 53 serve different purposes.

48.2 The difference in the nature of, and purposes served by, PAIA and rule 53, "*underscore the reality that it is inapt simply to transpose PAIA proscriptions on access to information to the rule 53 scenario*".

48.3 "*In summary, the denial of access to information – whether under ss 12(d), 36, 41 or any other section of PAIA – does not necessarily lead to the type of information covered by those sections being exempt from disclosure under rule 53*".[33]

49. It is accordingly submitted that NERSA's reliance on PAIA is misplaced.

Karpowership's defence based on OUTA's alleged *onus* of proving non-confidentiality

50. Karpowership contends that OUTA bears the onus to prove non-confidentiality:

50.1 "*OUTA has misconceived the onus of proof applicable to applications of the present nature. It elected not to launch its application on the basis that it identified which documents or information the respondents' assert*

---

32 ***Helen Suzman*** para 17 (last sentence), and paras 43 to 55.

33 Helen Suzman para 55.

confidentiality over are not, in fact, confidential. It is not for Karpowership to make out such a case";[34] and

50.2 *"At the outset, I emphasise that OUTA is mistaken regarding the onus of proof. OUTA failed to launch its application on the basis that the information it seeks and which NERSA redacted were, in fact, not confidential."*[35]

51. Karpowership's argument is thus that the applicant in this application, which is the applicant in the pending review proceedings, bears the *onus* to prove that documents which are relevant (relevance not being contested) but which it has not seen, are not confidential in order to succeed with an application to compel the production thereof as part of the rule 53 record. The argument is baseless as shown below with reference to applicable case law. Rather, it is for a respondent wishing to exclude a document from the rule 53 record, to prove that it falls under a recognised ground for exclusion.

52. The general rule in the law of evidence is that he who asserts must prove. The locus classicus of ***Pillay v Krishna***[36] clearly set out the law in this respect:

"*The first principle in regard to the burden of proof is ... the burden of proof always lies on him who takes action. If one person claims something from another in a court of law then he has to satisfy the court that he is entitled to it. But there is a second principle which must always be read with it ... he who avails himself of an exception is considered a plaintiff; for in respect of his exception a defendant is a plaintiff. Where a person against whom the claim is made is not content with any a mere denial, but sets up a special defence then he is regarded quoad that defence as being the claimant:*

---

34 KPS AA para 9 at 019-3.

35 KPS AA para 83 at 019-26.

36 1946 AD 946 at 951- 953.

for his defence to be upheld he must satisfy the court that he is entitled to succeed upon it."

53. In the context of the right of access to information in terms of PAIA, Chief Justice Ngcobo, writing for the majority of the Constitutional Court in ***President of the Republic of South Africa and Others v M&G Media Ltd***,[37] described a similar argument about placing an *onus* of proof on a party which did not enjoy access to a certain document as manifestly unfair and contrary to the spirit of the PAIA and the Constitution:

> *"[15] The imposition of the evidentiary burden of showing that a record is exempt from disclosure on the holder of information is understandable. To place the burden of showing that a record is not exempt from disclosure on the requesting party would be manifestly unfair and contrary to the spirit of PAIA read in the light of s 32 of the Constitution. This is because the requester of information has no access to the contents of the record sought and is therefore unable to establish that it is not exempt from disclosure under the Act. By contrast, the holder of information has access to the contents of the record sought and is able to establish whether or not it is protected from disclosure under one or more of the exemptions contained in Ch 4. Hence s 81(3) provides that the evidentiary burden rests with the holder of information and not with the requester."*

54. Although we are not concerned with a record requested under PAIA in the present matter but with a rule 53 record, it is submitted that the principle is logical and fair and should apply with equal force in rule 53 review proceedings. An applicant in review proceedings cannot and should not be burdened with an *onus* to prove non-confidentiality of documents which it does not have. The onus to prove confidentiality should rest with the holders of the information i.e., the decision maker (NERSA) or Karpowership.

---

37 2012 (2) SA 50 (CC) para 15.

Part C: KARPOWERSHIP'S COUNTER APPLICATION AND OUTA'S PRAYER 2

Introduction

55. We deal in this part with -

55.1 Karpowership's grounds for claiming a confidentiality regime;

55.2 the requirements to succeed with an application to impose a confidentiality regime (in principle); and

55.3 the terms of the confidentiality regime, should the court decide to order disclosure of the redacted documents subject to a confidentiality regime.

Karpowership's grounds for seeking a confidentiality regime

56. The redacted record was filed by NERSA on 17 June 2022 (pursuant to an indulgence to file the record by 10 June 2022). OUTA was provided with a spreadsheet[38] containing a list of redacted items and reasons for the alleged confidentiality on 12 September 2022.[39] OUTA showed in its founding affidavit that the layout of the spreadsheet creates confusion and that the sheet is of little assistance to properly identify what has been redacted and the reasons therefor.[40]

57. In any event, it is evident from a perusal of the spreadsheet that large parts of the record have been redacted and that the provisions of sections 34 and 36(1) of PAIA are invoked by Karpowership as the basis for the alleged confidentiality

---

38 The spreadsheet is attached as annexure "FA2" to the FA at 014-14.

39 FA para 61 at 013-29.

40 FA paras 62 and 63 at 013-29 to 013-30.

and thus redaction. Karpowership's protestation that it does not "invoke" the provisions of PAIA but that those sections *"reflect a statutory recognition that the categories of information specified therein are, by their nature, confidential" is a distinction without a difference.*[41] There is no doubt that it relied on the provisions of PAIA. It quoted sections 34 and 36(1) of PAIA v*erbatim* under the heading *"Reasons for confidentiality"* on the spreadsheet. It also still relies on PAIA in its answering affidavits albeit that it has sought to amplify its reasons.[42]

The requirements to succeed with a claim for a confidentiality regime

58. In ***Helen Suzman*** the Constitutional Court confirmed[43] that a fact-specific claim of confidentiality is required before there can be a pronouncement on a possible confidentiality regime:

> *"[76] In this case must we then order disclosure subject to a confidentiality regime? Since no fact-specific claim of confidentiality was raised, I do not think it necessary to pronounce on a possible confidentiality regime."*

59. It thus falls to be considered whether Karpowership's grounds for exclusion in the spreadsheet, as amplified in its answering affidavit,[44] qualify as "fact-specific reasons for confidentiality" which justify the imposition of a

---

41 KPS AA para 186.1 at 019-58: *"OUTA misses the point. The reference to the provisions of PAIA and POPIA is not an invocation of those sections but reflects a statutory recognition that the categories of information specified therein are, by their nature, confidential."*

42 KPS AA paras 87 and 88 at 019-27.

43 ***Helen Suzman*** supra para 76 at p 30.

44 KPS AA paras 87 to 150 at 019-27 to 019-44.

confidentiality regime. We respectfully submit that they do not and that Karpowership has not made out a case for the imposition of a confidentiality regime for the reasons set out below.

60. First, as shown above, the Constitutional Court has held that confidentiality under PAIA does not necessarily lead to the type of information covered by those sections being exempt from disclosure under rule 53.

61. Second, as pointed out by OUTA in its founding affidavit, information cannot merely be regarded as confidential because one of the parties says it is. The correspondence attached to the respective affidavits show that the respondents, throughout the period of engagement prior to the launching of this application to compel, expected OUTA to accept the confidentiality of the redacted parts of the record on Karpowership's say-so. This remained the position in its answering affidavit. The Constitutional Court in *Helen Suzman* stated the following in this regard:[45]

> *"...Surely, confidentiality must relate to the nature of the information. Information cannot be confidential just because the person who would like it to be regarded as such says it is."*

62. Third, although Karpowership has sought to amplify its explanations on why it alleges that the redacted information is confidential in nature in its answering affidavit, [46] the explanations remain too vague and too general for the court to conduct a fact-specific analysis and order a confidentiality regime on the basis thereof. It is emphasised that the documents under discussion have not been

---

45 ***Helen Suzman*** supra para 63 at p 27.

46 KPS AA paras 87 to 150 at 019-27 to 019-44.

seen by the applicant or by the court. It is submitted that the quantum and specificity of facts should be such as to enable the court to make an assessment on whether there is a legally cognisable basis upon which to claim that they are privileged and exempt from disclosure. It is submitted that Karpowership has failed to furnish sufficient facts and sufficiently specific facts to justify a confidentiality regime being imposed and to curtail the applicant's rights under rule 53 and section 34 of the Constitution.

63. Fourth, Karpowership must show that there is a legally cognisable basis upon which to claim that the documents concerned are privileged and exempt from disclosure. It has failed to do so. By way of example, Karpowership alleges that the project costs and tariffs must be treated as confidential because *"it will prejudice Karpowership in its dealings with its competitors throughout the world"* and will be used by such competitors *"to compete with Karpowership not only in South Africa but also in other jurisdictions of interest to Karpowership"*.[47] Potential competition is no ground for confidentiality. Businesses compete for price every day. Karpowership's interest in avoiding competition is thus no justification for keeping the project costs a secret. However, even if it were, public interest considerations far outweigh any such interest. If this were a valid ground for confidentiality, any party which submitted an application for a license or a tender to a state organ would be entitled to claim that the costs (which will be borne by the *fiscus* and thus by taxpayers) should not be disclosed to the public as it can be used by their competitors to compete with them. The public would never be entitled to know or question what the state spends on tenders.

---

47 KPS AA para 110 at 019-33.

This is, with respect, contrary to all the values that NERSA is, on its version, bound to observe.[48] As stated by Legodi JP in ***Palm Stationary*** (quoted in the preamble above), parties doing business with the South African government must be prepared to be transparent and play open cards.

64. Fifth, the default position in a constitutional dispensation such as ours remains one of full disclosure and a confidentiality regime will only be ordered in exceptional circumstances. In their discussion of the ***Helen Suzman*** judgment and the possibility of confidentiality of the record, the learned authors of the seminal work ***Administrative Law in South Africa***[49] put it as follows:

> *"Madlanga J went on to note that documents may be excluded from the Rule 53 record only if there is some 'legally cognisable basis' for doing so, such as legal privilege. He also indicated that confidentiality may, in exceptional cases, be a basis for excluding documents from the record. His judgment, however, suggests that it is more likely that, in deserving cases, confidentiality concerns are addressed through a suitably-crafted confidentiality regime – a device that is increasingly adopted in practice but which should, in our view, be confined to exceptional cases, with the default position that the full record is to be disclosed. In Helen Suzman Foundation the court refused to order non-disclosure of the JSC's deliberations, or to impose a blanket confidentiality regime on the disclosure, particularly given that the JSC had made a blanket assertion of confidentiality relating to its deliberations rather than a fact-specific claim of confidentiality."*

It is submitted that Karpowership has not shown that there are exceptional circumstances which would justify a departure from the default position. None of the documents they redacted are out of the ordinary in the context of tenders or applications to state organs or state departments for regulatory approvals.

---

48 KPS AA paras 7 and 8 at 017-9 to 107-10.

49 Hoexter & Penfold, 3rd ed 2021 (Juta) at p 712, at pp 714 to 715.

The contents of Karpowership's proposed confidentiality regime

65. Should the court, however, decide to order disclosure of the redacted documents subject to a confidentiality regime, the further question is what the terms should be and whether the strict regime claimed by Karpowership in its counter application is justified.

66. The confidentiality regime proposed by Karpowership envisages -

66.1 that NERSA shall despatch two records, a non-confidential record (which excludes the alleged confidential information) and a confidential record;

66.2 that only "permitted parties"[50] be afforded access to the unredacted record (subject to them signing a strict confidentiality undertaking) but which excludes OUTA which is the applicant in the review proceedings;

66.3 that any pleading will be filed and served in two versions namely a non-confidential version and a confidential version with access to the latter being limited to permitted parties;

66.4 that only permitted parties be present in court where any argument requires disclosure of the confidential information it requires a closed hearing where only the judge and those "approved" through the signing of the confidentiality regime have access to the proceedings.

---

50 Annexure A to the notice of counter application clause 1.6 read with clauses 6 and 7, at 019-74 and 019-76.

67. The honourable court is called upon by Karpowership in its counter-application to make this order which is premised on an acceptance that the redacted documents are confidential and which is definitive of the rights of the parties and the public in respect of access to the record for the duration of the proceedings.

68. It is submitted that Karpowership's proposed confidentiality regime *prima facie* curtails the rights entrenched in section 34 in that:

68.1 it limits OUTA, as applicant in the main review application, in the formulation and prosecution of its case. OUTA will have to rely on its legal representatives and current independent experts to dissect the record, make decisions on the relevance of information and draft further affidavits without OUTA's input;

68.2 it thus in effect hinders the proper functioning of the court's review function;

68.3 without OUTA having access to the record, the parties will not have identical copies of the relevant documents available to them and there will not be *"equality of arms"*;

68.4 it infringes on OUTA's right to a fair *public* hearing.

69. In his minority judgment in ***Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In re Masetlha v President of the Republic of South Africa and Another***[51], where a newspaper group requested access to the

[51] 2008 (5) SA 31 (CC).

redated part of a review record, Van der Westhuizen J remarked at paragraph 181 of the judgment that even where national security required non-disclosure (which is not the case in the present matter), it must still be shown that the specifical non-disclosure that is being sought is the least restrictive method to achieve the purpose. Karpowership has not done so. Its confidentiality regime is by no means the least restrictive method to achieve the purpose.

70. Karpowership's cynical response to OUTA's complaint[52] that it would not be able to give proper instructions to its legal advisers or be able to participate properly in the litigation without access to the unredacted record, is that there is nothing unusual about a confidentiality regime being limited to parties' legal representatives and independent experts.[53] Karpowership further states in its answering affidavit[54] 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",* thereby again attempting to place some form of *onus* on OUTA.

71. Firstly, it is certainly unusual. Secondly, it follows logically that OUTA cannot provide its legal representatives with instructions in respect of the supplementary founding affidavit or replying affidavit pertaining to documents that it (OUTA) is not allowed to see. No evidence needs to be put up by OUTA to reach this conclusion. These submissions are borne out by the decisions in the cases mentioned below.

---

52 FA para 40 at 013-14 to 013-15.

53 KPS AA para 175.2 and 175.3 at 019-54.

54 At 019-54.

72. In ***Unilever plc and Another v Polagric (Pty) Ltd***[55] such an arrangement was stated to be limited to very special circumstances. An argument had ensued about the confidentiality of documents in a rule 35(12) discovery process. The applicant objected to the production of certain documents whilst the respondent indicated during argument that it would agree to an order confining the production of the documents to the legal advisers and experts of the respondent only. The Court (per Thiring J) stated the following in this regard:

"No doubt there are cases where such orders are necessary and can be justified. However, I do not think that this is one of them. It is unwise, in my view, unless very special circumstances exist, to create a situation in which the legal advisers or experts of a party to opposed litigation may find themselves in possession of information which may be highly relevant to the litigation but which they are precluded from communicating to their client. What are they to do with such information? How are they to obtain instructions in relation thereto? How are they to advise their client on the further conduct of the litigation or on whether it should be proceeded with at all? These, it seems to me, are some of the questions which can arise and which, in this case, could potentially place the respondent's legal advisers and experts in an invidious and even untenable position. Serious ethical questions could arise. The interests of the respondent could be prejudiced by the fact that it is unable to receive proper advice based on all the relevant facts. In the Crown Cork case supra Schutz AJ, as he then was, said at 1100A - D:

> *'No less in South Africa than in England does the conflict arise between the need to protect a man's property from misuse by others, in this case the property being confidential information, and the need to ensure that a litigant is entitled to present his case without unfair halters. And, although the approach of a Court will ordinarily be that there is a full right of inspection and copying, I am of the view that our Courts have a discretion to impose appropriate limits when satisfied that there is a real danger that if this is not done an unlawful appropriation of property will be made possible merely because there is litigation in progress and because the litigants are entitled to see documents to*

---

55 2001 (2) SA 329 (C) at p 341.

which they would not otherwise have lawful access. But it is to be stressed that care must be taken not to place undue or unnecessary limits on a litigant's right to a fair trial, of which the discovery procedures often form an important part. I trust that by holding what I have I have not opened a new door to interlocutory litigation or to a flood of ill-founded objections on grounds of confidentiality. Practitioners would do well to remember that the normal rule is full inspection.'

I find myself in respectful agreement with these views..."

73. In ***Ekuphumleni Resort (Pty) Ltd and Another v Gambling and Betting Board, Eastern Cape and Others*** the Court per Leach J described an argument in support of such a condition as truly preposterous, as follows:[56]

"[12] The Board's proposal to make information available to an attorney on condition that he does not disclose it to his clients, is truly preposterous. The relationship between an attorney and his client has to be frank and open, and the client is entitled to expect his attorney to discuss with him all available information which might be relevant to the case at hand. This could not be achieved if the attorney were prohibited from disclosing information to his client, which might have a material bearing upon the outcome of the matter. If, for example, the Board's disclosure to the applicants' attorney showed that one of the members of the Board was probably biased against the applicants, the attorney can hardly be expected to keep that from his clients, to their prejudice. After all, an attorney is expected to act to the benefit of the person employing him for his professional expertise. Very wisely, Mr Buchanan, who appeared on behalf of the Board, did not seek to persuade me that it had been proper to volunteer this information to the applicants' attorney on a confidential basis."

74. Karpowership's contention that *"There is nothing unusual about a confidentiality regime being limited to a parties' legal representatives and independent experts"*[57] is thus unsupported by the relevant authorities. It is, in fact, highly

---

56 2010 (1) SA 228 (E) at para 12 p 234 to 235.

57 KPS AA para 175.3 at 019-54.

unusual for a party itself not to be granted access to the record and Karpowership has not laid a proper basis for contending that it is required.

75. Karpowership asserted in correspondence and in its answering affidavit[58] that the restrictive confidentiality regime that it proposes and prays for in its counter-application was *"approved"* by the Constitutional Court in the ***Helen Suzman*** decision.

76. Closer scrutiny of the ***Helen Suzman*** judgment does not support these statements. A "*Helen Suzman type confidentiality regime"* (if such exists) is a far cry from what is being sought by Karpowership. In ***Helen Suzman*** the Court did not pronounce on a confidentiality regime as it found that no fact-specific claim of confidentiality was raised, and disclosure was ordered without it being made subject to a confidentiality regime.[59]

77. The confidentiality regime that Karpowership proposes is in fact premised on a regime similar to was agreed to by the parties in ***Bridon International GmbH v International Trade Administration Commission and Others***[60] and was referred to in ***Helen Suzman*** as an example of cases where a confidentiality agreement had been concluded by the parties.

78. The facts in ***Bridon*** are, however, distinguishable from the facts in the present application. The facts in ***Bridon*** may be summarised as follows.

---

58 Letter of 2 September 2022 addressed to the Acting Judge President attached as annexure "FA9" to OUTA FA at 014-39 to 014-42; KPS AA para 71 at 019-21 and para 77 at 019-23.

59 *Supra* para 76 at p 30.

60 2013 (3) SA 197 (SCA).

78.1 The International Trade Administration Commission ("ITAC") had sent out questionnaires to known interested parties from different countries as part of its investigation into the imposition of anti-dumping duties on the importation of steel-wire ropes into South Africa.

78.2 Bridon, the appellant, was a German-based manufacturer of steel-wire ropes. It was common cause that, as part of the questionnaire and during the verification exercise, Bridon supplied information to ITAC of *"an extremely sensitive commercial and highly confidential nature"*.

78.3 The Minister of Trade and Industry was the second respondent. The third respondent, Scaw South Africa, was a South African manufacturer of steel products and the fourth respondent, Casar, was also a German-based exporter of steel-wire ropes to South Africa.

78.4 It was common cause that Bridon, Scaw and Casar were competitors both in South Africa and in several international markets insofar as the manufacturing of steel-wire ropes are concerned.

78.5 Upon finalisation of its investigation, ITAC recommended that anti-dumping duties be continued on wire ropes exported by some German manufacturers (which included Casar) but excluded Bridon from this and recommended that no such duties be imposed on Bridon. The Minister accepted ITAC's recommendation, and the duties were effected by way of publication in the Government Gazette.

78.6 Casar brought a review application in the North Gauteng High Court to review and set aside ITAC's recommendation as well as the Minister's

decision to accept and implement the recommendation. Bridon was not a party to the review application.

78.7 ITAC tendered disclosure of the non-confidential records but contended that it was precluded by certain provisions contained in the International Trade Administration Act 71 of 2002 to disclose confidential information without the consent of the owner (Bridon).

78.8 Casar brought an application to compel production of the record, to which Bridon was a party. Bridon was also the only party that opposed the application to compel production of the record.

78.9 It was not in dispute that the information supplied by Bridon to ITAC was recognised as confidential under s 34(1)(a) of the International Trade Administration Act.

78.10 Casar (as applicant in the application to compel) accepted that disclosure of the Bridon's statutorily recognised confidential information to its competitors would have an adverse effect on Bridon and suggested the strict confidentiality regime, where access was restricted to the legal representatives and one independent expert. This was accepted by the court *a quo*.

78.11 Bridon appealed on the basis that the information should not be disclosed at all. The SCA considered it the court's task to conduct a weighing-up of the conflicting interests and found that the High Court's order appropriately balanced the parties' competing interests.

79. The facts in ***Bridon*** differ from the present matter in several material respects:

79.1 the confidentiality of the information supplied by Bridon as part of ITAC's questionnaire was statutorily recognised and the statute precluded ITAC from disclosure without the consent of the owner of the information. There is no such statutory recognition or preclusion in the present matter;

79.2 the applicant in ***Bridon*** was a direct market competitor of Bridon. OUTA is a non-profit organisation and in no way in competition with Karpowership;

79.3 both Bridon's competitors (Casar and Scaw) recognised the confidentiality of the information. Confidentiality was therefore not in dispute as in the present matter;

79.4 neither ITAC nor the Minister opposed the application to compel and indicated that they would abide by the decision of the Court. In the present instance NERSA is actively opposing the application;

80. The confidentiality regime proposed by Karpowership which envisages the filing of two sets of all the papers by the parties in the main review application, a confidential and non-confidential version, with restricted access to the confidential version is, in addition, unduly cumbersome, both in terms of volume and costs, and impractical.

81. It is accordingly submitted that reliance on ***Bridon,*** albeit by way of an incorrect allegation that this restricted regime was *"approved"* by the Constitutional Court in ***Helen Suzman,*** is misplaced. The facts are clearly distinguishable from the facts in the present matter.

Alternative relief claimed by OUTA in prayer 2 of the Notice of Motion

82. As stated, the confidentiality regime proposed by OUTA is based on the one that was employed in ***Cape Town City v South Africa National Roads Authority and Others.***[61]

82.1 It entails that the eight people named in OUTA's proposed agreement, being two attorneys from Jennings Inc (attorney of record for OUTA), OUTA's two counsel, OUTA's two independent experts from Meridian Economics, and two representatives from OUTA (one of which is the deponent to OUTA's founding affidavit in the main review application) be granted access to the full, unredacted record subject to them signing a confidentiality undertaking.

82.2 OUTA will then supplement its founding affidavit in the main review application. Should reference be made to allegedly confidential (previously redacted) parts of the record, it will first serve the supplementary affidavit on the respondents to give them an opportunity to object to any information contained in the supplementary affidavit from being made public. If there is such an objection, a judge can be approached by any party to rule on the confidentiality of those specific documents/information in a closed hearing.

82.3 This will narrow the dispute about confidentiality considerably, as the Court will in the end only need to decide on the confidentiality of documents referred to in the supplementary papers and would not need

---

61 2015 (3) SA 386 (SCA).

to make a blanket pre-determination that everything in the redacted record is confidential without having seen any of the documents.

83. There are two material differences between the confidentiality regime proposed by Karpowership in its counter-application, and the regime that was proposed by OUTA on 17 October 2022 and is contained in its alternative relief in the notice of motion.

83.1 In Karpowership's proposal the Court is now called upon to make a final determination on the confidentiality of documents and information but which do not serve before it. This will have the effect that none of the redacted information can ever be disclosed to any other than the permitted parties.

OUTA's regime on the other hand allows for the information to be provisionally treated as confidential but for a final determination to be made by a court in respect of specific documents/information that OUTA would want to rely on in its further affidavits. Any redacted documents or information not referred to by OUTA (or any of the other parties) in its further affidavits in the main review application will not be in issue and will remain subject to the confidentiality regime. This approach will considerably narrow the dispute to only relevant documents.

83.2 Karpowership's proposed regime precludes OUTA itself as applicant in the review proceedings from having access to the record. OUTA will therefore not be able to participate in providing instructions or

discussing strategy on its own affidavits where such affidavits contain or make reference to any redacted parts of the record, as stated above.

OUTA's regime on the other hand includes access to the redacted records for OUTA itself through its named authorised representatives and who will sign confidentiality undertakings.

84. Even if the Honourable Court is persuaded that the record does contain some confidential aspects and that a proper case has been made out by the respondents for such confidentiality to be maintained, Karpowership seeks to impose the most restrictive rather than the least restrictive method to achieve the goal of keeping certain information confidential.

85. It is submitted that OUTA's alternative relief introduces a less restrictive regime whilst still achieving the objective of keeping information confidential until a court can at a later stage decide the issue of confidentiality of specific documents before it.

NERSA's opposition to the record being disclosed to OUTA's independent experts

86. Despite not having raised an objection to disclosure of the allegedly confidential documents to OUTA's experts in any of the preceding correspondence, NERSA for the first time in its answering affidavit objected thereto as follows:[62]

> *"47. It is NERSA's view that the experts that the Applicant want to include in the confidentiality regime, were involved in the drawing of the founding papers. As a result, their objectively is already in doubt.*

---

62 NERSA AA paras 47 to 49 at 017-20 to 017-21.

48. Based on the aforesaid, I submit that it is imperative to exclude the Applicant's experts in that by being a party to the confidentiality regime, they will gain material knowledge which is a subject of the review application, thereby likely to influence their opinions.

49. In the circumstances, I submit that the Applicant's experts will in no way be objective and the only way to ensure their objectivity is to be excluded from the confidentiality regime."

87. The suggestion that OUTA's experts lack independence simply because they have expressed a preliminary opinion based on publicly available information in OUTA's founding affidavit in the review application is without any foundation in fact.

88. The experts used by OUTA are two independent energy experts from Meridian Economics based in Cape Town. An applicant is required to make out a case in its founding affidavit. The fact that OUTA consulted these experts to assist them does not impact on their independence and unsubstantiated allegations such as those made by NERSA do not constitute a *bona fide* reason for questioning their independence and excluding them from having access to the record.

89. Such an exclusion will prejudice OUTA in the formulation and the prosecution of its case, which in turn will infringe OUTA's right to a fair hearing. It is submitted that it has no merit.

Part D: OTHER ISSUES RAISED BY RESPONDENTS

Introduction

90. We deal in this paragraph with several other issues raised by NERSA and Karpowership in their respective affidavits to contend that OUTA was somehow precluded from instituting the present application.

91. NERSA alleges that the application is premature as the matter is subject to case management and that *"[a]t this stage, there is no directive that allows for the institution of these proceedings"*.[63] NERSA goes so far as to accuse OUTA of abusing the court process through the launch of these proceedings as it holds the view that the issues should have been determined through case management.[64]

92. Karpowership in turn alleges:

92.1 that OUTA lacks *locus standi*;

92.2 that OUTA *"fails to provide an explanation"* on what steps it took after receiving NERSA's reasons for the impugned decision to enable the Court to determine whether the main review application was instituted without unreasonable delay[65] (despite it having been instituted within the 180- day period provided for by section 7(1) of PAJA); and

92.3 that OUTA's application is *"precipitous and disregards the agreement reached at the case management meeting of 5 September 2022"*[66] and that OUTA *"reneged"* on the agreement reached[67] despite the

---

63 NERSA AA para 20 at 017-15

64 NERSA AA para 37 at 017-18

65 Karpowership AA para 172.3 at 019-52 – 109-53

66 Karpowership AA para 208.2 at 019-67

67 Karpowership AA para 209.1 at 019-67

transcription of the case management meeting[68] not supporting Karpowership's version of such an alleged agreement that was reached.

93. These issues have no bearing on the question of whether OUTA is entitled to disclosure of the full review record and are thus irrelevant to the present proceedings. As the learned authors in ***Administrative Law in South Africa***[69] point out:

> *"The right to receipt of the record is not dependent on the merits of the applicant's review. As Brand JA remarked in Competition Commission v Computicket (Pty) Ltd,[70] 'the obligation to produce the record automatically follows upon the launch of the proceedings, however ill-founded that application may later turn out to be."*

94. We nonetheless briefly deal with these issues below.

NERSA's allegation that the application is premature due to the review application having been referred to case management

95. The authorities are clear. The moment OUTA launched the main review application it became entitled to the full review record in terms of rule 53(1)(b). Failing compliance with the rule, it was entitled to launch an application to court to compel such compliance. It does not require a directive allowing it to do so.

96. The purpose of case management with respect is not to usurp the role of a judge in open court but to assist in streamlining the process and facilitating the hearing of complex and large matters.

---

68 RA annexure "RA2" at 025-4 – 025-16

69 Hoexter & Penfold, 3rd ed 2021 (Juta) at p 712

70 2014 JDR 2507 (SCA) at para 20

97. Where a stalemate has been reached regarding the contents of the record, as is common cause here, further case management meetings and correspondence would serve no purpose.

98. In the premises, it is submitted that there is no merit in NERSA's contentions that OUTA was precluded from launching this application by a *"further directive"*, or that it was *"premature"*, or that a directive was required to authorise this application. It is authorised by the rules of court.

Karpowership's contention that OUTA's allegedly failed to comply with an undertaking given at the case management meeting of 5 September 2022

99. Karpowership also relies on the case management process. It states in its answering affidavit that OUTA failed to comply with an obligation it assumed in terms of an alleged agreement reached at the case management meeting before the Honourable Ledwaba AJP on 5 September 2022. It contends that OUTA agreed or undertook to perform an analysis of the documents provided and indicate which of those it considers non-confidential. OUTA is then accused of having failed to perform such an analysis and instead resorted to the institution of these proceedings.[71]

100. It is further claimed that the proposal by Karpowership's counsel as allegedly agreed to by OUTA, was *approved* by the Honourable AJP.[72] In the same paragraph it is stated that Karpowership's attorney who attended the meeting,

---

71 KPS AA para 9 at 019-3; para 164.4 at 019-49; para 173.3 at 019-53; para 176.1 at 019-54; para 184.2 at 019-58.

72 KPS AA para 73 at 019-22.

Ms Burford, will deliver an affidavit to confirm Karpowership's version of events, but such an affidavit was not filed.[73]

101. NERSA, on the other hand, does not make any mention of an agreement as alleged by Karpowership, but alleges in its answering affidavit that this application to compel is premature as the matter is under case management and that there was a further directive to the effect that should the parties fail to reach an amicable solution, they should revert to the DJP and arrange another meeting to allow the court to issue further directives.[74]

102. Following receipt of the respective answering affidavits and the divergent views of what transpired at the case management meeting held on 5 September 2022, OUTA obtained an official transcription of the meeting and attached it to its replying affidavit.[75] The transcription does *not* support:

102.1 NERSA's version that a further directive was issued which would preclude OUTA from bringing the present application or that a case manager had been appointed;

102.2 Karpowership's contention that an agreement had been reached with the *"approval"* of the Honourable Ledwaba AJP for OUTA to identify which documents are non-confidential; and

---

73 OUTA RA para 141 at 024-50.

74 NERSA AA para 15 at 017-14.

75 OUTA RA annexure "RA2" at 025-4 – 025-16.

102.3 that there was an obligation on OUTA first to perform an analysis of the documents provided and identify which it considers to be non-confidential.

103. It is submitted that, despite both NERSA and Karpowership having placed great emphasis on the case management meeting that took place on 5 September 2022 and attempting to obtain some tactical advantages from what they respectively allege with regard thereto, the transcription does not support their respective versions and the meeting bears no further relevance to the present application where the parties agree that there is a stalemate.

OUTA's *locus standi*

104. NERSA, the decision-maker, does not take issue with OUTA's *locus standi* in its answering affidavit. Karpowership alleges that OUTA lacks *locus standi* in the main application (and by implication in this interlocutory application).

105. OUTA, in paragraph 163 of its replying affidavit in the present application,[76] repeated the basis of its locus standi as set out in its founding affidavit in the main review application.[77]

106. In ***Competition Commission v Computicket (Pty) Ltd***[78] where Computicket brought a review application of a decision by the Competition Commission, the Commission argued that Computicket first had to make out a *prima facie* case

---

76 Caselines at 024-56 to 024-58.

77 Caselines at 002-8 to 002-10.

78 2014 JDR 2507 (SCA).

in order to demand the record. The SCA per Brand JA stated the following in respect of the Commission's argument at paragraph 20 of the judgment:

"I agree with the CAC's finding that this argument effectively places the cart before the horse. Not infrequently the ability of an applicant for review to discharge the onus resting on it to make out a case, will depend on considerations appearing – or not appearing – from the record of the material upon which the challenged decision had been made. Moreover, upholding the Commission's argument would give rise to a two stage enquiry on the merits of the case: first, without the record to determine whether the applicant had made out a prima facie case. If the applicant clears that hurdle, the second stage enquiry then follows to finally determine the merits, this time with the benefit of the record which had now been made available. The proposed scenario, for which there appears to be no justification in logic, is clearly unsustainable. Finally, the argument under consideration is not supported by Rule 53. In terms of this rule, the obligation to produce the record automatically follows upon the launch of the application, however ill-founded that application may later turn out to be."

107. In the unreported judgment of ***Ntombela v Murray N.O.***,[79] it was confirmed that founding papers are only finalised after the record has been provided and an applicant has had an opportunity to file a supplementary affidavit. The court per Opperman J stated at paragraph 54 of the judgment:

"The law in regard to Rule 53 must thus be adhered to and as read with Rule 6. The litigation to invoke Rule 6(5)(d)(iii) was not completed because the record has not been supplied. The applicants are correct in their submission that they cannot continue with the Rule 53-process if the record is not supplied. The founding papers, unlike in a pure Rule 6 application, only comes to finalization after the record has been provided and the applicants had the opportunity to file a supplementary affidavit to vary, amend or add to their initial founding affidavit. The Rule 6(5)(d)(iii) Notice was indeed premature; it follows with logic that the Rule 6(5)(d)(iii)-proceedings may only follow after the founding papers have been concluded."

---

79 Unreported (FB) Case No 3807/2020 dated 7 December 2021.

108. The lack of *locus standi* is an *in limine* point that would typically be raised by utilising the provisions of rule 6(5)(d)(iii) in application proceedings. Should Karpowership wish to raise this point, it should be done in the main review application once OUTA has finalised its founding papers and Karpowership has an opportunity to answer thereto.

109. It is submitted that Karpowership's questioning of OUTA's *locus standi* in these interlocutory proceedings when the full record is still to be provided, is premature and in the words of the honourable Brand JA, places the cart before the horse. It does not impact on OUTA's right to receive the record.

Alleged delay cause by OUTA in launching the main review application

110. Karpowership confirms in paragraph 27 of its answering affidavit[80] that the main review application was launched 179 days after publication of the impugned decision by NERSA, therefore falling within the 180-day period allowed for by s 7(1) of PAJA. It attempts, however, to cast this as an *"unreasonable delay"* and serve as basis for OUTA's *"absence of diligence"*.[81]

111. In ***South Durban Community Environmental Alliance v MEC for Economic Development, Tourism and Environmental Affairs, KwaZulu-Natal Provincial Government and Another***,[82] the Supreme Court of Appeal dealt with the 180-day period as follows in paragraph 64 of the judgment:

---

80 Caselines at 019-7.

81 KPS AA para 28 at 019-8.

82 2020 (4) SA 453 (SCA).

"[64] Although a delay of more than 180 days is per se unreasonable, this does not mean that a delay within the 180-day period set out in s 7(1) of PAJA is necessarily reasonable. However, as Plasket J stated in Joubert Galpin Searle v RAF:

> *'Notionally, therefore, it is possible that a delay in launching a review application of less than 180 days after the cause of action arises can be an unreasonable delay, but I think it is fair to say that cases of this sort will be rare and have exceptional circumstances. I say this because in practice, prior to the PAJA coming into force, delays of anything between six and nine months were generally regarded as not being unreasonable and, since PAJA came into force, the 180-day limit has tended to be regarded as the dividing line between reasonable and unreasonable delay.'"*

112. It is submitted that the attempts to place OUTA in an unfavourable light by suggesting that there is a *"lack of diligence"* are unfounded.

113. In any event, the question of whether there was an unreasonable delay by OUTA in launching the main review proceedings falls to be determined in the main review application, and following the *dictum* in *Competition Commission* quoted above, does not detract from OUTA's right to receive the record.

114. The chronology of events furthermore shows delayed responses by both NERSA and Karpowership in the proceedings. After the application was launched on 26 April 2022 and the record had become due on 19 April 2022 in terms of Rule 53(1)(b), Karpowership only delivered a notice of intention to oppose the main review application on 20 May 2022[83].

115. NERSA only delivered a heavily redacted record on 17 June 2022 and provided the spreadsheet with confidential information referred to on 12 September

---

[83] Caselines at 009-5 to 009-8.

2022, nearly three months after delivery of the record and despite several requests by OUTA's attorneys to provide a list of what is confidential.

116. OUTA made its *"with prejudice"* offer on 17 October 2022. NERSA responded to the letter on 26 October 2022 and Karpowership on 3 November 2022.

117. OUTA filed a Rule 30A notice on 12 December 2022 in terms whereof NERSA was given 10 days to remove the cause of complaint. *Dies non* ran from 15 December to 15 January and the Court was in recess for more than a month. OUTA filed the present interlocutory application on 23 January 2023.

118. The allegations in paragraph 81 of Karpowership's answering affidavit[84] that OUTA *"then served the current application on 23 January 2023 – some three months after Karpowership's attorneys responded to OUTA's attorney's letter"* is somewhat misleading:

a) the period 3 November 2022 to 23 January 2023 is not three months;

b) the December recess and a month-long period *dies non* period intervened; and

c) despite the application having been launched on 23 January 2023, Karpowership only filed its answering affidavit more than 2 months later, on 28 March 2023.

119. It is accordingly submitted that Karpowership's attempts to cast OUTA in an unfavourable light are unfounded.

---

84 Caselines at 019-25.

120. It is further worth pointing out that according to Karpowership OUTA lacked diligence in bringing the application timeously. According to NERSA, on the other hand, the application is premature. Yet, all parties agree that a stalemate has been reached:

120.1 In paragraph 17 of NERSA's answering affidavit[85], the deponent states:

"The institution of these proceedings is illustrative of the fact that the parties have reached a stalemate regarding the filing of the record."

120.2 In paragraph 20 of Karpowership's answering affidavit, the deponent states:

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

121. In the premises it is submitted that the stalemate regarding production of the record needs to be decided by this above honourable court and that the respondents' diverse opinions on the timing of the application bears no relevance to the real dispute.

E. CONCLUSION

For the reasons set out more fully above we respectfully submit as follows:

122. The relief in prayer 1 should be granted. Neither of the two opposing respondents have demonstrated exceptional circumstances that justify a departure from the default position of full disclosure of the record.

---

85 Caselines at 017-14.

123. The counter application should be dismissed. Karpowership has not made out a proper case for the imposition of a confidentiality regime.

124. Should the court, however, decide to order disclosure of the redacted documents subject to a confidentiality regime, it is submitted that -

124.1 Karpowership has not made out a proper case for the definitive relief and strict confidentiality regime it seeks. It makes out no case at all as to why OUTA itself as applicant in the main review application should not be granted access to the record;

124.2 the alleged confidentiality should only be finally pronounced on once the applicant (including its legal representatives and experts) and the court have seen the documents or information in question;

124.3 the alternative relief contained in prayer 2 of OUTA's notice of motion should be granted.

125. In the premises we request that the relief as set out in prayers 1 and 4 of the notice of motion, *alternatively* the relief as set out in prayers 2, 3 and 4 of the notice of motion be granted with costs and that the counter application be dismissed, with costs.

JL GILDENHUYS SC

S MENTZ

Counsel for the Applicant

Chambers, Cape Town and Pretoria

31 January 2024