

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)**

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Third Respondent

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(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

**JOINT PRACTICE NOTE:
INTERLOCUTORY APPLICATION TO COMPEL PRODUCTION OF RECORD**

- Date on opposed roll:** 4 – 6 June 2024
(Special allocation)
- Counsel for Applicant:** Adv J Gildenhuys SC
Cell: 082 921 5614
Email: gilden@law.co.za

Adv S Mentz
Cell: 082 0434177
Email: mentz@gkchambers.co.za
- Counsel for First Respondent:** Adv P Mokoena SC
Cell: 082 496 2734
Email: pmokoena@thulamelachambers.co.za

Adv T J Makgate
Cell: 073 215 4800
Email: makgate@rsabar.com

4. **Counsel for Second to Fifth Respondents:** Adv J Babamia SC
Cell: 082 874 3786
Email: jbabamia@law.co.za

5. **Nature of the Motion:**

5.1 This is an interlocutory application for the production of a review record in a Rule 53 review application.

5.2 The applicant (“OUTA”) launched a review application on 26 April 2022 to review and set aside the decision of the first respondent (“NERSA”) to grant electricity generation licences to the second to fourth respondents (collectively referred to with the fifth respondent, their holding company, as “Karpowership”). This notice of motion in the main review application can be found on **Caselines at 001-1 – 001-6**.

5.3 ON 17 June 2022 NERSA filed a substantially redacted review record (**Redacted record at 029-1 – 029-1268**).

5.4 There is a dispute about whether the record should be treated as confidential and if so, what the parameters of such confidentiality should be and who should have access to the record.

6. **Directive issued by the Honourable Ledwaba DJP on 4 December 2023 (Caselines at 034-1 – 034 - 4):**

6.1 A similar application was brought under case number 23339/2022 by The Green Connection NPC (“the Green Connection application”). In accordance with a directive issued by the Honourable Ledwaba DJP on 4 December 2023, the OUTA application under case number 23017/2022 and the Green Connection application under case number 23339/2022 are to be heard together on the allocated days of 4 – 6 June 2023.

- 6.2 In accordance with the directive the applicant had to file heads of argument by the end of January. The applicant (OUTA) filed heads of argument on 31 January 2024 (filing notice at **030-3 - 030-6**).
- 6.3 The respondents had to file heads of argument by no later than end of April 2024. The first respondent (NERSA) filed heads of argument on 28 February 2024 (filing notice at **033-1 – 033-4**).
- 6.4 The second to fifth respondents (Karpowership) have failed to file heads of argument by the end of April 2024, which at the time of preparing this joint practice note remains outstanding.

7. **Relief sought by parties in interlocutory application to compel production of the record:**

- 7.1 OUTA seeks production of the complete, unredacted record in prayer 1 of its notice of motion in this interlocutory application. In the alternative, OUTA seeks in prayer 2 for an order in line with a “*with prejudice*” offer that was made by OUTA similar to the confidentiality regime that was used by the parties in *Cape Town City v South Africa National Roads Authority and Others* 2015 (3) SA 386 (SCA) (**notice of motion at 012-1 – 012-6 read with the amended prayer 2 at 032-6; founding affidavit at 013-1 – 013-46 & annexures at 014-1 – 014-60**).
- 7.2 Karpowership opposes the application (**Karpowership answering affidavit at 019-1 – 019-80; annexures at 019-84 – 019-224**) and has a counter-application in terms whereof it seeks enforcements of its preferred confidentiality regime (**notice of counter-application at 021-1 – 021-3**).
- 7.3 NERSA opposes the application in its entirety and does not request any counter-relief (**NERSA answering affidavit at 017-1 – 017-31; annexures at 017-32 – 017-36**).

8. **Issues to be determined:**

It is submitted that the main issues for determination are as below.

- 8.1 Which party bears the *onus* of proving confidentiality of a review record.
- 8.2 Whether OUTA, as applicant in the main review application, is entitled to a full unredacted record, *alternatively* to the regime that was proposed “*with prejudice*” by OUTA on 17 October 2022 as contained in prayer 2 of the notice of motion.
- 8.3 Whether the respondents are entitled to restrict the applicant’s access to the review record (or part thereof) on the basis of confidentiality and if so, to what extent.
- 8.4 In respect of Karpowership’s counter-application:
 - 8.4.1 whether Karpowership makes out a case for the confidentiality regime as prayed for in its counter-application;
 - 8.4.2 whether Karpowership makes out a case for exclusion of OUTA itself (through its representatives) from being granted access to the record.
- 8.5 In respect of NERSA’s contentions:
 - 8.5.1 whether the application is premature due to NERSA’s allegation that the matter is under case management;
 - 8.5.2 whether NERSA makes out a case for OUTA’s experts to be excluded from the record.

8.6 Whether the Court can make a final determination on documents and information without having seen the documents/information in question.

8.7 The issue of costs.

9. **Estimated duration:**

The matters are set down for hearing as a special motion for three (3) days from 4 – 6 June 2024. The allocation was done by the Honourable Ledwaba DJP on the parties' estimated duration for the two interlocutory applications where OUTA and Green Connection are the respective applicants.

10. **Papers:**

9.1 The complete application to compel with all papers filed in this interlocutory OUTA application is filed under Caselines sections 012 – 026 and comprises of 576 pages in total (to include the affidavits with annexures as well as the Rule 35(12) & (14) notices and answers thereto).

9.2 The affidavits and annexures can be found at the following pages on Caselines:

- 1) Notice of Motion with annexure at 012 – 012-8
- 2) OUTA founding affidavit at 013-1 – 013-46
Annexures to OUTA's founding affidavit at 014-1 – 014-60
- 3) NERSA's answering affidavit at 017-1 – 017-31
Annexures to NERSA's answering affidavit at 017-32 – 017-36
- 4) Karpowership's answering affidavit at 019-1 – 019-68

Annexures to Karpowership's answering affidavit at 019-84 – 019-224

- 5) Karpowership's counter-application with annexures at 019-69 – 019-80
- 6) OUTA's replying affidavit at 024-4 – 024-73
Annexures to OUTA's replying affidavit at 025-1 – 025-81

9.3 There were also two Notices in terms of Rule 35(12) and (14) served by OUTA on NERSA, to which NERSA responded:

- 1) First Notice in terms of Rule 35(12) and (14) at 018-1 – 018-4
NERSA's response thereto at 020-1 – 020-20
- 2) Second Notice in terms of Rule 35(12) and (14) at 022-1 - 022-4
NERSA's response thereto at 022-7 – 022-66

9.4 It is submitted that the Notice of Motion (**012-1 – 012-8**), the affidavits (**013-1 – 013-46; 017-1 – 017-31; 019-1 – 019-68 and 024-4 – 024-73**), and Karpowerships' counter-application (**019-69 – 019-80**) should be read.

9.5 The annexures to the respective affidavits on the pages as separately indicated above are referred to and described in the affidavits. It is accordingly submitted that a detailed perusal of the annexures is not required subject to counsel for the parties being permitted to refer thereto during argument where necessary.

9.6 Similarly, it is submitted that a detailed perusal of the Rule 35(12) and (14) notices and the documents is not required subject to counsel for the parties being permitted to refer thereto during argument where necessary.

11. **Chronology:**

A chronology of events is attached hereto as “**A**”.

DATED THIS 6TH DAY OF MAY 2024.

**Jennings Incorporated
Attorneys for Applicant**

Per: Andri Jennings
Tel: 012 110 4442
Email: andri@jinc.oc.za; delia@co.za
Ref: A JENNINGS/OUT015

**Prince Mudau & Associated
Attorneys for First Respondents**

Per: Prince Mudau
Tel: 010 224 0608
Email: prince@pm-attorneys.co.za
dineo@pm-attorneys.co.za
kganedi@pm-attorneys.co.za
irene@pm-attorneys.co.za
Ref: LIT/PM/MAT180

**Pinsent Masons South Africa Inc
Attorneys for Second to Fifth Respondents**

Per: Jason Smit
Tel: 010 493 4603
Email: Jason.Smit@pinsentmasons.com
Andrew.Fawcett@pinsentmasons.com
Tinyiko.Ndlovu@pinsentmasons.com
Sarah.Burford@pinsentmasons.com
Ref: 691335.07000

“A”**CHRONOLOGY**

- August 2020: Department of Mineral Resources and Energy (“DMRE”) published a request for proposal in respect of the Government’s Risk Mitigation Independent Power Procurement Programme for the procurement of 2000MW electricity.
- 13 April 2021: Karpowership made application to NERSA for licences to operate generation facilities.
- 22 Sept 2021: Karpowership’s licence applications approved by NERSA.
- 29 Oct 2021: Reasons for the decisions published by NERSA.
- 25 April 2022: Green Connection launched review application under case number 23339/2022.
- 26 April 2022: Review application issued by OUTA in terms of the Promotion of Administrative Justice Act (“PAJA”) read with Rule 53 of the Uniform Rules of Court under the above case number.
- 19 May 2022: Record fell due in terms of OUTA’s notice of motion read with Rule 53(1)(b).
- 20 May 2022: Karpowership delivered its notice of intention to oppose the review application.
- 24 May 2022: Karpowership requested that the parties enter into a confidentiality agreement prior to the filing of the record by NERSA.

- 30 May, 7 June,
13 June 2022: OUTA informed Karpowership that it could not consent to blanket confidentiality agreement unless it was clear what information was sought to be kept confidential.
- 17 June 2022: NERSA filed redacted record.
- 5 Sept 2022: Case management meeting held before the Honourable Ledwaba DJP attended by representatives of OUTA, Green Connection, NERSA and Karpowership.
- 12 Sept 2022: NERSA provided spreadsheet with purported reasons for the redacted portions of the record.
- 17 Oct 2022: OUTA made “*with prejudice*” offer of a confidentiality regime.
- 12 Dec 2022: OUTA served Rule 30A notice.
- 23 Jan 2023: OUTA launched interlocutory application to compel production of the record in the review application under the above case number.
- 21 February 2023: NERSA delivered its answering affidavit.
- 28 March 2023: Karpowership delivered its answering affidavit.
- 24 May 2023: OUTA delivered its replying affidavit.
- 4 December 2023: Directive issued by the Honourable Ledwaba DJP containing dates for special allocation and time periods within which the parties are to file heads of argument.
- 31 January 2024: OUTA delivered its heads of argument
- 28 February 2024: NERSA delivered its heads of argument