

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

Case no: 23017/2022

In the review application between:

**ORGANISATION UNDOING TAX ABUSE NPC
(Registration no: 2012/064213/08)**

Applicant

and

**THE NATIONAL ENERGY REGULATOR OF
SOUTH AFRICA**

First Respondent

**KARPOWERSHIP SA COEGA (RF) (PTY) LTD
(Registration no: 2020/754336/07)**

Second Respondent

**KARPOWERSHIP SA SALDANHA BAY (RF) (PTY) LTD
(Registration no: 2020/754347/07)**

Third Respondent

**KARPOWERSHIP SA RICHARDS BAY (RF) (PTY) LTD
(Registration no: 2020/754352/07)**

Fourth Respondent

**KARPOWERSHIP SA (PTY) LTD
(Registration no: 2019/537869/07)**

Fifth Respondent

**MINISTER OF MINERAL RESOURCES AND
ENERGY N.O.**

Sixth Respondent

**MINISTER OF FORESTRY, FISHERIES, AND THE
ENVIRONMENT N.O.**

Seventh Respondent

**ESKOM HOLDINGS (SOC) LTD
(Registration no: 2002/015527/30)**

Eighth Respondent

APPLICANT'S PRACTICE NOTE

1. **Date on the unopposed roll:** 31 July 2025

2. **Counsel for the Applicant:** Adv Sonika Mentz
Groenkloof Chambers, Pretoria
Email: mentz@gkchambers.co.za
Cell: 082 043 4177

- This matter has a protracted history with a voluminous record, much of which is not relevant for the unopposed review application before this Honourable Court on 31 July 2025. I set out in paragraph 5 below the parts of the record that require reading for purposes of this application. I further file this comprehensive practice note to provide the relevant context as to why this matter is on the unopposed roll, and to set out the applicant's submissions in summarised form.
- To ease navigation of the file on Caselines, I have requested my instructing attorney to create a separate file under **Section 000** specifically for the unopposed application before this Court on 31 July 2015.

3. **Nature of the application and background:**

3.1 The application serving before the Honourable Court is a review application for the review and setting aside of electricity generation licences awarded in 2021 by the first respondent ("NERSA") to the second to fourth respondents, who in

turn are wholly owned by the fifth respondent (collectively referred to as “Karpowership”) (**Notice of Motion at 000-1 – 000-6; Founding Affidavit at 007 – 000-55**).

3.1.1 The licences were for electricity generation by “powerships” that were to be moored at the harbours of Coega, Saldanha Bay, and Richard’s Bay respectively. The main purpose was to add electricity to the national grid on an urgent basis and as an emergency measure, with the reported costs projected at the time to be in excess of R200 billion over 20 years.

3.1.2 The application is brought in terms of the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”).

3.2 The review application was issued out of the above Honourable Court in April 2022 and both NERSA and Karpowership filed notices of intention to oppose (NERSA’s at **009-1 – 009-3**; Karpowership’s at **009-5 – 009-8**), with the eighth respondent (“ESKOM”) having filed a notice to abide (at **010-1 – 010-3**).

3.2.1 Despite the initial opposition by the first to fifth respondents, no answering papers have been filed, and the matter is no longer opposed.

3.2.2 The Karpowership entities in South Africa (second to fifth respondents) have been wound up and Karpowership’s attorneys have withdrawn on 11 June 2025 behalf of the second to fifth respondents (**Notice of withdrawal as attorneys of record at 000-296 – 000-297**).

Brief background:

3.3 Subsequent to the launching of the review application, a heavily redacted record consisting of 1 268 pages was filed by NERSA in June 2022, whereafter a protracted and highly contentious dispute about the production of the full record and the confidentiality thereof followed. This interlocutory dispute lasted for approximately 2 years and required a special allocation by the Deputy Judge President. It was finally heard in the above Honourable Court on 4 June 2024.

3.3.1 An order was granted in the interlocutory application by the Honourable Windell J on 5 June 2024 (at **072-1 – 072-8**), followed by her written judgment on 7 August 2024 (at **073-1 – 073-9**).

3.3.2 Much of the documents on Caselines (**sections 011 to 038**) relate to this lengthy interlocutory dispute about the record and are largely irrelevant for purposes of the main review application now serving before the Honourable Court.

3.4 Following the outcome of the dispute about the record, neither NERSA nor Karpowership filed answering papers within the prescribed time or any time thereafter.

3.5 The respondents' failure to file answering papers was brought about by a material change in circumstances, which included notification from Karpowership's attorneys on 25 February 2025 that the second to fifth respondents have been wound up, and a written acknowledgement by NERSA that the licenses should be revoked.

- 3.6 This material change in circumstance was addressed by OUTA in a supplementary affidavit filed on 23 May 2025 (Point 20 at **000-240 – 000-249**). None of the facts deposed to in the supplementary affidavit have been placed in dispute by NERSA or Karpowership.
- 3.7 Given the absence of answering papers, the matter was enrolled on the unopposed roll in accordance with the provisions of section 10.13 of the Practice Manual which states:

“13.10 ENROLMENT OF APPLICATIONS AFTER NOTICE OF INTENTION TO OPPOSE

- 1. Where the respondent has failed to deliver an answering affidavit and has not given notice of an intention only to raise a question of law (rule 6(5)(d)(iii)) or a point in limine, the application must not be enrolled on the opposed roll.*
- 2. Such an application must be enrolled on the unopposed roll. In the event of such an application thereafter becoming opposed (for whatever reason), the application will not be postponed as a matter of course. The judge hearing the matter will give the necessary directions for the future conduct of the matter.*
- 3. The notice of set down of such an application must be served on the respondent's attorney of record.”*

4. **Short submissions and OUTA's “with prejudice” offer of 23 May 2025:**

- 4.1 Despite NERSA's clear indication that the licences should be revoked and its failure to file answering papers, it (NERSA) has failed to withdraw its notice of intention to oppose the review application.

- 4.2 It is trite that an administrative action, even where unlawful, exists in fact and has legal consequences until set aside by a competent court (***Oudekraal Estates (Pty) Ltd v City of Cape Town 2004 (6) SA 222 (SCA)***).
- 4.3 It is submitted that OUTA is entitled to have NERSA's decision to award the generation licences reviewed and set aside and to recover its costs for the application from NERSA. OUTA has throughout contended that the generation licences were ill-considered and should never have been granted in the first place. This turned out to be true.
- 4.4 It is further submitted that a proper case has been made out in the founding affidavit for the review and setting aside of NERSA's decision. In summary, the grounds for review are:
- 4.4.1 NERSA awarded the licences before environmental authorisation had been obtained from the seventh respondent (DFFE) and while Karpowership was still under criminal investigation by the Green Scorpions.
- 4.4.2 At the time of NERSA's decision to award the licences no port authority permits had been obtained.
- 4.4.3 Although NERSA's internal licencing procedures require ESKOM to enter into power purchase agreements ("PPAs") with the successful bidders as a condition for the granting of generation licences, there was

no indication that ESKOM would sign the PPAs. In fact, the CEO of ESKOM at the time publicly expressed his wariness of entering into long term contracts with powerships that generate energy using LNG in a rapidly changing energy environment.

4.4.4 Despite the repeated extension of the deadline by NERSA for Karpowership to reach financial close, such financial close was not reached, whilst NERSA accepted as fact at the time of making the impugned decision that it would be obtained.

4.4.5 NERSA showed a lack of transparency in its failure to deal with the issue of price variation in circumstances where prices over the next 20 years will be dependent on the US dollar price. This causes uncertainty and may come at a tremendous price for the South Africa public.

4.5 Following the above, it is submitted in accordance with what has been stated in the founding affidavit, that NERSA has failed to comply with the provisions of section 10(2)(e) of the Electricity Regulation Act (“ERA”) as NERSA failed to assess Karpowership’s ability to comply with the relevant legislative requirements (both in terms of the environmental authorisations and the port authority permits required) before having granted the generation licences.

4.6 It is further submitted that NERSA’s decision to award the generation licences stands to be reviewed and set aside in accordance with the provisions of section 6(2) of PAJA and as more fully set out in the founding affidavit at

paragraphs 54 – 85 (at **000-34 – 000-43**), paragraphs 105 – 112 (at **000-50 – 000-53**), and in conclusion paragraphs 117 – 120 (at **000-54 – 000-55**). More specifically:

4.6.1 S 6(c) in that the administrative action was procedurally unfair;

4.6.2 S 6(2)(e)(iii) in that it was taken because irrelevant considerations were taken into account, or relevant considerations were not considered;

4.6.3 S 6(2)(f)(ii) in that it is not rationally connected to the information before the administrator at the time of making the decision, and not rationally connected to the reasons given for it by the administrator;

4.6.4 S 6(2)(h) in that it is so unreasonable that no reasonable person could have exercised the power or performed the function. This is especially so given the many uncertainties at the time of the decision that were simply treated as fact in coming to the decision;

4.6.5 S 6(2)(i) in that it is otherwise unconstitutional or unlawful.

4.7 OUTA' application is further supported by an expert energy consultant, Dr Grové Steyn, who for purposes of the founding affidavit and (at the time) without the benefit of the record provided an opinion which makes it clear that NERSA did not properly consider relevant factors and failed to fulfil its oversight functions in terms of the ERA. Dr Steyn's expert opinion, confirmed by him

under oath, is contained in paragraphs 86 – 104 of the founding affidavit (at **000-43 – 000-50**)

4.8 Although NERSA has not withdrawn its notice of intention to oppose the review application but has not taken any other steps, OUTA has made a **‘with prejudice’** offer to NERSA on 23 May 2025 for the draft order marked “X” to be made by agreement an order of court. Despite repeated requests, there has been no meaningful response to this offer from NERSA’s attorneys. It is submitted that NERSA’s agreement was requested as a courtesy but is not required for the draft order marked “X” to be made an order of court.

4.9 The Honourable Court will note that in terms of the draft marked “X”, and despite NERSA’s refusal to withdraw its notice of intention to oppose, OUTA is prepared to accept costs on an unopposed and party-and-party basis, to include costs of two counsel (where applicable).

“1. The decision of the first respondent to award a generation licence to the second respondent under application number NERSA-1532172523-62476 is reviewed and set aside.

2. The decision of the first respondent to award a generation licence to the third respondent under application number NERSA-1532172523-62559 is reviewed and set aside.

3. *The decision of the first respondent to award a generation licence to the fourth respondent under application number NERSA-1532172523-62555 is reviewed and set aside.*
4. *The first respondent shall pay the costs of the application on a party-and-party scale on an unopposed basis, such costs to include cost of two counsel where applicable, on scale C.”*

4.10 As set out in the supplementary affidavit, there has throughout been two counsel involved on all sides. It was common cause between OUTA and NERSA on the papers in the interlocutory application that the matter is one of national importance (**supplementary affidavit par 26 at 000-248**). It is further submitted that the volume of the record is indicative of the complexity of this matter. This was recognised by the Honourable Windell J when she granted costs of two counsel on an attorney-and-client scale on Scale C in the interlocutory application.

4.10.1 Although in the original notice of motion costs of two counsel was not requested, the grounds for the employment of two counsel were dealt with in the supplementary affidavit. Both NERSA and Karpowership throughout had two counsel on record. It is submitted that, given the circumstances as referred to above and the facts set out in the supplementary affidavit, it is appropriate.

4.10.2 A comparison between the original notice of motion and the draft order marked “X” shows:

- Prayers 1 – 3 of the notice of motion, which deals with the review and setting aside of each of the three decisions remains the same.
- In prayer 4 of the notice of motion OUTA asks for remittal of the impugned decisions back to NERSA. This relief has become obsolete and will serve no purpose as Karpowership has been liquidated, and NERSA agrees that the licences should be revoked.
- In prayer 5 the notice of motion OUTA asks that NERSA pays the costs of the application. The draft order contains costs of two counsel on scale C but specifically on an unopposed scale.
- In prayer 6 OUTA asks that the remaining respondents pay the costs if opposed. The Karpowership entities have been liquidated and their attorneys have withdrawn, so prayer 6 becomes irrelevant.

4.10.3 NERSA has been informed that OUTA will proceed to ask for an order in terms of the draft marked “X” at the hearing of 31 July 2025 (letter of 23 May 2025 at **000-270 – 000-271**, letter of 21 July 2025 at **000-290**).

4.11 It is submitted that the draft order, which only makes provision for party and party costs on an unopposed scale, is the bare minimum to what OUTA is

entitled. It is further submitted that the issue of costs remains within the discretion of the Honourable Court and that the circumstances warrant cost of two counsel, where applicable (albeit only on an unopposed scale).

4.12 NERSA has been informed on 23 May 2025 already that, should they cause unnecessary further opposition and/or delay (which is submitted will be futile and a waste of public funds), costs will be requested on an attorney-client scale and if relevant, on an opposed basis.

4.13 OUTA will accordingly ask for an order in accordance with the draft marked “X”.

5. **Papers to be read:**

It is submitted that the following papers will need to be read:

5.1 OUTA’s notice of motion (at **000-1 – 000-6**) and founding affidavit (at **000-7 – 000-55**) in the review application.

5.2 OUTA’s supplementary affidavit dated 23 May 2025 which deals the material change in circumstance which occurred since the launching of the application in April 2022 (at **000-240 – 000-249**).

5.2.1 The affidavits filed by OUTA contain annexures of which the relevant parts are referred to in the affidavits itself. It is therefore submitted that a detailed perusal of the annexures is not required,

subject to counsel for the applicant being allowed to refer to such annexures at the hearing of the matter if required.

5.3 Letter to NERSA's attorney on 23 May 2025 containing "with prejudice" offer (under point 26 at **000-263 – 000-265**) with draft order marked "X" under point 27 at **000-266 – 000-267**)).

5.4 The final notice of set-down dated 23 May 2025 can be found under point 37 (at **000-293 – 000-295**), with proof of service thereof under point 24 (at **000-259**).

5.5 The letter of 21 July 2025 from OUTA's attorneys again informing NERSA's attorneys that OUTA will proceed with the draft order marked "X" on 31 July 2025 (under point 34 at **000-290**).

6. **Estimated duration:** 15 Minutes

7. **Oral hearing:**

Due to the nature and protracted history of the matter, it is submitted that an oral hearing is preferable to the matter being decided on papers only, should the Honourable Court wish to be specifically addressed on any aspect(s).

S Mentz
Counsel for Applicant
Groenkloof Chambers, Pretoria
21 July 2025