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BY E-MAIL

The Honourable Minister  
Department of Forestry, Fisheries and the Environment

Your Ref Port of Richards Bay  
14/12/16/3/3/2/2007  
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28 November 2023

The Honourable Minister BD Creecy

**KARPOWERSHIP SA (PTY) LIMITED - ENVIRONMENTAL AUTHORISATION FOR THE PROPOSED GAS TO POWER VIA POWERSHIP PROJECT AT THE PORT OF RICHARDS BAY (PROJECT REF. 14/12/16/3/3/2/2007)**

**APPLICATION IN TERMS OF SECTION 43(9) OF THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT 107 OF 1998 ("NEMA")**

## 1. Introduction

1.1 We refer to the above matter and submit this Section 43(9) Application on behalf of Karpowership SA (Pty) Ltd, ("**Karpowership**" or "**the Applicant**").

1.2 On 25 October 2023, Karpowership was granted an Environmental Authorisation ("**EA**") to undertake its gas to power project in the Port of Richards Bay ("**the Project**") by the Department of Forestry, Fisheries and the Environment ("**DFPE**") (EA Reference 14/12/16/3/3/2/2007, Second Issue).

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- 1.3 The issuing of the EA was the culmination of an extensive and comprehensive Environmental Impact Assessment (“**EIA**”) process, with the first application for an EA being lodged with the DFFE on 5 October 2020 and the first EIA was lodged with the DFFE on 26 April 2021. On 23 June 2021, the DFFE refused the EA due to alleged gaps and procedural deficiencies in the EIA. Karpowership appealed this decision on 13 July 2021 and the matter was remitted back to the DFFE Competent Authority in August 2022.
- 1.4 On 6 January 2023, the amended EIA was submitted and a request for condonation was submitted in terms of Section 47C of the NEMA to submit the comments of certain Interested & Affected Parties (“**I&APs**”) that had been omitted from the PPP process. On 3 May 2023, the DFFE granted this extension.
- 1.5 On 23 May 2023, select Non-Governmental Organisations (“**NGOs**”) appealed this Section 47C decision and a response to the appeal was submitted by Karpowership on 21 June 2023. On 22 July 2023, the Minister of the DFFE dismissed the appeal.
- 1.6 On 30 August 2023 Karpowership submitted the revised EIA which contained the final information sought by the DFFE in order for the Competent Authority to make an informed decision.
- 1.7 The EA was finally issued by the DFFE on 25 October 2023.
- 1.8 In terms of Regulation 4(2) of the Environmental Impact Assessment Regulations, 2014, as amended (“**EIA Regulations**”), Karpowership was obliged to (through the Environmental Assessment Practitioner (“**EAP**”)) notify all registered I&APs of the granting of the EA in writing within fourteen (14) days of date of the decision as well as the provisions regarding the submission of appeals that are contained in the Regulations. Notification of the Competent Authority’s decision was sent to all registered I & A P’s on 2 November 2023 & A P’s had 20 days within which to lodge an appeal against the and appeals were due by no later than 22 November 2023.
- 1.9 Two appeals were received on 22 November 2023:
  - 1.9.1 From the Biodiversity Law Centre; and
  - 1.9.2 From the Centre for Environmental Rights acting on behalf of groundWorks, the South Durban Community Environmental Alliance (SDCEA) and others.
- 1.10 We note that the Biodiversity Law Centre’s appeal does not comply with the Appeal Regulations.

## 2 LEGISLATIVE PROVISIONS

- 2.1 In terms of Section 43(7) of the NEMA, the lodging of an appeal suspends the operation of the EA or any provision or condition attached thereto: This would prevent Karpowership from proceeding with the Project until the appeals process is finalised as Section 43(7) of the NEMA states that:

*“An appeal under this section suspends an environmental authorisation, exemption or any other decision made in terms of this Act or any other specific environmental Act, or any provision or condition attached thereto, except for a directive or other administrative*



*enforcement notice that is aimed at addressing significant harm to the environment, issued in terms of this Act or any other specific environmental management Act.”*

2.2 Section 43(9) of the NEMA allows for an application to ‘nullify’ the effect of Section 43(7), or in other words, ‘cancel’ the EA’s suspension:

*“Despite subsection (7), pending the finalisation of the appeal, the Minister, Minister responsible for mineral resources, the MEC or municipal council, as the case may be, may, on application and on good cause shown, direct that-*

*(a) the environmental authorisation, exemption or any other decision made in terms of this Act or any other specific environmental management Act, or any provision or condition attached thereto may wholly or in part, not be suspended.”*

2.3 While Section 43(9) does not specifically set out what “good cause” must be shown, the generally accepted principle is that such directive is not simply “there for the asking” and must be properly motivated. In other words, “good cause” must be shown to motivate why an appeal should not suspend the EA as per Section 43(7).

2.4 On 15 November 2023, we submitted to the DFFE a note analyzing what good cause is and what elements must exist for a successful Section 43(9) application (“**the Section 43(9) Good Cause Letter**”). It is clear from the Section 43(9) Good Cause Letter that good cause clearly exists in this Project and that this is a case where a Section 43(9) application should be granted. We attach a copy of the Section 43(9) Good Cause Letter as Annexure “A” and request that it is read together with and as part of this Section 43(9) Application.

2.5 To summarize, the aforementioned Section 43(9) Good Cause Letter addresses the elements of “good cause” and how it applies to Karpowership in this instance. Good cause addressed all the factors that bear on the fairness of granting the relief and affecting the proper administration of justice.

2.6 The “good cause” test to be applied by Karpowership in this Section 43(9) Application centres around two aspects, namely (1) the balancing of rights and whether there is any prejudice in granting the Section 43(9) application on the one hand, or not on the other; and (2) whether any irreparable harm would be caused if the Section 43(9) application is granted on the one hand, or not on the other.

2.7 The purpose of this Application is not to respond in-depth to the Grounds of Appeal, that will be done in due course in the Appeal process. The purpose of this Application is to determine whether the Grounds of Appeal have impacted on the good cause motivation shown in the Section 43(9) Good Cause Letter and as set out above and therefore whether a response to the Grounds of Appeal is required to meet the good cause threshold for this Section 43(9) application.

### **3 GROUNDS OF APPEAL AND GOOD CAUSE REQUIRED FOR SECTION 43(9) APPLICATION- THE BIODIVERSITY LAW CENTRE APPEAL**

3.1 The Grounds of Appeal in the Biodiversity Law Centre Appeal are as follows:

3.1.1 Ground 1: Failure to consider impacts



Response relating to good cause required for the Section 43(9) Application:

This ground of appeal is based on the allegation that, in the absence of a final project layout and prior to conclusion of 12-months of further avifauna monitoring, the potential consequences for and impacts on the environment of the Project could not have been adequately considered, investigated and assessed.

The allegation is incorrect (12 months of avifauna monitoring has been done and all projects are required to submit a final project layout, often post issuance of the EA) and does not impact on the Section 43(9) good cause motivation.

3.1.2 Ground 2: Contravention of material requirements for consideration of an EA

Response relating to good cause required for the Section 43(9) Application:

This ground of appeal is based on the allegation that as the EA does not approve the EMPr, and consequently the EA should not have been granted. The EA does approve the Generic EMPr and requires finalisation of the EMPr, subject to further public participation.

This ground of appeal is incorrect and therefore does not impact on the Section 43(9) good cause motivation.

3.1.3 Ground 3: Failure by CA to take relevant factors into account

Response relating to good cause required for the Section 43(9) Application:

This ground of appeal is based on the allegation that the CA failed to take into account all relevant factors including the impacts of the Project, harms, mitigation measures, laws and policy. This ground of appeal is incorrect, these issues were considered in-depth over a period of almost 3 years in the EIA process and were subjected to severe public and regulatory scrutiny. It must also be borne in mind that there were no significant impacts predicted by the EIA according to the work done by the independent specialists – all specialists found the impacts to be acceptable and recommended that the Project should proceed subject to the required mitigation measures being in place.

This ground of appeal is incorrect and therefore does not impact on the Section 43(9) good cause motivation.

3.1.4 Ground 4: Unlawfully issuing a conditional EA

Response relating to good cause required for the Section 43(9) Application:

This ground of appeal is based on the allegation that it is illegal in terms of Regulation 24 for the CA to grant an EA which may be subject to further conditions (such as the layout design, EMPr design and offset design). It is not illegal and is in fact common practice for the CA to do this. The CA has this authority in terms of NEMA and the EIA



Regulations and it is common practice and found in many EA's as the EA, EMPr and impacts predicted in the EIA are dynamic and require ongoing changing responses and mitigation in order to mitigate the environmental impacts of a project.

This ground of appeal is incorrect and therefore does not impact on the Section 43(9) good cause motivation.

### 3.1.5 Ground 5: Failure to comply with public participation requirements

Response relating to good cause required for the Section 43(9) Application:

This ground of appeal is based on the allegation that public participation relating to the offsets and the offsets agreement were not complied with. The offsets were in fact part of the EIA and were subject to public participation. There is no obligation to make the Offsets Agreement public.

This ground is incorrect and therefore does not impact on the Section 43(9) good cause motivation.

### 3.1.6 Ground 6: Failure to comply with the environmental management Principles

Response relating to good cause required for the Section 43(9) Application:

This ground of appeal is based on the allegation that a risk averse approach did not consider the sensitive Richards Bay environment. The independent specialists involved in the EIA did in fact take a risk averse approach to their detailed studies of the Richards Bay environment and recommended the project should proceed subject to the required mitigation measures which are comprehensively set out in their recommendations and are carried through to the EA and EMPr.

This ground of appeal is incorrect and therefore does not impact on the Section 43(9) good cause motivation.

## **4 GROUNDS OF APPEAL AND GOOD CAUSE REQUIRED FOR SECTION 43(9) APPLICATION- THE GROUNDWORKS AND SDCEA APPEAL**

4.1 The Grounds of Appeal in the groundWorks / SDCEA and others Appeal are as follows:

### 4.1.1 Ground 1: the EIA process was procedurally defective

Response relating to good cause required for the Section 43(9) Application:

This ground of appeal is based on the allegation that the EIA process could not be extended beyond 6 January 2023, not even by the Section 47(C) application. These matters have already been considered by the DFFE in previous objections raised by groundWorks, have been found to be without merit and have been dismissed by the DFFE. The appellant further alleges that the changes made to the EIA in 2022 and 2023 were so significant that the public



did not have enough time to digest these changes. That allegation is incorrect- the changes were insignificant and were marked-up (highlighted) in the EIA to make it easier for the I & A P's to detect where the changes had occurred. This ground of appeal is incorrect and therefore does not impact on the Section 43(9) good cause motivation.

4.1.2 Ground 2: the decision maker was incorrect in stating that there was adequate public participation as the EIA public participation process was defective

Response relating to good cause required for the Section 43(9) Application:

This ground of appeal is based on the allegation that public participation did not comply with the minimum requirements of the law. The EIA and all public interactions complied with and often exceeded the minimum legal requirements

This ground of appeal is incorrect and therefore does not impact on the Section 43(9) good cause motivation.

4.1.3 Ground 3: the EA is not protective of the environment due to inappropriate conditions, and minimum requirements not being met. The EA is contrary to the environmental legal provisions of the NEMA

Response relating to good cause required for the Section 43(9) Application:

This ground of appeal is based on the allegation that the EA is vague and Listing Notice Activities are not adequately described in the EIA. The Listing Notices have been scrutinized and amended. The conditions of the EA are not vague but in fact are very specific and onerous. This ground of appeal also alleges that any further refinements or changes to the Project are illegal (the layout plan, offsets, the EMP, avifauna, thermal plume and underwater noise). This is also incorrect as it is not possible to "lock in" each and every predicted impact of a project during the EIA phase. All projects are dynamic and environmental and project designs must respond to a dynamic environment to mitigate, to the greatest extent possible, such dynamic project impacts. It must also be borne in mind that there were no significant impacts predicted by the EIA according to the work done by the independent specialists – all specialists found the impacts to be acceptable and recommended that the Project should proceed subject to the required mitigation measures being in place.

This ground of appeal is therefore incorrect and does not impact on the Section 43(9) good cause motivation.

4.1.4 Ground 4: The decision maker failed to adequately consider the need and desirability of the Project and the studies in the EIA were inadequate

Response relating to good cause required for the Section 43(9) Application:

This ground of appeal is based on the allegation that the project is neither



necessary nor desirable. However the EIA, the Socio-Economic study and the Need and Desirability Study all show the opposite- that the Project is necessary and desirable. This ground of appeal fails to take into account the positive aspects of the Project such as the positive contribution of the Project to alleviating loadshedding, reducing Eskom's dependency on diesel generators, increasing dispatchable power and facilitating more renewable energy which can be brought onto the grid.

This ground of appeal is therefore incorrect and does not impact on the Section 43(9) good cause motivation.

4.1.5 Ground 5: The decision maker and Karpowership failed to adequately consider alternatives

Response relating to good cause required for the Section 43(9) Application:

This ground of appeal is based on the allegation that the Project should have considered renewables. Based on the criteria of the RMIPPPP, renewables alone cannot meet the criteria- the successful renewable bidders had to add storage capacity (batteries) as the power must be dispatchable. Powerships were selected on merit and price, therefore there was no obligation to consider renewables as an alternative by Karpowership, however other bidders were able to successfully bid with renewables (and battery storage) showing that LNG driven thermal power and renewables need to be balanced and are not mutually exclusive.

This ground of appeal is incorrect and therefore does not impact on the Section 43(9) good cause motivation.

4.1.6 Ground 6: The decision maker failed to adequately consider the climate change impacts of the Project

Response relating to good cause required for the Section 43(9) Application:

This ground of appeal is based on the allegation that the CCIAR was deficient. And yet the CCIAR complies with law and precedent and was undertaken by a leading independent climate change specialist.

This ground of appeal is therefore incorrect and does not impact on the Section 43(9) good cause motivation.

4.1.7 Ground 7: The decision maker did adequately not take into account the air quality issues

Response relating to good cause required for the Section 43(9) Application:

This ground of appeal is based on the allegation that the AIA failed to adequately consider the baseline air pollution and given the already high levels of pollution in the baseline air quality and the AIA's incomplete assessment of



the Project's emissions and its associated health impacts, the decisionmaker's grant of the Authorisation was unreasonable and unlawful. It is submitted that this allegation is not correct. The AIA was compiled by a highly qualified independent specialist, in accordance with the regulated requirements for an Atmospheric Impact Report. The impact of emissions of the Project on air quality was assessed using a regulated approach, and the predicted ambient concentrations from the Project are low and well below the health-based NAAQS. Maximum predicted concentrations occur over the port and adjacent industrial areas, and the contribution from the Project to current and future ambient air quality is small. Moreover, the DFFE: Air Quality Directorate has issued a Provisional Atmospheric Emission Licence to Karpowership SA Richards Bay (Rf) (Pty) Ltd on 17 November 2023, which is a testament that the AIA adequately assessed the Project's emissions and its associated impacts and mitigations.

This ground of appeal is incorrect and therefore does not impact on the Section 43(9) good cause motivation.

4.1.8 Ground 8: The decision maker did not adequately take into account the underwater acoustics

Response relating to good cause required for the Section 43(9) Application

This ground of appeal is based on the allegation that there is inadequate baseline noise modelling, incorrect cumulative impact prediction and misleading cumulative modelling and that this failure to analyse cumulative noise impacts on the humpback dolphin violates the law. In fact, the underwater acoustics baseline modelling that was done is a first of a kind innovation in South Africa. Impacts on all relevant marine animals were modelled. Any remaining impacts will be offset. There is no predicted impact on the humpback dolphin. The underwater noise studies conducted included both an Underwater Acoustic Assessment component (including baseline underwater noise monitoring and predictive modelling assessments), and an assessment of the Marine Ecology, both by qualified and experienced specialists. The harbour is a pre-existing noise source. The noise to be produced by the Karpowership operations is not anticipated to contribute meaningfully to the existing noise levels in the Port of Richards Bay. Furthermore, when considering an "above worst-case" scenario, the Powerships do not produce noise to the extent that it will cause direct harm to marine organisms, based on current understanding and available research. As the noise produced by the Powerships is similar to the noise produced by other large vessels in the port, the Powerships are not anticipated to produce any significant additional disturbance or change to behaviour to marine mammals unless a marine mammal is directly adjacent to the ships for an extended period of time.

This ground of appeal is incorrect and therefore does not impact on the Section 43(9) good cause motivation.





4.1.9 Ground 9: The decision maker failed to properly consider the offsets, as the offsets do not meet the environmental legal provisions and principles

Response relating to good cause required for the Section 43(9) Application:

This ground of appeal is based on the allegation that the offsets proposed for the project do not comply with the law and that the public participation associated with the offsets were flawed. In fact, the Offsets comply with the law, best practice and were included in the EIA for public participation. There is no obligation to make the Offsets Agreement public.

This ground of appeal is incorrect and therefore does not impact on the Section 43(9) good cause motivation.

4.1.10 Ground 10: The marine and estuarine ecology component was deficient, and therefore the decision maker failed to adequately consider it

Response relating to good cause required for the Section 43(9) Application:

This ground of appeal is based on the allegation that the Coastal, Estuarine and Marine Impact Assessment did not adequately assess the impacts on marine life and therefore that the decision maker did not have sufficient information to conclude that “the authorised activities will not conflict with” NEMA when the impacts on coastal fisheries have not been properly assessed. The Marine Ecologists, Anchor Environmental led by Dr. Barry Clark, have thirty years’ experience in marine biological research and consulting on coastal zone and marine issues. The Coastal, Estuarine, and Marine Impacts report is considered to provide a substantial overview of the commercial fisheries operating in the Richards Bay Estuarine (RBE) area, including on the often overlooked small-scale and subsistence fisheries. Best available data on the activities of these fisheries were analysed, mapped and interpreted. The report highlights the importance of the coastal shore and estuarine habitats to local fisheries and the wider ecological functioning of the area. The impacts of the Project have been assessed in relation to the impact the Project’s expected marine activities will have on the estuarine function of the RBE and surrounding area, based on the location of mooring and extent of impacts based on interpretation of the modelling reports combined with best available knowledge on the marine ecology and fisheries of the RBE. The extent of noise and thermal plume impacts on surrounding marine ecology near to the Project operations and are considered to be far enough away from the sensitive habitats of the RBE. The mangroves, mudflats seagrass and freshwater input areas are noted for their ecological importance but are not anticipated to be directly affected by Project impacts. The Project is not expected to contribute significantly to the current industrial use (and associated impacts e.g., noise, vessel traffic, degradation of habitat) as the Project operations are of a similar level to that of existing ships using the port, and the FSRU much lower, so will not significantly change the existing ecological status of the bay, and therefore its functioning and impact to commercial and small-scale fisheries.



This ground of appeal is therefore incorrect and does not impact on the Section 43(9) good cause motivation.

4.1.11 Ground 11: The decision maker did not adequately consider the Project's impacts on avifauna

Response relating to good cause required for the Section 43(9) Application:

This ground of appeal is based on the allegation that there are significant deficiencies in the analyses of avifaunal impacts in the EIA and specialist reports. Inter alia the allegation that the FEIR lacks key baseline data necessary to fully predict the impacts of the ships and to build an appropriate mitigation and monitoring program, underestimates the risks of the project to key species and fisheries, and has failed to evaluate the impact of the project on specific species. The FEMPR also proposes insufficient mitigation measures and mitigation measures that lack the necessary specificity to be effective. In fact, The Avifauna assessment was conducted by specialists that are highly qualified and well known in their field. The avifauna specialists are confident that their assessment was done in accordance with the EIA Regulations, and is an accurate reflection of the impacts on birds. The conservation importance of the various habitats in the Port of Richards Bay (sandbanks, mangroves, mudflats etc.), as well as those in the surrounding wetland areas (uMhlathuze Estuary, Thulazihleka Pan) is addressed in detail in the Avifauna report. In addition, bird count and monitoring was conducted to understand the avifauna baseline, including additional monitoring for a period of 12 months prior to construction. The Avifauna assessment's findings indicate that the impact on avifauna is not significant. Mitigation measures to minimise Avifauna impacts are captured in the EMPr. Where these could not be achieved, offset in the form of a combined out-of-kind, together with a like-for-like, for an appropriate marine offset, was agreed with EKZNW.

This ground of appeal is therefore incorrect and does not impact on the Section 43(9) good cause motivation.

4.1.12 Ground 12: The decision maker failed to adequately consider relevant coastal management considerations according to the NEM: ICMA

Response relating to good cause required for the Section 43(9) Application

This ground of appeal is based on the allegation that the Decision Maker did not comply with Section 63(2) of NEM: ICMA as it prohibits a competent authority from issuing an environmental authorisation for an activity which "would be contrary to the interests of the whole community." With respect the appellants have misinterpreted Section 63(2) of the NEM: ICMA within the confines of an Industrial port and therefore its relevance to the Project. In an industrial Port such as Richards Bay the principal governing legislation is the NEMA and the National Ports Act. The decision was therefore correctly taken



and the law correctly applied to the decision and in the EIA phase. Section 63(2) of the NEM: ICMA has in any event been repealed.

This ground of appeal therefore incorrect and does not impact on the Section 43(9) good cause motivation.

4.1.13 Ground 13: The Socio-Economic Impacts studies were deficient, and the decision maker therefore did not adequately consider the impacts

Response relating to good cause required for the Section 43(9) Application:

This ground of appeal is based on the allegation that in terms of NEMA and the Constitution, all development must be ecologically sustainable while economic and social development must be justifiable. Further, the social impacts of activities including disadvantages and benefits must be considered, assessed and evaluated and decisions must be appropriate in light of such consideration and assessment. The appellants allege that the EIA process did not adequately consider all such impacts, particularly in respect of: small scale fishers, the biodiversity economy, tourism, energy costs, knock-on effects on the economy and carbon border adjustment. In response The Socio-Economic Impact Assessment (SEIA) report is to be read together with various studies forming part of the Social Impact Assessment (SIA) (tourism, traffic, small scale fishers), as the polycentric approach was applied. The socio-economic study findings take into account the findings of the other specialist studies, and separate specialist studies address the small-scale fishers and tourism aspects. The SEIA report presents the different perspectives and impacts of the project in complex socio-economic systems. The Karpowership proposed project is a response to the current energy crises and forms part of the RMIPPPP and is assessed in that context. The SEIA report accurately reflects the direct and indirect negative and positive impacts of the project based on its own research and that of the findings of the other technical specialist reports.

This ground of appeal is therefore incorrect and does not impact on the Section 43(9) good cause motivation.

4.1.14 Ground 14: The decision maker failed to adequately consider the cultural and heritage impact

Response relating to good cause required for the Section 43(9) Application:

This ground of appeal is based on the allegation that the cultural heritage impacts assessment (Umlando report) does not adequately consider the cultural and heritage impacts of the Project on the people in the area. The appellant further alleges that there is no evidence of consultation with the people living in the area on the potential impacts of the Project on their cultural heritage despite the existence of many fishing communities, including those in and around Richards Bay that have deep tangible and intangible cultural heritage that is linked to their fishing, harvesting and use of the ocean in diverse



ways, all of which will be affected by the project. This is incorrect as The Heritage Impact Assessment addresses the cultural impacts within the study area. It is important to note that the Project is within an operational Port with restricted access to the public, and therefore it cannot directly affect the public. The nearby Alkandstrand and Pelican Island can continue to be used for cultural practices, as is currently the case, and there is no evidence as to how the proposed Karpowership project will indirectly affect them. Issues regarding religion are intangible and personal, and the proposed Project does not affect these.

This ground of appeal is incorrect therefore does not impact on the Section 43(9) good cause motivation.

#### 4.1.15 Ground 15: The lack of independence and objectivity displayed by the EAP

Response relating to good cause required for the Section 43(9) Application

This ground of appeal is based on the allegation that there is a clear lack of objectivity and independence by the EAP which is a contravention of EIA Regulation 13. This allegation is unsubstantiated and common- the appellants have tried various methods to undermine the credibility of the EAP in the hope that this will derail the Project. There is no evidence to substantiate this claim and it must be borne in mind that the EAP is only one of approximately 30 specialists involved in the EIA. All the specialists must act objectively (their declarations of independence are included in the EIA) and all specialists recommended that the Project could proceed subject to the required mitigation measures.

This ground of appeal is therefore completely without merit and does not impact on the Section 43(9) good cause motivation.

## 5 RELIEF SOUGHT

5.1 The purpose of this letter is a Section 43(9) application to direct that the environmental authorisation **not be suspended** pending finalisation of the appeal.

5.2 Section 43(9) provides that, pending the finalisation of the appeal, the Minister may, on application and on good cause shown, direct that environmental authorisation not be suspended.

### Good Cause

#### *Balancing of Rights*

5.3 The deadline for achieving Commercial Close for the Project is 31 December 2023 with Project document signature due to take place on 22 December 2023. If the appeal is allowed to suspend the EA and there is no valid EA on those dates Karpowership stands to lose its Preferred Bidder status and the process expires i.e: there will be no further



Project.

- 5.4 If the Section 43(9) application fails and Karpowership's Preferred Bidder status is lost, Karpowership may be entirely prevented from reaching Financial Close and therefore fail to achieve the requirements under the RMIPPPP. The prejudice to Karpowership is clear.
- 5.5 A successful Section 43(9) application would not result in prejudice to any party. The appellant parties will still have the right to appeal and to have their appeals fairly adjudicated.

#### *Irreparable Harm*

- 5.6 Irreparable harm in this instance refers to harm to the environment. In other words, would there be any harm caused to the environment, if the Section 43(9) is granted?
- 5.7 According to the Project construction and implementation timetable, construction is only planned to start at the beginning of March 2024, by which time the appeals would have been decided. Therefore, there is no risk to the environment i.e.: no risk of harm being caused while the appeals are being decided.
- 5.8 Karpowership is prepared to accept the risk associated with a successful Section 43(9) application and will continue to implement the Project while the appeals are being adjudicated. In addition, as indicated above, it must also be borne in mind that there were no significant impacts (or significant harm) predicted by the EIA according to the work done by the independent specialists – all specialists found the impacts to be acceptable and recommended that the Project should proceed subject to the required mitigation measures being in place. Therefore, even when the Project is implemented, according to the EIA and the specialist studies, no significant harm to the environment will take place.
- 5.9 Furthermore, Karpowership would be prepared to provide a guarantee to the DFFE that if the appeals are successful, it will either stop project implementation pending a High Court Review or, if Karpowership decides not to Review the appeal decision then it will rehabilitate any work that has been commenced with. It is submitted that this scenario is unlikely, as, given the Project construction timeline referred to in 5.7 above, the appeals should be adjudicated well before Project construction commences.
- 5.10 The balance of convenience therefore favours the granting of the interim relief, as the prejudice to Karpowership and the Project far outweighs any possible prejudice that the appellants may experience.

## **6 CONCLUSION**

- 6.1 We respectfully submit that the Section 43(9) Good Cause Letter concisely sets out the grounds for good cause which exist in this Project and request that it is read together with and as part of this Section 43(9) Application.
- 6.2 In addition, it is clearly shown above that the Grounds of Appeal of the two appeals do



not adversely impact on the good cause shown, there is no prejudice to any party and no irreparable harm is caused.

6.3 We respectfully submit that the granting of the Section 43(9) application is in the interests of justice for the reasons as set herein and as outlined in the Section 43(9) Good Cause Letter.

6.4 In accordance with the motivation provided in the Section 43(9) Good Cause Letter and the additional response to the Grounds of Appeal as they relate to the issue of good cause provided in this Application, we therefore request that:

6.4.1 The Honourable Minister grants this Section 43(9) application and declares that the EA is not suspended by the appeals that were lodged.

We trust that you find the above in order but should you wish to discuss any aspect hereof, kindly contact the undersigned.

Yours sincerely

**Adam Gunn**  
Legal Director  
for Pinsent Masons Africa LLP  
This letter is sent electronically and so is unsigned