



# Pinsent Masons

*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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15 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)**

### **NOTIFICATION REGARDING GOOD CAUSE AND THE POTENTIAL 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 make the following submission on behalf of Karpowership SA (Pty) Ltd, (“**Karpowership**” or “**our client**”).

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 3 year 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 submitted to 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 to the DFFE and a request for condonation was then made in terms of Section 47C of the NEMA regarding the submission of certain information including 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, certain I & A P’s 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 for the Competent Authority to make an informed decision.
- 1.7 On 25 October 2023 the EA was issued by the DFFE.
- 1.8 In light of the national importance of the Project and the potentially deleterious effect that a suspension caused by Section 43(7) may have, we submit this pre-application summary of the important issues relating to the Section 43(9) application and in particular, in relation to the central issue of “good cause” which clearly exists in this case.
- 1.9 Note that this is not a Section 43(9) application. This is a summary of the relevant law and its application to the Project, particularly regarding the issue of “good cause”. A Section 43(9) application will follow in due course which will contain a comprehensive application to the extent such appeals may be lodged.

## 2 LEGISLATIVE PROVISIONS AND GOOD CAUSE

- 2.1 In terms of Regulation 4(2) of the EIA 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 (this includes a notification of the provisions regarding the submission of appeals that are contained in the EIA Regulations). I & A P’s have 20 days within which to lodge an appeal against the EA.
- 2.2 Notification of the Competent Authority’s decision was sent to all registered I & A P’s on 2 November 2023. Thus, should any I&AP wish to submit an appeal, it is due by no later than 22 November 2023.
- 2.3 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.”*

- 2.4 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 caused by an appeal:

*“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.”*

- 2.5 It should be noted that both the scope of the application and the threshold for granting a Section 43(9) application changed when the NEMA was amended on 30 June 2023. Pre-amendment, Section 43(9) stated:

*“Notwithstanding subsection (7) and pending the finalisation of the appeal, the Minister, the Minister responsible for mineral resources or MEC, as the case may be, may direct that any part or provision of the directive not be suspended, but only strictly in exceptional circumstances where there is an imminent threat to human health or the environment.”*

- 2.6 Thus, the threshold for a Section 43(9) application is no longer “exceptional circumstances” but good cause. Good cause is a much lower threshold.

- 2.7 Section 43(9) does not define good cause or state what must be proven for an application to be granted. We thus turn to case law and although this does not apply directly to Section 43(9), it is submitted that the precedent established by the courts create precedent which binds any administrative official/functionary who may be called upon to determine a 43(9) application and are also instructive in terms of understanding the elements of good cause.

- 2.8 The aspects of the term good cause, place different emphasis on the meaning of good cause according to the issue at hand (for example, condonation, default, etc). While specifically considering good cause in respect of procedural non-compliance, the Court’s comments in *Madinda v Minister of Safety and Security* [2008] ZASCA 34; 2008 (4) SA 312 (SCA) illustrate general terms and concepts which can be applied in all instances of assessing ‘good cause’. At para 10, the Court commented that *“‘Good cause’ looks at all those factors which bear on the fairness of granting the relief as between the parties and as affecting the proper administration of justice. In any given factual complex it may be that only some of many such possible factors become relevant. These may include prospects of success in the proposed action, the reasons for the delay, the sufficiency of the explanation offered, the bona fides of the applicant, and any contribution of other persons or parties to the delay and the applicant’s responsibility therefore”* (our emphasis).

- 2.9 These sentiments were also echoed in *Sello v Minister of Police N.O and Another* [2022] ZAGPPHC 233 (13 April 2022).



2.10 In L v L (A3008/2021) [2022] ZAGPJHC 21 the court referred to the text of Professor JL van Zyl in Joubert (ed) The Law of South Africa vol 6 (first reissue) at 21a who describes 'good cause' as follows:

*"As far as the meaning of "good cause" (or sufficient reason)" is concerned, it is the view of the courts that a precise definition of the term is neither possible nor desirable, but that the particular circumstances of each case must be considered"* (para 38)

2.11 In terms of Section 18 of The Superior Courts Act 10 of 2013 ("**the Superior Courts Act**"), the default position is similar to the NEMA in that an appeal automatically suspends an order of court, pending the outcome of an appeal. Section 18 of the Superior Courts Act introduces exceptions to this rule in a way similar to Section 43(9) of NEMA.

2.12 Section 18 allows for an application to be brought to nullify the suspension of the court order (ie allowing one to apply for leave to execute a judgment, pending appeal). Although Section 18(1), still uses the higher threshold of exceptional circumstances (similar to NEMA pre-amendment), when invoking Section 18, the applicant must deal with the issue of irreparable harm. In *Incubeta Holdings and Another v Ellis and Another* 2013 ZAGPJHC 274 the court held that the enquiry into irreparable harm involves determining whether there would be irreparable harm to either the party or proof of the absence of irreparable harm.

2.13 The courts have often found that appeals possess the requirements for the decision or order not to be suspended pending the outcome of an appeal. The court in *T & M Canteen CC v Charlotte Maxeke Academic Hospital and Another* 2021 ZAGPJHC 519 granted the application, invoking Section 18(1) and (3) of the Superior Courts Act. The judgment and order were not suspended during the appeal process as a result due to commercial and reputational losses caused by the respondents' actions.

### **3 GOOD CAUSE IN THIS KARPOWERSHIP MATTER**

3.1 According to the above legislative provisions and precedent it is clear that there is no precise definition of good cause and that in each case it is an issue that must be determined with reference to the facts.

3.2 Therefore determining whether there is good cause in the Karpowership matter may be answered with reference to the following questions:

3.2.1 Balancing of rights. Is there any prejudice to either of the parties if the Section 43(9) is not granted on the one hand or granted on the other?

3.2.2 Is there any irreparable harm caused if the Section 43(9) is not granted on the one hand or granted on the other?

#### **3.3 Balancing of Rights – Prejudice to the Parties**

##### **Prejudice to the Parties if the Section 43(9) is not granted**

3.3.1 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 ie: there will be no further Project.

- 3.3.2 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.

Prejudice to the Parties if the Section 43(9) is granted

- 3.3.3 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.

3.4 Irreparable Harm

- 3.4.1 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?
- 3.4.2 According to the Project construction and implementation timetable, construction is only planned to start by the end of March 2024, by which time the appeals would have been decided. Therefore, there is no risk to the environment ie: no risk of harm being caused while the appeals are being decided.
- 3.4.3 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.
- 3.4.4 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 3.4.2 above, the appeals should be adjudicated well before Project construction commences.

3.5 Other issues to consider relating to "good cause" in Section 43(9)

- 3.5.1 A failed Section 43(9) is not in the national interest as all the positive aspects associated with the Project then cannot be realized. The contribution to alleviating load shedding, the addition of LNG fired dispatchable power, the reduction of diesel-fired dispatchable power, the capacitating of more renewable energy into the grid. All these opportunities are lost if the Section 43(9) is not granted.
- 3.5.2 The decision to award the EA by the Competent Authority demonstrates that all issues and impacts identified during the EIA (and all prospective gaps identified



by the DFFE) regarding the Project have been duly closed-out and sufficient mitigation and/or monitoring measures have been implemented to address such environmental concerns.

- 3.5.3 As the EIA has been through several iterations and PPP, the issues which are subject to appeal are now narrowed. There were very few changes to the 2023 EIA which may be appealed by appellants. Therefore, there are very few issues which could form the appellants Grounds of Appeal and it is submitted, with respect that the prospects of a successful appeal are low.

#### **4 CONCLUSION**

- 4.1 It is clear from the above that good cause as required by Section 43(9) is clearly evident in this matter.
- 4.2 There is no prejudice to any party or irreparable harm caused if the Section 43(9) is granted. On the other hand, if the Section 43(9) is not granted, the prejudice to our client is immense and the Project may fail.
- 4.3 If appeals are lodged against the decision to grant the EA, our client's Section 43(9) application will be submitted in due course.

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