

CHENNELLS ALBERTYN
ATTORNEYS, NOTARIES & CONVEYANCERS

P.O. BOX 1022
STELLENBOSCH 7599

44 ALEXANDER STREET
STELLENBOSCH 7600
SOUTH AFRICA

TEL: +27 (0) 21 883 3189
FAX: +27 (0) 21 883 8910
E-MAIL: fiona@chennellsalbertyn.co.za
WEBSITE: www.chennellsalbertyn.co.za

17 August 2023

Our ref: 11306FB/cvdy

Pinsent Masons South Africa Inc

Attention: Andrew Fawcett
Per email: Andrew.Fawcett@pinsentmasons.com
Jason.Smit@pinsentmasons.com
Sarah.Burford@pinsentmasons.com
Rob.Morson@pinsentmasons.com
Dzanga.Nefefe@pinsentmasons.com
Christen.Kleingeld@pinsentmasons.com

cc: **Prince Mudau & Associates**

Per email: prince@pm-attorneys.co.za
dineo@pm-attorneys.co.za
kganedi@pm-attorneys.co.za

Kapditwala Inc t/a Dentons South Africa

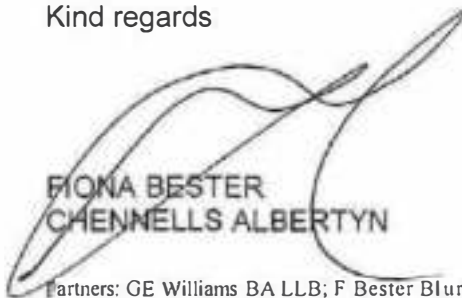
Attention: Shahid Sulaiman
Per email: shahid.sulaiman@dentons.com
and/or
Zaeem Soofie
Per email: zaeem.soofie@dentons.com

Dear Sirs / Ms

**RE: GREEN CONNECTION / NATIONAL ENERGY REGULATOR OF SOUTH AFRICA & FIVE
OTHERS / CASE NO. 23339/2022 / RULE 53 REVIEW INTERLOCUTORY APPLICATION**

We refer to the above matter and attach hereto our client's Replying / Answering Affidavit in respect of the Application to Compel Discovery of the Rule 53 Record for your attention.

Kind regards



FIONA BESTER
CHENNELLS ALBERTYN

Partners: GE Williams BA LLB; F Bester BLuris BProc; AJ Dorer LLB; S Etsebeth LLB; GJ Hendriksz BSocSc LLB
Assisted by: E Mukasa LLB; K. Gouwsventer BA LLB;
Consultants: RS Chennells BCom LLB LLM PhD

Rondebosch: 18A Greenwich Grove, Station Road,
Rondebosch, 7700 • PO Box 78, Newlands, 7725
Tel: 021 685 8354 • Fax: 021 685 0710
• E-mail: info@chennellsalbertyn.co.za

Stellenbosch: 44 Alexander Street, Stellenbosch, 7600
• PO Box 1022, Stellenbosch, 7599
Tel: 021 883 3189/883 8069 • Fax: 021 883 8910
• E-mail: chenstel@chennellsalbertyn.co.za

In association with Chrystelle van Staden Attorneys



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

Case No: 23339/22

In the matter between:

**THE GREEN CONNECTION NPC
(Registration number: 2021/773490/08)**

Applicant

and

**NATIONAL ENERGY REGULATOR OF
SOUTH AFRICA**

First Respondent

**MINISTER OF MINERAL RESOURCES AND
ENERGY**

Second Respondent

**KARPOWERSHIP SA SALDANHA BAY
(RF) PROPRIETARY LIMITED
(Registration number: 2020/754347/07)**

Third Respondent

**KARPOWERSHIP SA COEGA
(RF) PROPRIETARY LIMITED
(Registration number: 2020/754336/07)**

Fourth Respondent

**KARPOWERSHIP SA RICHARDS BAY
(RF) PROPRIETARY LIMITED
(Registration number: 2020/754352/07)**

Fifth Respondent

**ESKOM HOLDINGS SOC LTD
(Registration number: 2002/015527/30)**

Sixth Respondent

FILING SHEET

Document filed herewith:

1. Applicant's Replying and Answering Affidavit : Application to Compel Discovery of Rule 53 Record.

DATED AT CAPE TOWN THIS 17TH DAY OF AUGUST 2023.

CHENNELLS ALBERTYN ATTORNEYS

Attorneys for Applicant

44 Alexander Street

Stellenbosch, 7600

Tel: 021 883 3189

Ref: Fiona Bester/cvdv/11306FB

Email: fiona@chennellsalbertyn.co.za and

carol@chennellsalbertyn.co.za

C/O PRETORIUS & CILLIERS

810 Frhensch Street

Moreleta Park

PRETORIA

Tel: 012 997 3530

Ref: Karin Pretorius

TO: THE REGISTRAR
HIGH COURT
GAUTENG

AND TO: PRINCE MUDAU & ASSOCIATES
Attorneys for First Respondent
Email: prince@pm-attorneys.co.za
kganedi@pm-attorneys.co.za
dineo@pm-attorneys.co.za
C/O DABISHI NTHAMBELENI INC
Eco Fusion 6, 300 Witch-Hazel
Highveld Ext 59
Centurion
PRETORIA
Tel: (010) 224 0608
Ref: LIT/PM/MAT179

(Service by email)

AND TO: MINISTER OF MINERAL RESOURCES AND ENERGY

Second Respondent
71 Trevenna Campus
cnr Meintjes and Francis Baard Streets
Sunnyside
PRETORIA
and
The State Attorney
SALU Building
316 Thabo Sehume Street
PRETORIA

AND TO: PINSENT MASONS SOUTH AFRICA INC *(Service by email)*

Attorneys for Third to Fifth Respondents
9th Floor
61 St Katherine Street
Sandton
JOHANNESBURG, 2196
Tel: 010 493 4603
Email: Jason.Smit@pinsentmasons.com
Andrew.Fawcett@pinsentmasons.com
Sarah.Burford@pinsentmasons.com
Christin.Kleingeld@pinsentmasons.com
Rob.Morson@pinsentmasons.com
Dzanga.Nefefe@pinsentmasons.com

Ref: 691335.07000
c/o VZLR ATTORNEYS INCORPORATED
1st Floor/ Block 3
Monument Office Park
71 Steenbok Avenue
Monument Park
PRETORIA

AND TO: KAPDITWALA INCORPORATED *(Service by email)*

T/A DENTONS SOUTH AFRICA
Attorneys for Sixth Respondent
Unit 36, 5th Floor, Katherine & West Building
114 West Street
Sandton, JOHANNESBURG
Tel: (011) 326 6257
Ref: Shahid Sulaiman and/or Zaeem Soofie
Email: Johannesburg.Litigation@dentons.com
and
Shahid.sulaiman@dentons.com and zaeem.soofie@dentons.com
c/o **RUDOLPH BOTHA ATTORNEYS**
273 Cradock Avenue
Lyttelton Manor
CENTURION
Tel: (012) 664 0656

Email: anzelle@rbattorneys.co.za
Caselines: litigation@rbattorneys.co.za
Ref: AN/PK/BE196

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

Case No: 23339/22

In the matter between:

**THE GREEN CONNECTION NPC
(Registration number: 2021/773490/08)**

Applicant

and

**NATIONAL ENERGY REGULATOR OF
SOUTH AFRICA**

First Respondent

**MINISTER OF MINERAL RESOURCES AND
ENERGY**

Second Respondent

**KARPOWERSHIP SA SALDANHA BAY
(RF) PROPRIETARY LIMITED
(Registration number: 2020/754347/07)**

Third Respondent

**KARPOWERSHIP SA COEGA
(RF) PROPRIETARY LIMITED
(Registration number: 2020/754336/07)**

Fourth Respondent

**KARPOWERSHIP SA RICHARDS BAY
(RF) PROPRIETARY LIMITED
(Registration number: 2020/754352/07)**

Fifth Respondent

**ESKOM HOLDINGS SOC LTD
(Registration number: 2002/015527/30)**

Sixth Respondent

**APPLICATION TO COMPEL DISCOVERY OF RULE 53 RECORD:
REPLYING AND ANSWERING AFFIDAVIT**

A handwritten signature in black ink, consisting of a large, stylized 'A' or 'S' shape with a vertical line extending downwards from the right side.

I, the undersigned,

FIONA BESTER

do hereby make oath and state:

1. I am an adult female attorney practicing as such at Chennells Albertyn Attorneys situated at 44 Alexander Street, Stellenbosch. I deposed to the founding affidavit in this interlocutory application.
2. The facts contained in this affidavit are within my own personal knowledge, save where the context indicates otherwise, and are true and correct, to the best of my knowledge and belief.
3. I shall, where appropriate, employ the same defined terms as used in my founding affidavit; and thus, for example, refer to the Applicant as "TGC", to the First Respondent as "NERSA", and to the Third, Fourth and Fifth Respondents collectively as the "Karpowership companies".
4. I have read the answering affidavit deposed to by Mr Gumede on behalf of NERSA and the answering affidavit deposed to by Mr Katmer on behalf of the Karpowership companies.
5. I set out below TGC's reply to the answering / opposing affidavits of NERSA and the Karpowership companies, together with TGC's answer to the counter-application brought by the Karpowership companies.
6. I deal only with individual paragraphs of the aforementioned affidavits which warrant a response. Allegations therein which are not specifically addressed are denied unless that would be inconsistent with anything in my founding affidavit.



THE AFFIDAVIT OF NHLANHLA GUMEDE

Ad paragraph 1.3

7. I deny that the allegations contained in Mr Gumede's affidavit are true and correct.

Ad paragraphs 7 to 10

8. The contents of these paragraphs are irrelevant.
9. NERSA is obligated to comply with Rule 53. It is not permitted to unilaterally decide what documents should be included in the Rule 53 Record, without seeking the consent of TGC or permission from the Court.
10. NERSA's obligation to consider competing interests and to apply its mind impartially without fear or favour and in the interest of the public at large while observing fair, transparent and lawful processes, requires it to obey the Rules of Court and not unlawfully deviate therefrom by withholding important parts of a Rule 53 Record.

Ad paragraphs 11 to 20

11. I deny (i) NERSA's interpretation of the content and outcome of the case management meeting and (ii) NERSA's allegation that this interlocutory application is an abuse of court process.
12. NERSA has failed to comply with Rule 53 and TGC is entitled to approach the Court for an order compelling NERSA to comply with the court rules. There is no legal or procedural requirement that TGC is obligated to exhaust the case management process prior to approaching the Court, nor does the doctrine of *lis pendens* apply. Furthermore, a case management judge would not be able to resolve the interlocutory dispute over the record in a case management meeting, only issue directives to facilitate the hearing of such an application.

A handwritten signature in black ink, consisting of a large, stylized capital 'A' followed by a smaller, more complex flourish.

13. NERSA has further mischaracterised the purpose and content of the case management meeting. The purpose of the of the parties attending the case management meeting was clearly set out in Pinsent Masons email to the DJP dated 20 June 2022 to merely "*discuss the possible case management and joint hearing of these reviews as well as an expedited hearing date*"¹. The purpose of referring the matter to case management was thus clearly to attempt to facilitate the hearing of the matter and not to resolve legal disputes that would require a hearing in open court.
14. Regarding the content of the case management meeting, it is clear from the transcript that the DJP did not issue any directives. He merely stated that the parties "*(p)referably please come to*" him when they have tried to sort out the issues². This can in no sense be considered to be a directive, merely a suggestion. It is also clear that the case management meeting was adjourned without a case manager having been appointed and without any of the procedural aspects in the main application having been addressed.
15. Furthermore, TGC did not undertake or agree that a dispute on the content of the Rule 53 Record could or would only be determined in the case management meeting. This is clear not only from the transcript, but also TGC's multiple written communications³ (of which NERSA only refers to one).
16. Save as aforesaid, the contents hereof are denied.

Ad paragraphs 21 to 29

17. Whilst Mr Gumede does not annex a copy of NERSA's policies and guidelines to his affidavit, I note that OUTA delivered a notice to NERSA in terms of Rule 35(12) and (14) dated 6 March 2023, a copy of which is annexed hereto marked "TGC RA1", in

¹ Caselines at 008-81.

² Caselines at 010-45, lines 24 – 25.

³ Recorded in detail in my founding affidavit.

A handwritten signature in black ink, consisting of a large, stylized capital 'A' followed by a capital 'G' and a capital 'B'.

terms of which a copy of the aforementioned NERSA policies and guidelines were requested.

18. Specifically, OUTA requested:

**A copy of the Policies and Guidelines as referred to in the Answering Affidavit between paragraphs 22 and 23 under the heading (as well as the subparagraphs 23 - 29:*

NERSA IS BOUND BY ITS POLICY AND GUIDELIN(E)S ON THE TREATMENT OF CONFIDENTIAL INFORMATION SUBMITTED TO IT.

19. In terms of OUTA's replying affidavit dated 23 May 2023⁴, NERSA replied to OUTA's notice as follows:

"the First Respondent hereby replies to the Applicant's notice in terms of Rule 35(12) and (14) by filing herewith the following:

- 1. Form A: Request for Treatment of Confidential Information*
- 2. Section 8(9)(a) of the National Energy Regular (sic) Act."*

20. A copy of the relevant extract from OUTA's replying affidavit is annexed hereto marked "TGC RA2".

21. A copy of the "Form A: Request for Treatment of Confidential Information" referred to by NERSA in paragraph 1 of its reply is annexed to OUTA's replying affidavit marked "RA3" and annexed hereto marked "TGC RA3".

22. Form A is a blank form. A blank form can never constitute a policy or guideline. Section 8(9)(a) of NERA is legislation, which can also not constitute a policy or

⁴ Paragraph 22.

A handwritten signature in black ink, consisting of a large, stylized 'A' or 'B' shape with a vertical line extending downwards and a small 'P' or 'B' at the bottom right.

guideline of NERSA.

23. NERSA therefore clearly does not have a policy or guidelines "*on the treatment of confidential information submitted to it*".
24. In any event, any such policy or guidelines could never serve to override the court rules and legal principles pertaining to Rule 53 Records.
25. I note that the Karpowership companies' completed Forms A (annexure "NER4" to Mr Gumede's affidavit), and NERSA's internal memorandums recording the outcome / decision regarding the Karpowership companies' requests for the treatment of significant portions of its information as confidential (annexure "NER5" to Mr Gumede's affidavit), were not included in the redacted Rule 53 Record, NERSA's provisional index or revised provisional index.
26. Annexure "NER4" to Mr Gumede's affidavit contains the following:

26.1. In relation to KPSAC:

26.1.1. Form A, which is undated and which does not contain the prescribed **"SOLEMN DECLARATION BY REQUESTER / MANDATED REPRESENTATIVE"**;

26.1.2. Letters to NERSA dated 20 April 2021 and 31 May 2021, informing NERSA that the information identified therein that was submitted as part of the generation licence application is confidential information in line with the Promotion of Administrative Justice Act ("**PAJA**") and the Promotion of Access to Information Act ("**PAIA**"), that should not be made available for public inspection.

26.2. In relation to KPSARB:

A handwritten signature in black ink, consisting of a large, stylized capital 'A' followed by a capital 'B'.

26.2.1. No Form A;

26.2.2. Letter to NERSA dated 31 May 2021, informing NERSA that the information identified therein that was submitted as part of the generation licence application is confidential information in line with PAJA and PAIA, that should not be made available for public inspection.

26.3. In relation to KPSASB:

26.3.1. Form A, which is undated and which does not contain the prescribed **"SOLEMN DECLARATION BY REQUESTER / MANDATED REPRESENTATIVE"**;

26.3.2. Letters to NERSA dated 07 April 2021 and 31 May 2021, informing NERSA that the information identified therein that was submitted as part of the generation licence application is confidential information in line with PAJA and PAIA, that should not be made available for public inspection.

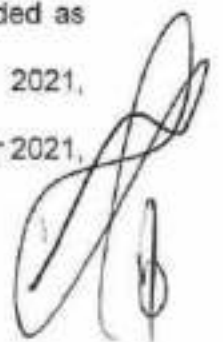
27. The documents contained in annexure "NER4" are problematic for a number of reasons:

27.1. The Form A documents completed by the Karpowership companies do not correlate to the blank Form A document which NERSA asserts is its policy. The blank Form A has four sections (sections A to D), whereas the completed Karpowership companies' forms have five sections (sections A to E), and the table contained in section C of the blank Form A has five columns reflecting five categories of information required to be provided by the applicant, whereas the completed Karpowership companies' forms only have four columns reflecting four categories of information required to be

A handwritten signature in black ink, consisting of a stylized 'B' followed by a series of loops and a long horizontal stroke.

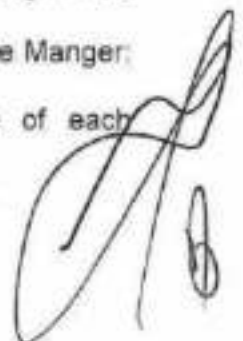
provided by the applicant;

- 27.2. KPSAC and KPSASB each lodged an "application" for confidential treatment of information contained in NERSA's Decision and Record of Decision, but neither of these were made under oath as required by Section E of NERSA's own form (section D of the blank Form A);
- 27.3. Other requests for confidential treatment of information were made by each of the Karpowership companies by way of letters, and not in terms of the prescribed Form A, which NERSA asserts is its policy;
28. Annexure "NER5" to Mr Gumede's affidavit contains the following:
- 28.1. NERSA's internal memorandum, dated 18 October 2021, recording the outcome / decision regarding KPSAC's request on 12 October 2021 that NERSA treat the paragraphs and tables that contain the tariff charge rates, financial information, calculated tariff prices, Eskom budget quote fee and names of contractors as confidential. The memorandum is not signed as approved by the Full-Time Regulator Member: Electricity Regulation, Mr Gumede. In terms of Annexure A thereto, the information sought to be treated as confidential is contained in NERSA's Decision and Reason for Decision on KPSAC's application for a generation licence.
- 28.2. NERSA's internal memorandum, dated 18 October 2021, recording the outcome / decision regarding KPSARB's request on 12 October 2021 that NERSA treat the paragraphs and tables that contain the tariff charge rates, financial information, calculated tariff prices, Eskom budget quote fee and names of contractors as confidential. The memorandum is recorded as being "*Compiled by*" a Mr Seemela on 18 October 2021, "*Recommended/Not Recommended*" by a Mr Mavuso on 18 October 2021,

A large, stylized handwritten signature in black ink, located in the bottom right corner of the page. The signature is fluid and cursive, with a prominent loop at the end.

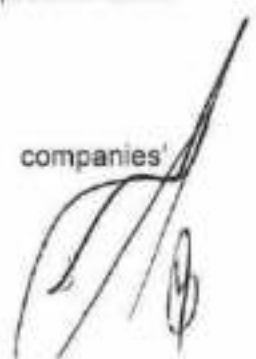
and "Approved" by Mr Gumede on 18 October 2021. In terms of Annexure A thereto, the information sought to be treated as confidential is contained in NERSA's Decision and Reason for Decision on KPSARB's application for a generation licence.

- 28.3. NERSA's internal memorandum, dated 18 October 2021, recording the outcome / decision regarding KPSASB's request on 12 October 2021 that NERSA treat the paragraphs and tables that contain the tariff charge rates, financial information, calculated tariff prices, Eskom budget quote fee and names of contractors as confidential. The memorandum is recorded as being "*Compiled by*" Mr Seemela on 19 October 2021, "*Recommended/Not Recommended*" by Mr Mavuso on 20 October 2021, and "*Approved*" by Mr Gumede on 26 October 2021. In terms of Annexure A thereto, the information sought to be treated as confidential is contained in NERSA's Decision and Reason for Decision on KPSASB's application for a generation licence.
29. The documents contained in annexure "NER5" are also problematic for a number of reasons:
- 29.1. They only purport to approve confidentiality requests submitted to NERSA on 12 October 2021. It is not apparent from Mr Gumede's affidavit if the 12 October 2021 requests are contained in annexure "NER4".
- 29.2. There do not appear to be any memorandums approving any of the confidentiality requests contained in annexure "NER4".
- 29.3. None of the memorandums record whether or not they were Recommended or Not Recommended by Mr Mavuso, Executive Manager, ELR, which is a requirement in terms of the last page of each

A large, stylized handwritten signature in black ink, located at the bottom right of the page. It consists of a large, sweeping loop followed by a smaller, more intricate flourish.

memorandum.

- 29.4. The Karpowership companies' "applications" appear to have been granted by NERSA, save that the decision in respect KPSAC is not signed, and therefore seems not to have been approved.
- 29.5. The memorandum relating to the KPSARB request is recorded as being compiled, recommended/not recommended and approved on the same day (18 October 2021). Having regard to the quantity of information sought to be subject to confidential treatment, it is submitted that neither Mr Mavuso nor Mr Gumede could have properly applied their minds to the confidentiality requests prior to recommending (if in fact Mr Mavuso did recommend) and approving same. This again illustrates NERSA's unquestioning deference to the Karpowership companies' confidentiality demands.
- 29.6. The memorandum relating to the KPSASB request is dated 18 October 2021, but recorded as being compiled by Mr Seemela the day after, on 19 October 2021.
30. I repeat that no policy or guidelines unilaterally developed and adopted by NERSA can ever serve to override the court rules and legal principles pertaining to Rule 53 Records.
31. Furthermore, section 7 of PAIA stipulates that that PAIA does not apply to a record of a public body (i) if that record is requested for purposes of civil proceedings, (ii) if it is requested after the commencement of such civil proceedings, and (iii) the production of that record is provided for in any other law (which, in the present case is Rule 53).
32. NERSA's alleged "policy" and decision on the Karpowership companies'

A handwritten signature in black ink, consisting of a large, stylized 'S' or 'D' shape followed by a smaller, more complex mark.

confidentiality requests are also not authorised by either PAIA or ERA and are accordingly liable to be set aside in terms of section 8(2)(a) of PAJA, alternatively in terms of the principle of legality. TGC reserves all of its rights in this regard.

33. In any event, the memorandums record that the approvals are sought in relation to the information that the Karpowership companies consider confidential for purposes of NERSA's Reasons for Decision being posted on the NERSA website. Thus, even if NERSA's "policy" and decisions on the confidentiality of the Karpowership companies' information was binding on it and all third parties (which is denied), NERSA is not precluded from making the allegedly confidential documents available in terms of Rule 53 alternatively TGC's interim confidentiality regime, only from publishing such information on its website.

34. Save as aforesaid, the contents hereof are denied.

Ad paragraphs 30 to 35

35. NERSA is an organ of state and regulatory authority subject to the provisions of the Constitution of South Africa and the applicable legislation. In fact, as NERSA confirms in paragraph 8 of its answering affidavit, transparency, accountability and acting in the public interest are three of the cornerstones of its mandate. Entities that submit applications to NERSA are or should be aware thereof and are also bound to comply with the applicable legal principles.
36. It is denied that the information is "*clearly and obviously confidential*" merely because "*it relates to commercial operations of an entity*". This is unacceptably vague, and the fact that information relates to the commercial operations of an entity does not automatically render such information confidential. Our courts have held that the fact that documents contain information of a confidential nature does not *per se* confer on

A handwritten signature in black ink, consisting of a large, stylized 'A' or 'B' shape with a long horizontal stroke extending to the right.

them any privilege against disclosure.⁵

37. Save as aforesaid, the contents hereof are denied.

Ad paragraph 47

38. NERSA fails to explain how the fact that the information will be provided to TGC's officials and its expert under the interim confidentiality regime will *"in all probabilities defeat NERSA's policy and guidelines on the treatment of confidential information"*.

Ad paragraph 48

39. It is completely incorrect for NERSA to state that *"it is not in dispute that some of the information so required is confidential."*

40. TGC has not conceded the alleged confidentiality of any of the information contained in the record, and does dispute that the information required is confidential.

Ad paragraphs 49 to 52

41. NERSA's assertion that TGC's expert cannot be a party to a confidentiality regime as he will gain material knowledge, which is a subject of the review application, which will thereby likely to influence his opinion, is simply untenable.

42. In essence, NERSA is stating that an expert witness cannot have access to the very information required by the expert witness to form an expert opinion. It is inconceivable that an expert witness can form any kind of opinion when he or she does not have access to the relevant information on which he or she is required to opine.

Ad paragraph 65

⁵ Helen Suzman Foundation v Judicial Service Commission 2016 (4) SA 1 (CC) at 11D and 29G-30H.

A large, stylized handwritten signature in black ink, located in the bottom right corner of the page. The signature is cursive and appears to be a combination of initials and a full name.

43. This paragraph does not make grammatical sense.
44. TGC was obligated to institute a similar application seeking the same relief as any relief obtained by OUTA would not apply to TGC, as the matters have not been consolidated.
45. Thus, if the Court were to rule in OUTA's interlocutory application that the Rule 53 Record must be provided to OUTA subject to a confidentiality regime, TGC would not be permitted access to the full Rule 53 Record as it is not a party to OUTA's interlocutory application.

THE AFFIDAVIT OF MEHMET KATMER

Ad paragraph 1

46. I note the contents hereof.

Ad paragraph 2

47. I deny that the facts in Mr Katmer's affidavit are true.

Ad paragraph 3

48. I note the contents hereof.

Ad paragraph 4

49. I deny that TGC's interim confidentiality proposal is flawed in any manner.

Ad paragraph 5

50. TGC was not obligated to file a supplementary founding affidavit in terms of Rule 53, as NERSA failed to deliver a complete and unredacted Rule 53 Record.

A handwritten signature in black ink, consisting of a large, stylized 'A' or 'B' shape with a vertical line extending downwards from the right side.

51. As noted in my founding affidavit⁶, during July 2022 TGC informed NERSA and the Karpowership companies that it was of the opinion that it was not under any time constraints to file supplementary papers until it is in receipt of the full Rule 53 Record.
52. The reasons therefore were set out in detail in the relevant correspondence.
53. Save as aforesaid, the contents hereof are denied.

Ad paragraph 6

54. The Karpowership companies' proposal was not approved by the DJP. I repeat paragraphs 11 to 15 above.
55. Save as aforesaid, the contents hereof are denied.

Ad paragraph 7

56. TGC did not merely continue to adopt *"a blanket approach asserting in correspondence that it was not prepared to accept any of Karpowership's information to be confidential"*.
57. As recorded in my founding affidavit, and in fact in Mr Katmer's affidavit itself, TGC (i) proposed an interim confidentiality regime⁷ and (ii) informed the Karpowership companies on 12 September 2022 that, as TGC was not in possession of a complete index referring to the redacted documents, it was not in a position to provide the Karpowership companies with a complete list of redacted information to be considered by its experts⁸.
58. TGC's Notice in terms of Rule 30A did not in its own terms threaten that this interlocutory application would be brought *"within 10 court days after affording the*

⁶ Caselines at 008-27, para 55 - 008-27, para 58; 008-96 - 99.

⁷ Caselines at 008-16, paras 18 - 19; 008-54 - 55; 008-27, para 59; 011-21, para 69; 011-143 - 144.

⁸ Caselines at 008-37, para 76; 008-148 - 149; 011-25, para 84; 011-201 - 202.

A handwritten signature in black ink, consisting of a large, stylized capital 'A' followed by a smaller, cursive 'p'.

respondents a 10-day period to produce the unredacted record (emphasis supplied).

The Rule 30A Notice expressly stated that, if NERSA and the Minister failed to produce the unredacted record, TGC intends, after the lapse of 10 days, to apply for an order that the said notice or request be complied with.

59. Furthermore, Rule 30A does not stipulate a time period within which such an application is required to be brought.

60. Save as aforesaid, the contents hereof are denied.

Ad paragraph 8

61. I repeat 58 to 59 above. It is clear therefrom that TGC has not failed to comply with the Rules of Court, nor its Rule 30A Notice.

62. If the Karpowership companies were genuinely of the view that this interlocutory application was irregular, they would have applied to court to have the alleged irregular step set aside in terms of Rule 30. They failed to do so. This is no doubt because they are well aware that the application is not irregular.

63. It is denied that TGC's complaints are of a "*false nature*". The reasons that it requires a copy of the full unredacted Rule 53 Record has been clearly explained to both NERSA and the Karpowership companies on numerous occasions⁹. It is furthermore abundantly clear from the significant efforts made by TGC to reach agreement with the respondents on an interim confidentiality regime and the numerous communications sent by TGC to the respondents regarding the Rule 53 Record, that TGC in fact requires the documentation it seeks production of to advance its review application.

⁹ Recorded in detail in my founding affidavit.

A handwritten signature in black ink, consisting of a large, stylized capital letter 'A' with a vertical line through it, and a smaller, less distinct mark below it.

64. Save as aforesaid, the contents hereof are denied.

Ad paragraph 9

65. The bald averment that TGC has failed to advance its review application generally as evidenced by "*extent of the delays*", is unsubstantiated and denied with the contempt that it deserves. Noticeably, no further "*example*" of "*delays*" is provided to support this averment.

66. It is furthermore denied that this interlocutory application has been brought "*for the ulterior purpose of compelling the complete and unfettered disclosure of information that TGC knows to be confidential and commercially sensitive.*" This bald averment is similarly unsubstantiated and stands to be rejected out of hand. TGC would certainly not incur the significant costs of this application merely to compel disclosure of information irrelevant to TGC's main application. There would be absolutely no benefit to TGC in doing so.

67. Save as aforesaid, the contents hereof are denied.

Ad paragraphs 10 to 11

68. TGC's claims are based on reasonable inferences drawn from the correspondence between the parties, and from NERSA's failure to comply with Rule 53 and its complete acquiescence to all of the Karpowership companies' confidentiality demands.

69. Furthermore, the confidentiality requests submitted to NERSA by the Karpowership companies and NERSA's alleged "approvals" thereof (annexures "NER4" and "NER5" to Mr Gumede's affidavit) only strengthen TGC's claims. In this regard I repeat 27 and 29 above.

70. Save as aforesaid, the contents hereof are denied.

A handwritten signature in black ink, consisting of a large, stylized loop followed by a vertical line and a small flourish.

Ad paragraph 12

71. It is denied that the Karpowership companies have embarked on "*extensive endeavours...in good faith to avert the present litigation or, at least, to narrow the disputed issues as far as practicable*". All that the Karpowership companies have done is prescribe an unreasonably restrictive blanket confidentiality regime, and refused to engage with TGC to negotiate an acceptable and reasonable interim confidentiality agreement.

72. Save as aforesaid, the contents hereof are denied.

Ad paragraph 13

73. It is denied that the proposed regime is appropriate. It will prevent TGC's legal representatives from being able to take instructions from their own client or its expert on aspects relating to the Rule 53 Record. This is clearly inappropriate and serves to prejudice TGC.

74. I repeat paragraphs 89¹⁰ to 105¹¹ of my founding affidavit.

75. Save as aforesaid, the contents hereof are denied.

Ad paragraph 14

76. The Karpowership companies' counter-application should accordingly be dismissed with costs, and TGC's interlocutory application should be granted with costs.

77. Save as aforesaid, the contents hereof are denied.

Ad paragraph 15 - 23

¹⁰ Caselines at 008-44.

¹¹ Caselines at 008-50.

A handwritten signature in black ink, consisting of a large, stylized capital 'D' followed by a vertical line and a small flourish to the right.

78. I have no knowledge of the shareholding as alleged, nor the business and operations of Karadeniz, but do not deny the averments for purposes of this application.
79. However, I deny that the Karpowership companies' bid complied with all legal requirements.

Ad paragraph 24

80. I admit the contents hereof.

Ad paragraphs 25 to 27

81. The allegations about the confidentiality of certain documents and/or information in these paragraphs are too vague for TGC to respond thereto in any meaningful way, especially when taking into account that TGC has not had sight of any of the documents allegedly containing confidential information.
82. I accordingly do not admit that the information submitted to NERSA was of a confidential nature, and also specifically deny that the Karpowership companies have made out any case for the confidentiality of any specific document or information. By way of example, I deny that BEE undertakings and ratios can be confidential or form *"part of Karpowership's technical know-how"* as alleged.
83. In addition to the aforesaid denials, I deny that the present application fails to be determined in terms of PAIA. PAIA establishes, in accordance with section 32 of the Constitution, a default position of openness in relation to documents held by the state. TGC has a procedural right, and NERSA has an obligation, to make the Rule 53 Record available, irrespective of whether the record contains documents or information which may be refused lawfully by an information officer under chapter 4 of the PAIA.
84. Furthermore, the review application is brought against the backdrop of section 217 of

A handwritten signature in black ink, consisting of a large, stylized capital 'A' followed by a smaller, less distinct mark.

the Constitution, which provides that when an organ of state, such as NERSA, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. Where the Karpowership companies are seeking to do business with an organ of state in South Africa, ultimately funded by the South African taxpayer, it is bound to these principles.

85. I also note that any confidentiality undertakings required by the DMRE can never serve to override Rule 53 and the default constitutional position which makes openness, access to information and free expression the norm, and requires justification of an exception.

86. Save as aforesaid, the contents hereof are denied.

Ad paragraphs 28 to 29

87. It is admitted that, at a meeting of NERSA held on 21 September 2021, NERSA proceeded to approve: (i) the KPSASB generation licence application, (ii) the KPSAC generation licence application and (iii) the KPSARB generation licence application. In each instance NERSA also approved the charge rates used by each of the Karpowership companies to calculate the tariffs in their PPAs.

88. It is admitted that NERSA sent its Reason for Decision documents for the licence approvals to TGC's legal representative, Adrian Pole under cover of email dated 29 October 2021.

89. However, I deny that there were sufficient grounds for granting the applications and that the reasons provided by NERSA were adequate. Consequently, the review application was instituted by TGC.

90. Save as aforesaid, the contents hereof are denied.

A handwritten signature in black ink, consisting of a large, stylized capital 'A' followed by a capital 'P' and a capital 'G'.

Ad paragraph 30 to 31

91. The allegations herein are patently incorrect.
92. In its founding affidavit in the main application, TGC set out in detail the reasons why the application had been instituted without unreasonable delay. Please refer to paragraphs 165¹² to 166¹³ of the founding affidavit in the main application.
93. The attempt to create atmosphere in these paragraphs by suggesting that TGC somehow lacked diligence, is rejected.
94. Save as aforesaid, the contents hereof are denied.

Ad paragraph 32

95. The contents hereof are admitted.

Ad paragraph 33

96. I admit that I received the email referred to herein (attached as "AA1"), but deny the correctness of the views set out therein.
97. This email is referred to in my founding affidavit and annexed as "TGC IA5" thereto.

Ad paragraph 34

98. The contents hereof are denied.

Ad paragraph 35

99. I deny that the Karpowership companies legitimately exercised their rights, as well as complying with the legal obligations they assumed during the RMI4P proceedings.

¹² Caselines at 002-68.

¹³ Caselines at 002-68 – 69.

A handwritten signature in black ink, consisting of a large, stylized 'S' or 'B' shape with a vertical line through it, and a small 'B' to the right.

Rather, they interfered with TGC's legal entitlement in terms of Rule 53 to a full and unredacted record.

100. The Karpowership companies and NERSA failed to engage in any meaningful way with TGC's interim confidentiality proposal. I deny that the Karpowership companies provided an "open platform" for discussion as alleged, but instead insisted, and still insists, on the strict confidentiality proposed by them.

101. It is evident that there was never truly a willingness to negotiate, as the many letters exchanged between the parties' attorneys illustrate. This is further evidenced by the Karpowership companies' opposition to this interlocutory application and the institution of their counter-application, where their strict and unreasonable confidentiality regime is again sought.

102. Save as aforesaid, the contents hereof are denied.

Ad paragraph 39

103. It is submitted that Mr Katmer is being deliberately obtuse. Even if TGC's letter referred only to "documentation" (which it did not), it is clear therefrom that TGC is seeking a list of the documentation and/or the information contained therein that is alleged to be confidential.

104. However, in TGC's letter, it expressly requested that the Karpowership companies:

"provide our offices with reasons why your client considers the listed documentation or information as confidential".

105. Save as aforesaid, the contents hereof are denied.

Ad paragraphs 36 to 38 and 40 to 68

106. I admit that the written communications attached to Mr Katmer's answering affidavit

A handwritten signature in black ink, consisting of a large, stylized capital letter 'A' followed by a smaller, less distinct mark.

as annexures "AA2" to "AA21" were exchanged in the period between 27 May 2022 and 7 July 2022, but deny the correctness of the assertions made, inferences drawn and position taken by Pinsent Masons and Prince Mudau in these letters, and reiterate TGC's position as set out in my letters.

107. I note that the vast majority of these written communications are already referred to in my founding affidavit and copies thereof were annexed to my founding affidavit.

Ad paragraphs 69 to 75

108. I admit that the written communications referred to in these paragraphs were exchanged.

109. Again, I note that the vast majority of them are already referred to in my founding affidavit and copies thereof were annexed to my founding affidavit.

110. As noted in my founding affidavit¹⁴, prior to the case management meeting on Monday, 5 September 2022 at 08h30, I was not aware of the letter from Pinsent Masons to the DJP sent under cover of email at 16h14 on Friday, 2 September 2022, and it only came to my attention when reference was made to it during the case management meeting. Neither I nor my counsel had therefore had an opportunity to consider the contents of the letter or consult with our client in this regard prior to the meeting. It was clear that OUTA's legal representatives were in a similar position. The case management meeting was accordingly adjourned with an indication from all parties that they would attempt to reach agreement regarding the Rule 53 Record.

111. I deny the correctness of the allegations made and the conclusions drawn by Pinsent Masons in their aforementioned letter, and previously set out the reasons therefor in

¹⁴ Caselines at 008-30, para 65 – 008-32, para 68.

A handwritten signature in black ink, consisting of a large, stylized capital 'A' followed by a smaller, less distinct mark.

detail in my letter to Pinsent Masons dated 9 September 2022¹⁵.

Ad paragraph 76

112. I deny that the DJP approved the proposal by the Karpowership companies' senior counsel and that this could, in good faith, be attested to by Ms Sarah Burford in a confirmatory affidavit. This is confirmed by the fact that no such confirmatory affidavit was filed, despite Mr Katmer's statement that this would be done.
113. Furthermore, it is clear from the transcript of the case management meeting that no such approval was given by the DJP. I repeat 13 to 15 above.

Ad paragraphs 77 to 78

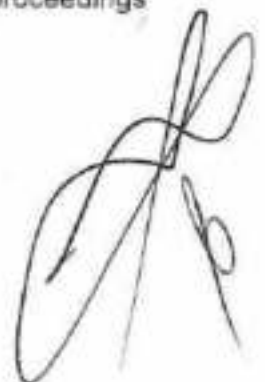
114. I admit that the written communications referred to in these paragraphs were exchanged.

Ad paragraph 79

115. The fact that the spreadsheet attached to Prince Mudau's email was prepared by Pinsent Masons is yet another example of NERSA's lack of independence as regulator in this matter.
116. I deny that the spreadsheet was helpful, complete or that the reasons advanced therein in support of confidentiality are valid.
117. I refer to paragraph 81¹⁶ of my founding affidavit.
118. I also record that sections 34 and 36 of PAIA (used on the spreadsheet as justification for the alleged confidentiality) are not applicable in the current court proceedings

¹⁵ Caselines at 008-34 - 36, para 74; 008-144 - 146.

¹⁶ Caselines at 008-38 - 39; 008-162 - 163.

A handwritten signature in black ink, consisting of a large, stylized capital 'A' followed by a capital 'P' and a capital 'M'.

which are, instead, regulated *inter alia* by Rule 53.

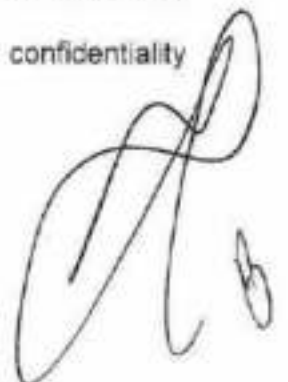
Ad paragraphs 80 to 85

119. I admit that the written communications referred to in these paragraphs were exchanged. Again, I note that the vast majority of them are already referred to in my founding affidavit and copies thereof were annexed to my founding affidavit.
120. I again deny that the DJP approved the proposal by the Karpowership companies' senior counsel. I repeat 13 to 15 above.

Ad paragraphs 86 and 87

121. I deny that TGC was obligated to specify the redacted information it wished to access and who it wanted it to be considered by.
122. In any event, this is an impossible task, as only NERSA and the Karpowership companies are aware as to the content of the redacted Rule 53 Record. Furthermore, it is evident that the revised provisional index and spreadsheet were incomplete and missing important information, as recorded in my letter to Prince Mudau dated 12 October 2022¹⁷. TGC is therefore in the dark as to what relevant information and documentation is in fact in NERSA's possession.
123. It would cause great prejudice to TGC if NERSA and the Karpowership companies were entitled to demand that TGC guess what information and documentation is in their possession that should be included in the Rule 53 Record and which TGC should have access to, without having had sight of the complete unredacted record.
124. My letter referred to in paragraph 87 did not merely persist with TGC's stance that NERSA should provide the complete record subject to an interim confidentiality

¹⁷ Caselines at 008-162 – 163.

A large, stylized handwritten signature in black ink, located in the bottom right corner of the page. The signature is cursive and appears to be a single name, possibly 'R. B.' or similar, with a large loop at the end.

undertaking. As noted above, it also recorded the deficiencies with NERSA's revised provisional index and spreadsheet.

Ad paragraphs 88 to 91

125. I admit that the written communications referred to in these paragraphs were exchanged.

126. Again, I note that the vast majority of them are already referred to in my founding affidavit and copies thereof were annexed to my founding affidavit.

Ad paragraphs 92 to 93

127. I repeat paragraphs 58 to 59, and 61 to 62 above.

Ad paragraphs 94 to 96

128. I note the contents hereof.

129. I deny that the Karpowership companies have made out a proper case for the relief requested in their counter-application.

130. I further deny that the spreadsheet (which appears to be the same as the one contained in annexure "TGC IA26" to my founding affidavit) is of assistance. I repeat 115 to 118 above.

Ad paragraphs 97 to 158

131. The Karpowership companies fail to make out a proper case for the relief sought in their counter application.

132. Their bald averments that the commercial information vaguely described in these paragraphs is confidential and that the disclosure of same will cause the alleged prejudice set out therein, essentially requires TGC and the Court to merely blindly

A handwritten signature in black ink, consisting of a large, stylized 'A' or 'R' shape with a vertical line extending downwards from the right side.

accept the Karpowership companies' averments in this regard, without having sight of the alleged confidential information.

133. This is significantly prejudicial to TGC and places it in a position in which it is unable to meaningfully address the Karpowership companies' claims of confidentiality and the alleged prejudice that would arise if the alleged commercial information is disclosed.
134. For example, it is impossible that all financial information is "*confidential and commercially sensitive*", and accordingly is required to be excluded from the Rule 53 Record in circumstances in which (i) there is a constitutional requirement that organs of state which contract for goods and services must do so cost-effectively and (ii) where the Karpowership companies seek to do business with the DMRE and Eskom (which, according to the Karpowership companies, are its customers) which could ultimately result in a cost to the South African public of billions of Rands.
135. The alleged prejudice to the Karpowership companies (if any) cannot be elevated above the requirements of transparency, competitiveness, cost-effectiveness and public accountability in contracting with the South African government and/or public and/or state-owned entities such as NERSA and Eskom.
136. I deny that any of the reasons advanced by the Karpowership companies in these paragraphs constitute "special circumstances" sufficient to justify a confidentiality regime as restrictive as the one that the Karpowership companies seek to impose.
137. In any event, the interim confidentiality regime proposed by TGC would serve to safeguard any truly confidential information.

Ad paragraphs 159 to 160

138. Save that the names of Karpowership companies' current directors referred to at

A large, stylized handwritten signature in black ink, consisting of several loops and a long horizontal stroke, followed by a smaller, more distinct signature.

paragraph 160 do not constitute personal information and should not be excluded from the Rule 53 record, TGC does not object to the redaction of personal information of individuals.

Ad paragraphs 164.1

139. I deny the contents hereof.

140. Notably, Mr Katmer fails to identify anywhere in his answering affidavit where I do not have personal knowledge of the contentions contained in my founding affidavit.

Ad paragraph 171.2

141. It is denied that TGC's interim confidentiality regime fails to provide adequate protection or extends to persons which should not be permitted access to confidential information. Notably, Mr Katmer fails to substantiate these bald allegations.

Ad paragraph 171.3

142. The alleged practical issues in no way constitute a valid reason why TGC's interim confidentiality regime should not be approved. Any such practical issues can be dealt with by the Court in its order approving TGC's interim confidentiality regime.

Ad paragraph 171.4

143. OUTA has not stated that it is not prepared to agree to an interim confidentiality regime in the terms proposed by the TGC. However, OUTA's stance on the matter is irrelevant as its main application has not been consolidated with TGC's main application and there is no requirement that the confidentiality regimes applicable to each matter have to be identical.

Ad paragraphs 180.3 to 180.4

A handwritten signature in black ink, consisting of a large, stylized loop followed by a smaller, more complex flourish.

144. I repeat paragraph 141 to 142 above.

Ad paragraph 189.3

145. As the applicant in a review application, TGC does not bear the onus of proving that the documents it seeks and which it identified in its founding papers were, in fact, not confidential.

146. The bald and patently incorrect averment set out in paragraph 189.3 of Mr Katmer's answering affidavit is quite wrong. It is in direct contradiction to the legal principles laid down by our courts regarding the purpose and scope of Rule 53.

147. Full legal argument in this regard will be advanced on behalf of TGC at the hearing of the matter.

Ad paragraph 189.8

148. As clearly stated in my founding affidavit¹⁸, and in all relevant correspondence to NERSA and the Karpowership companies¹⁹, whilst TGC does not agree that the Rule 53 Record should remain confidential to the extent suggested by the Karpowership companies, in order to progress the matter it proposed the interim confidentiality regime, which only applies pending a judicial determination by the court at the hearing of the review applications of the issue whether the disputed parts of the Rule 53 Record should remain confidential (and, if so, the extent of the confidentiality) or not.

CONCLUSION

149. In the circumstances:

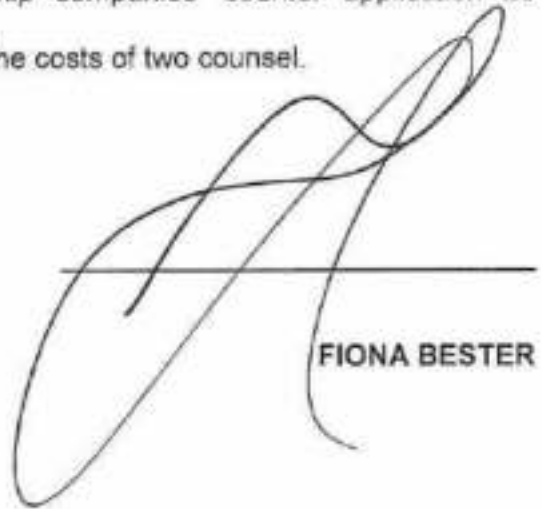
¹⁸ Caselines at 008-16, para 18.

¹⁹ See, for example, my letter to Pinsent Masons dated 9 September 2022 (Caselines at 008-144 – 146), in which I stated that: *"For the avoidance of any doubt, we again record that our client does not agree that the Rule 53 Record should remain confidential to the extent suggested by your clients, and is only willing to agree to an interim confidentiality regime pending a judicial determination by the court, at the hearing of the review applications, of the issue whether the disputed parts of the Rule 53 Record"*

A handwritten signature in black ink, consisting of a large, stylized 'S' or 'B' shape with a loop at the end, followed by a smaller, less distinct mark.

150. I accordingly persist with the request for an order in terms of the notice of motion to which this affidavit is attached;

151. I request that the Karpowership companies' counter application be dismissed with costs, including the costs of two counsel.



FIONA BESTER

I certify that:

1. The deponent has acknowledged that:
 - 1.1 she knows and understands the contents of this declaration;
 - 1.2 she has no objection to taking prescribed oath; and
 - 1.3 she considers the prescribed oath to be binding on her conscience.
2. The deponent thereafter uttered the words: "I swear that the contents of this declaration are true, so help me God".
3. The deponent signed this declaration in my presence at the address set out hereunder on this 17 day of **AUGUST 2023**.



COMMISSIONER OF OATHS

Megan Alicia Fortuin
Administration Clerk
Stellenbosch Magister Court
Alexandre Street, 7600

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

A handwritten signature in black ink, consisting of a large, stylized 'S' or 'A' shape, followed by the letter 'b'.

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

NOTICE IN TERMS OF RULE 35(12) AND (14)

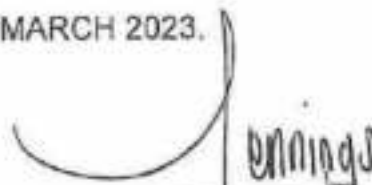
KINDLY TAKE NOTICE THAT the Applicant requires the First Respondent to produce for their inspection and copying, within five (5) days from date hereof the following documents:

1. A copy of the Policies and Guidelines as referred to in the Answering Affidavit between paragraphs 22 and 23 under the heading (as well as the subparagraphs 23 - 29:

**NERSA IS BOUND BY ITS POLICY AND GUIDELINS ON THE TREATMENT
OF CONFIDENTIAL INFORMATION SUBMITTED TO IT**



SIGNED AT PRETORIA ON THIS 6TH DAY OF MARCH 2023.



JENNINGS INCORPORATED
Attorneys for Applicant
 149 Anderson Street
 Brooklyn, 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
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

(Service by email)

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

AND TO: PINSENT MASONS SOUTH AFRICA INC
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

(Service by email)



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

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke, located in the bottom right corner of the page.

Ad paragraphs 23 to 29:**"TGC RA2"**(i) NERSA's alleged policy and guidelines

19. This section of NERSA's affidavit stands under the heading "*NERSA is bound by its policy and guidelines on the treatment of confidential information submitted to it*".
20. NERSA did not, however, identify or attach those policies and guidelines to its answering affidavit. As a result OUTA could not respond thereto in any meaningful way.
21. I was consequently instructed to request these documents. On 6 March 2023, my offices served a notice in terms of Rule 35(12) and (14) on NERSA's attorneys wherein NERSA was called upon to make available the policy and guidelines referred to in paragraph 23 of its answering affidavit for inspection (**Caselines at 018-2 – 018-4**).
22. NERSA filed a response to OUTA's Rule 35(12) and (14) notice on 13 March 2023 (**Caselines at 020-2 – 020-4**), wherein it stated that "*the First Respondent hereby replies to the Applicant's notice in terms of Rule 35(12)9 and (14) by filing herewith the following:*
- "1. Form A: Request for Treatment of Confidential Information
 2. Section 8(9)(a) of the National Energy Regular Act."

A handwritten signature, possibly reading 'A. J. B.', is written in black ink. To the right of the signature are the handwritten initials 'YB' and a circled number '11'.

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

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

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

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

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

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

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

A handwritten signature and initials are present in the bottom right corner of the page. The signature is a large, stylized cursive mark, and the initials are a smaller, more legible mark next to it.

"RA₃"

"TGC RA 3"



FORM A

Application for confidential treatment of information submitted to the Energy Regulator

INSTRUCTIONS

1. This form must be used for all applications for the confidential treatment of information submitted to the Energy Regulator.
2. Please note that this form has four sections (A, B, C and D).
3. All applications must be based on and substantiated in terms of the relevant provisions of:
 - (a) the Electricity Regulation Act, 2006 (Act No. 4 of 2006); or
 - (b) the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000); or
 - (c) any other appropriate legislation.
4. All applications must be accompanied by a detailed motivation supporting the application.
5. You must clearly indicate and highlight which information in your submission(s) is confidential as the Energy Regulator will not accept general claims of confidentiality of entire documents.
6. All information submitted to the Energy Regulator without this application shall be treated as not confidential and will be made available to the public.
7. The completed form with supporting documentation must be delivered to the Energy Regulator:
 - (a) by registered mail to: P O Box 40343, Arcadia 0007;

OR

 - (b) by hand at: Kulawula House, 526 Madiba Street, Arcadia, Pretoria.

Enquiries:

Contact:	Executive Manager: Electricity Regulation
Contact no.:	(012) 401 4617
Fax no.:	(012) 401 4700

Official Use Only

Date received	_____
Reference number	_____

**SECTION A: PARTICULARS OF THE PARTY MAKING THE REQUEST FOR
CONFIDENTIAL TREATMENT OF INFORMATION**

1. Name
2. Telephone number
3. Fax number
4. E-mail address
5. Details of mandated representative, including:
 - (a) Designation.....
 - (b) Family name.....
 - (c) First name.....
 - (d) Telephone number
 - (e) Fax number
 - (f) Email address

A handwritten signature, possibly reading 'Y. B.', is written in the bottom right corner of the page. The signature is written in dark ink and is somewhat stylized.

SECTION B: PARTICULARS REGARDING THE TYPE OF SUBMISSION

The request for confidential treatment of information is with regards to (tick the appropriate box below):

A licence application

☐

An application for an amendment of a licence

☐

An application for the revocation of a licence

☐

An objection to a licence application

☐

A complaint in terms of section 31 of the Act

☐

A tariff application

☐

Other (specify)

☐

.....

.....

.....

Handwritten signature and initials in the bottom right corner of the page.

SECTION C: DETAILS OF THE CONFIDENTIALITY REQUEST

Complete the following table and, for each piece of information for which confidential treatment is requested, provide information required in each column:

The name of the document that contains the information considered to be confidential	The page number, paragraph number and line number at which the confidential information begins and ends	Facts and evidence supporting the request for confidential treatment of information identified in column 2	The nature of and the economic value of the information (where applicable)	The applicable sections of the Electricity Regulation Act, 2006 (Act No. 4 of 2006), the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000) or any other appropriate legislation, supporting the request

Handwritten signature and initials, possibly '426'.

SECTION D: SOLEMN DECLARATION BY REQUESTER OR MANDATED REPRESENTATIVE

I _____ (full _____ names)

.....Identity

Number..... hereby declare that:

(a) I am authorised byto make this declaration (attach the authorisation); and

(b) All information provided herein is within my personal knowledge and is both true and correct.

Signed at (place) on this.....day of (month) (year).

.....
Signature

I certify that the deponent:

(a) has acknowledged that she/he knows and understands the contents of this application form and its annexures, that she/he has no objection to taking the prescribed oath and that she/he considers the oath binding on her/his conscience; and

(b) has in the prescribed manner sworn that the contents of this application form and its annexures are true and signed same before me at (place) on this day of.....(month)(year).

COMMISSIONER OF OATHS

Name _____

Address _____

Capacity _____

Handwritten signature and initials in the bottom right corner of the page.