BIODIVERSITY LAW CENTRE
LAW FOR NATURE

Date: 8 January 2024

TO: **The Appeals and Legal Review Section, Department of Forestry, Fisheries and the Environment**
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Our ref: BLC/KPRB/004

Dear Sirs

RE: 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 and background

1.1. This submission responds to the correspondence from the legal representatives of Karpowership SA (Pty) Ltd (**Karpowership**) dated 28 November 2023 styled an application in terms of section 43(9) of the National Environmental Management Act, 107 of 1998 (**NEMA**) (**the section 43(9) Application**). This occurs in the context of an environmental authorisation application made by Karpowership in respect of its Richard's Bay Project (**the Project**) and Chapter 5 read with section 2 of NEMA which sets out the framework, principles and objectives for integrated environmental management.

1.2. The section 43(9) Application was provided to the Biodiversity Law Centre (**BLC**) by the Department of Forestry, Fisheries and the Environment (**DFFE**) on 28 November 2023 with a request for comment by 8 December 2023. Following correspondence

between the BLC and DFFE, the deadline for comment was extended to 8 January 2024, mindful of the requirements of due process, the BLC's rights to just administrative action and procedural fairness and the closure of the appeal period between 15 December 2023 and 5 January 2024. The confirmation of such deadline is attached as "**BLC1**".

1.3. The section 43(9) Application has been submitted by Karpowership subsequent to, *inter alia*, the BLC's internal appeal against the granting of an Environmental Authorisation for Karpowership's Richard's Bay powership project (**Project**) (Authorisation registration number: 14/12/16/3/3/2/2007) (**EA**).

1.3.1. The EA was granted by the DFFE on 25 October 2023.

1.3.2. The BLC submitted its appeal, in terms of section 43(1) of NEMA on 22 November 2023 – the statutory deadline for the filing of any internal appeals in respect of the EA.[1]

1.3.3. The statutory consequence of such appeal is that, in terms of section 43(7) of NEMA the EA was suspended from 22 November 2023 (**Automatic Suspension**).

1.4. An appeal against the EA was also submitted on 22 November 2023 by the Centre for Environmental Rights, acting on behalf of groundWork, the South Durban Community Environmental Alliance, and others (**CER Appeal**).

1.5. Prior to the deadline for internal appeals, on 15 November 2023, Karpowership's legal representatives directed correspondence to the Minister of Forestry, Fisheries and the Environment (**Minister**) styled "*Notification Regarding Good Cause and the Potential Application in terms of section 43(9) of the National Environmental Management Act 107 of 1998"*. This "**Good Cause Letter**" purported to set out the "*the relevant law and its application to the Project, particularly regarding the issue of 'good cause'"*.[2] It was expressly not a "section 43(9) application".[3] Karpowership nevertheless applied its understanding of the law to its own cause, with the nub of the matter appearing to be the deadline for Commercial Close for the Project on 31 December 2023.[4]

1.5.1. This letter has subsequently been annexed to the section 43(9) Application and described as demonstrating that "*good cause clearly exists in this Project"* and "*Good cause addressed all the factors that bear on the fairness of granting relief and affecting the proper administration of justice"*.[5] Little is added by the section 43(9) Appeal, save to contend, erroneously, that the BLC's internal appeal as the CER Appeal, are "incorrect".

1.5.2. The Good Cause Letter was clearly pre-emptive: it anticipated the lodging of internal appeals; the Automatic Suspension which would follow by operation of law; and the difficulties created for Karpowership's obligation to meet Commercial Close on 31 December 2023. Nowhere in the Good Cause Letter or the section 43(9) Application has Karpowership explained the requirements of Commercial Close; why no extension of time may be obtained; the steps taken by Karpowership to obtain an extension of time or mitigate any losses resulting from delays; the contractual nexus applicable to Commercial Close;

[1] National Appeal Regulations (GNR993 in GG 38303 of 8 December 2014) (**National Appeal Regulations**), Regulation 4(1).
[2] Good Cause Letter, para 1.9.
[3] Ibid.
[4] Good Cause Letter, para 3.3.1.
[5] Section 43(9) Appeal, paras 2.4 and 2.5.

or, critically, how non-suspension of the EA pending an appeal (which empowers the appeal decision-maker to consider the application *de novo*) enables it to meet Commercial Close. Moreover, the section 43(9) Application appears to conflate Commercial Close with Financial Close[6] – which, in a commercial context, are notionally separate milestones attracting different consequences.

1.6. The BLC submits that Karpowership has not shown "good cause" for avoiding the Automatic Suspension wholly or in part as contemplated by section 43(9). Moreover, as addressed in detail below, the "good cause test" contended for by Karpowership is inappropriate and internally incoherent.

1.7. In the result, the BLC requests that the Minister rejects the section 43(9) Application and allows for the ordinary operation of the law to apply in order for the Automatic Suspension to remain in place until such time as all internal appeals have been concluded as required by section 43(7). Doing so will not only give proper effect to the requirements of just administrative action, but also ensure that the environmental authorisation application process adheres to the requisite environmental principles (including that of precaution) and facilitates lawful environmental decision-making as contemplated in Chapter 5 of NEMA.

1.8. We add two considerations which are relevant in the context of the section 43(9) Application:

1.8.1. According to the time-periods permitted by the National Appeal Regulations, Karpowership's responding statement was due 20 days from date of receipt of the appeal submission[7] (see the delivery receipt attached as "**BLC2**"). Accordingly, Karpowership's response was due on 12 December 2023. To date, no such response has been received. This is notwithstanding Karpowership's inclusion of comment on the BLC's internal appeal as well as the CER Appeal in the section 43(9) Application. It is odd that, given the urgency implied by Karpowership's section 43(9) Application, it would not have done everything in its power to ensure that the Minister was in possession of its response as soon as possible in order to expedite the appeal proceedings.

1.8.2. To the BLC's knowledge, no comment was received from Karpowership to address any difficulties created by the procedure to be followed in respect of the section 43(9) Application which would enable responses by the BLC (and CER) to be lodged with the DFFE after the 31 December 2023.

1.8.3. On 6 January 2024, Eskom issued a media statement to the effect that Commercial Close had not been met by Karpowership notwithstanding repeated extensions of time (attached as "**BLC3**"). It is unclear how this development affects the EA process. However, on Karpowership's version, it appears that this may render Karpowership's attempts to seek environmental authorisation nugatory. In this regard, we request that the DFFE seek the necessary clarity from Karpowership and/or Eskom, NERSA and the Department of Minerals and Energy to determine whether the further costs and time required to determine the EA are warranted by the DFFE and Minister – with particular regard to the need to avoid fruitless and wasteful expenditure.

1.9. The BLC provides its response to Karpowership's section 43(9) Application and Good Cause Letter on the assumption that the EA application is still to be determined and in

[6] Section 43(9) Application, paras 5.3 and 5.4.
[7] National Appeal Regulations, Regulation 5.

light of lack of clarity regarding whether Eskom's 6 January 2024 announcement has in fact rendered this application moot. In doing so, the BLC reserves its rights to amplify or amend its arguments should further clarity be obtained. Please note that, to the extent the section 43(9) Application has referenced the substance of the CER Appeal, the BLC is unable to provide comment.

1.10. In the remainder of this submission we provide:

1.10.1. An summary explanation of the BLC's arguments (see paragraph 2 below);

1.10.2. A detailed explanation of the flaws in Karpowership's contentions regarding the applicable legal test under section 43(9) as expressed in the "Good Cause Letter (see paragraph 3);

1.10.3. A detailed explanation of the proper approach to determining whether there is "good cause shown" for an appeal decision-maker to determine that an EA, exemption or other decision should not be suspended as contemplated by section 43(9) and Karpowership's failure in this regard (see paragraph 0); and

1.10.4. To the extent not addressed in paragraphs 2 to 0, an *ad seriatum* response to the section 43(9) Application (including responses to Karpowership's contentions should the Minister find that its presentation of the "good cause test" is valid) (see paragraph 5).

2. Summary of BLC's arguments

2.1. In material parts, section 43(9)(a) provides that "*Despite subsection (7), pending the finalisation of the appeal, the Minister… may, on application and on good cause shown, direct that… the environmental authorisation, exemption or any other decision… may wholly or in part, not be suspended"* (emphasis added).

2.2. This provision does not empower the Minister to "cancel" the EA's suspension, as contended for by Karpowership,[8] but rather empowers the Minister to create an exemption from the rule that the EA be suspended during the period between the filing of an appeal and its determination. This exemption does not amount to a concession by the Minister that she will not set aside or vary an EA once determining the appeal. Accordingly, such exemption is time-bound, temporary and cannot be equated with the EA that is final and uncontested.

2.3. Understanding this provision as empowering the Minister to create an exemption is important in determining the circumstances in which this power may be exercised.

2.3.1. First, it is evident that the Minister may not exercise this power of her own volition: she may only direct that an EA is "not suspended" following both (a) an "application";[9] and (b) "good cause shown" by the applicant.

2.3.2. Second, it is clear that an application alone is not sufficient: "good cause" must be shown. This requirement places the onus of demonstrating "good cause" on the applicant, in this case Karpowership. See further 3.4.5 and 4.4-4.5 below.

[8] Good Cause Letter, para 2.4.

[9] While there is no procedure specified in the text of NEMA, its regulations or guidelines for such application, we do not argue here that Karpowership has not sought to file such application.

2.3.3. Third, the onus on the applicant is to provide a reason which is of sufficient clarity, reasonableness and persuasion, in light of the principles of NEMA,[10] to justify the Minister directing that an EA will not be suspended in the period until she makes her decision regarding the merits or otherwise of an internal appeal. While a wide range of sufficient, clear and persuasive reasons may be provided to account for varying circumstances of EAs (as well as exemptions and decisions):

a) The Minister's directive is not there for the taking but must be supported by facts placed before her by the applicant (as acknowledged by Karpowership);[11] and

b) Should the Minister direct that the EA will not be suspended, this status of the EA will persist only until the Minister's decision on appeal is made.

2.3.4. Fourth, insofar as the Minister is required to make a determination regarding a section 43(9) appeal, she must be guided by the directive principles in section 2 of NEMA (which are applicable to all environmental decision-making) – including the principles relating to the avoidance, minimizing and remedy of environmental harms; risk aversion or precaution; environmental justice; and openness and transparency. She must also adhere to the requirements of just administrative action and the rule of law, in particular the requirements to act lawfully and rationally.[12]

2.4. Karpowership has placed nothing before the Minister other than the bald assertion that "non-suspension" of the EA will enable it to meeting Commercial Close (or Financial Close) on 31 December 2023. There is no reference to the relevant conditions precedent, no provision of underlying documentation, no explanation as why a temporary "non-suspension" would enable it to meet its contractual obligations, no explanation as to why an extension is not possible and – in sum, no material placed before the Minister to make an informed and rational decision in the context of NEMA and her obligations as an appeal authority within South Africa's environmental and administrative frameworks. For this reason, and on a proper interpretation of the law, Karpowership's section 43(9) Application falls to be denied.

2.5. Karpowership has argued for a test for "good cause" which is both internally incoherent and not supported by the "precedent" it cites.

2.5.1. First, Karpowership expressly distinguishes the language of "good cause" from that of "exceptional circumstances" which appeared in the text of section 43(9) operating prior to 30 June 2023.[13] In doing so, it argues that the "threshold" for a section 43(9) application is "lower" than "exceptional circumstances".[14] However, the notion of relative thresholds is irrelevant in the context of determining the appropriate test and does not take Karpowership's arguments further. Moreover, notwithstanding disavowing an "exceptional circumstances" test, Karpowership invokes section 18(1) of the Superior Courts Act, 10 of 2013 (**Superior Courts Act**) which requires demonstration of "exceptional circumstances" – and not "good cause".

[10] NEMA, section 2(1)(e).
[11] Section 43(9) Application, para 2.3.
[12] NEMA, section 1(5) read with the Promotion of Administrative Justice Act, 3 of 2000 (**PAJA**).
[13] Good Cause Letter, para 2.5.
[14] Good Cause Letter, para 2.6.

2.5.2. Second, as is made clear by the wide-ranging case-law discussing the term "good cause shown" in relation to various statutes and rules, the term must be contextually interpreted with the common thread that it requires that an applicant for a legal concession or exemption provides a sufficient, reasonable or plausible explanation. This is recognized by the text from *Madinda* cited by Karpowership itself.[15] This is not a matter of a lowered threshold – but rather an amendment that shifts from an objective set of factual circumstances "*where there is an imminent threat to human health or the environment*"[16] to describing what an applicant must place before the Minister in order that she may exercise her discretion to depart from the *de facto* legal position.

2.5.3. Third, the case-law invoked by Karpowership is arbitrary, not properly contextualized and, at times, misconstrued. As indicated in 3.1 below, the proper approach to statutory interpretation requires regard being given to the plain grammatical meaning of the statutory text, read in the context of the purpose and objects of the statutory scheme in which it appears and in order to promote the spirit, purport and objects of the Bill of Rights.[17] This is particularly critical in the context of NEMA which is one of the implementing statutes contemplated in section 24(b) of the Constitution. The arbitrary importation of a "test" from a range of statutes and case-law unrelated to the specific statutory of factual circumstances of an environmental appeal, cannot comply with these interpretative requirements.

2.5.4. Fourth, the language of "balance of convenience" imported by Karpowership[18] appears nowhere in the law it invokes.

2.5.5. Accordingly, we contend that the legal submissions made by Karpowership should be disregarded.

2.6. In the event that the Minister accepts Karpowership's legal contentions, the BLC maintains that Karpowership has not been able to meet the requirements of its own test insofar as it has not made out a case for irreparable harm to itself should the section 43(9) Application not be granted; it has failed to properly consider the scope of prejudice to the appellants, the environment and the constitutional rights of "everyone" to an environmental which is protected for the benefit of present and future generations; and it has failed to properly appreciate the risks to environmental rights and the fiscus should the EA not be suspended (assuming non-suspension has the consequences for which Karpowership contends). In particular, Karpowership has ignored the directive principles applicable to a determination of environmental harms, risk-prevention and precaution as well as the administrative principles governing environmental decision-making. We expand further on our contentions by responding *ad seriatum* to Karpowership's section 43(9) in paragraph 5 below.

3. The "Test" contended for by Karpowership is flawed

3.1. The proper approach to statutory interpretation has been set out by the Constitutional Court in *Cool Ideas*:

[15] Good Cause Letter, para 2.8.
[16] See the pre-amendment text of section 43(9).
[17] Constitution of South Africa, section 39(2); *Cool Ideas 1186 CC v Hubbard and another* 2014 (8) BCLR 869 (CC) para 28, footnotes omitted.
[18] Section 43(9) Application, para 5.10.

> *"[28] A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:*
>
> *(a) that statutory provisions should always be interpreted purposively;*
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> *(b) the relevant statutory provision must be properly contextualised; and*
>
> *(c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a)."*[19]

3.2. Karpowership has not applied this approach to statutory interpretation. Instead, it has relied on highly selective case-law to contend that "good cause" must be determined by asking two questions:

3.2.1. Whether there is prejudice to either of the parties if the section 43(9) application is granted or not granted; and

3.2.2. Whether there is any irreparable harm caused if the section 43(9) application is granted or not granted.[20]

3.3. This "test" rests on the erroneous notion that an appeal under NEMA reflects the interests of opposing parties: one pro-development and one anti. This construction fails to appreciate that the BLC is acting in the public interest in the context of ensuring that the principles of biodiversity offsetting are lawfully applied. Moreover, it entails a fundamentally misreading of the context of the appeal provisions within the framework of environmental controls which serve the public interest in having the environmental protected – and ignores the applicability of the requirement of showing good cause to "exemptions", "other decisions", "directives", "enforcement notices" and so on. Critically, the test contended for by Karpowership:

3.3.1. misapplies the case-law it invokes;

3.3.2. is internally incoherent in conflating "exceptional circumstances" with "good cause" while seeking to differentiate between these terms; and

3.3.3. is inconsistent with the long-standing interpretation of "good cause shown" by the courts.

<u>Balancing of rights and prejudice</u>

3.4. The Good Cause Letter does not clearly explain the source of the first leg of the test concerning "balancing of rights" or the assessment of prejudice to "*either of the parties*". It appears, however, to rest on Karpowership's interpretation of *Madinda v Minister of Safety and Security*[21] (***Madinda***) and *Sello v Minister of Police N.O.* (***Sello***).[22] However, Karpowership has misread the legal position in these cases which do not support the notion of relative prejudice – but rather that "good cause" requires that an applicant must supply cogent reasons to a court where seeking a legal concession (in this case, condonation for non-compliance with notice requirements).

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[19] *Cool Ideas 1186 CC v Hubbard and another* 2014 (8) BCLR 869 (CC) (***Cool Ideas***) para 28, footnotes omitted. Affirmed in *Mfoza Service Station (Pty) Limited v Engen Petroleum Limited and another* 2023 (4) BCLR 397 (CC) para 39 and *Competition Commission of South Africa v Group Five Construction Ltd* 2023 (1) BCLR 1 (CC) para 42-43.

[20] Good Cause Letter, para 3.2.

[21] [2008] ZASCA 34; 2008 (4) SA 312 (SCA).

[22] [2022] ZAGPPHC 233 (13 April 2022) Good Cause Letter, paras 2.8 and 2.9.

3.4.1. Both *Madinda* and *Sello* dealt with section 3(4) of the Institution of Proceedings Against Certain Organs of State Act, 40 of 2002 (**Institution of Proceedings Act**). The Institution of Proceedings Act requires that a creditor who seeks to enforce a debt against an organ of state must serve notice of its intention to do so within six months from the date the debt became due and/or in accordance with prescribed delivery requirements.[23] Where the creditor fails to comply with these statutory requirements, and the state defendant raises the creditor's failure as a defence, section 3(4)(b) empowers a court to condone the creditor's non-compliance.

3.4.2. "Good cause" appears in section 3(4)(b) as one of three requirements of which a court must be satisfied in order to grant condonation: (1) the debt has not been extinguished by prescription; (2) good cause exists for the failure by the creditor; and (3) the organ of state was not unreasonably prejudiced by the failure.

3.4.3. In other words, in section 3(4)(b) references "good cause" for failure by the creditor to comply with the requirement of the Institution of Proceedings Act is a separate requirement from "unreasonable prejudice" to the state party, as both *Madinda*[24] and *Sello*[25] confirm. Further, the good cause requirement itself does not require a "balancing of rights" or assessment of relative prejudice.

3.4.4. Rather, the "good cause" leg of this particular statutory test requires, in the words of the *Madinda* court, that:

> "*The court must decide whether the applicant has produced acceptable reasons for nullifying, in whole, or at least substantially, any culpability on his or her part which attaches to the delay in serving the notice timeously. Strong merits may mitigate fault; no merits may render mitigation pointless*".[26]

3.4.5. This approach is applied in *Sello* which emphasizes that the onus rests on the party who seeks departure from the default statutory procedure, to meet the requirements of section 3(4)(b) – including that good cause exists for its non-compliance.[27] As *Sello* emphasizes, the merits or otherwise of the creditor's case relate to its *bona fides* which play an important role in considering whether it has made a case for "good cause".[28]

3.4.6. Accordingly, *Madinda* and the cases it cites[29] clarify that the onus on the party seeking condonation is to provide a reasonable explanation. Karpowership, in fact acknowledges this by underlining "*the sufficiency of the explanation*" in paragraph 2.8 of the Good Cause Letter. A sufficient or reasonable explanation is a very different requirement to arguing relative prejudice, which Karpowership purports to do. Moreover, courts interpreting a wide range of

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[23] *Madinda* paras 1, 3, 5.
[24] *Madinda* para 12.
[25] *Sello* paras 10-11.
[26] *Madinda* para 12.
[27] See also *Torwood Properties (Pty) Ltd v South African Reserve Bank* 1996(1) SA 215 (W) (***Torwood** Properties)* at 227F-228F.
[28] *Sello* para 22.
[29] These include: *Torwood Properties* at 227I-228F in which the South African Reserve Bank invoked section 9(2)(g)(ii) of the Currency and Exchanges Act, 9 of 1933 to seek extension for a statutory period which required that it show "good cause" to obtain the extension of time; and *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 352H-353A in which the Appellate Division (as it then was) declined to further define "good cause" in the context of Rule 46(5) of the Magistrates' Courts rules (prior to 2018 amendment), indicating "*It is enough for present purposes to say that the defendant must at least furnish an explanation of his default sufficiently full to enable the Court to understand how it really came about, and to assess his conduct and motives*".

statutes and rules utilizing the phrase "good cause" have reflected the requirement of a reasonable explanation as set out more fully in paragraph 4.4 below. There is no basis for contending that "good cause" entails arguments regarding balancing of rights between two opposing parties. *Madinda* and *Sello* make it clear that the issue of a balance of rights and prejudice arises from the specific requirements of section 3(4)(b) of the Institution of Proceedings Act read as a whole.

Irreparable Harm

3.5. The second leg of the test for which Karpowership contends concerns an assessment of irreparable harm caused through suspending or not suspending an EA. This "requirement" appears to have been derived from section 18 of the Superior Courts Act. Again, Karpowership's reliance on section 18 is misconceived.

3.5.1. First, as Karpowership points out, section 18(1) "*still uses the higher threshold of exceptional circumstances*".[30] It is internally incoherent for Karpowership to distinguish the language of "good cause" in section 43(9) from the pre-amendment language of "exceptional circumstances" and then to rely on a test based on "exceptional circumstances".

3.5.2. Second, as set out in *Incubeta Holdings v Ellis*[31] (***Incubeta***) – which is cited by Karpowership – section 18 consists of a two-fold test which requires a factual finding of "exceptional circumstances" (contemplated in section 18(1) or (2)) which is prior to an additional factual finding regarding the presence or absence of "irreparable harm" (contemplated in section 18(3)):

> "*16.1 First, whether or not 'exceptional circumstances' exist, and*
>
> *16.2 Second, proof on a balance of probabilities by the applicant of-*
>
> *16.2.1 the presence of irreparable harm to the applicant/victor, who wants to put into operation and execute the order, and*
>
> *16.2.2 the absence of irreparable harm to the respondent/loser, who seeks leave to appeal".*[32]

a) Just as "good cause" and "prejudice" are different legs of the requirements under section 3(4)(b) of the Institution of Proceedings Act, "exceptional circumstances" and considerations of "irreparable harm" are different stages of the test under section 18 of the Superior Courts Act. As the *Incubeta* court explained, the presence or otherwise of "exceptional circumstances" and "irreparable harm" are two distinct enquiries into the facts of a case derived from section 18(1) and section 18(3) of the Act respectively:

b) The presence or otherwise of "exceptional circumstances" under section 18(1) is a finding of fact and "*the notion of the putting into operation an order in the face of appeal process* [is] *a matter which requires particular* ad hoc *sanction from the court. It is expressly*

[30] Good Cause Letter para 2.12.
[31] (2013/ 30879) [2013] ZAGPJHC 274; 2014 (3) SA 189 (GSJ) (16 October 2013).
[32] Confirmed in *Ntlemeza v Helen Suzman Foundation* [2017] 3 All SA 589 (SCA) paras 35-37, in turn referred to with approval in *Department of Transport and others v Tasima (Pty) Limited; Tasima (Pty) Limited and others v Road Traffic Management Corporation and others* 2018 (9) BCLR 1067 (CC) para 49.

recognized, therefore, as a deviation from the norm, ie an outcome warranted only 'exceptionality'."[33]

c) This is distinct from the further findings of fact regarding irreparable harm: "*The proper meaning of [section 18(3)] is that if the loser who seeks leave to appeal, will suffer irreparable harm the order must remain stayed, even if the stay will cause the victor irreparable harm too. In addition, if the loser will not suffer irreparable harm, the victor must nevertheless show irreparable harm to itself. A hierarchy of entitlement has been created….Two distinct findings of fact must now be made, rather than a weighing up to discern a 'preponderance of equities'* [as was the case under the common law]."[34]

d) Once again, Karpowership has conflated discrete stages of a test derived from a statute other than NEMA. Moreover, section 18 does not include a requirement of "good cause" at all.

3.5.3. Third, insofar as Karpowership has conflated "good cause" in section 43(9) of NEMA with "exceptional circumstances" in section 18 of the Superior Courts Act, it is not correct that commercial considerations are sufficient to trump other considerations. The example of *T & M Canteen CC v Charlotte Maxeke Academic Hospital and Another*[35] (***T&M Canteen CC***) invoked by Karpowership, is <u>not</u> one where "exceptional circumstances" were justified on commercial and reputational losses as contended by Karpowership.[36] T&M Canteen CC sought to have a spoliation order implemented, pending appeal against it by the respondents. By its very nature, a spoliation order is concerned with return of possession of property.

a) The reasoning of the court with regards to the presence of exceptional circumstances reads as follows:

> "*The aforegoing* [factual circumstances]*, in my view, constitute exceptional circumstances. The point is that a party who, through unlawful means, deprives an occupier of the occupation of premises, can hardly be heard to complain that the position is to be retained pending the appeal. Should the* [spoliation] *order not be put in operation with immediate effect, it would result in a situation arising where the respondents – having unlawfully spoliated the applicant's erstwhile peaceful and undisturbed possession and occupation of the premises – would benefit from their unlawful conduct. My view is that the court should guard against sending out a message to the public at large that it is alright to act unlawfully".*[37]

b) The court did consider irreparable harm as contemplated by section 18 of the Superior Courts Act (<u>but not as part of the exceptional circumstances requirement</u>). It was found to exist due to the presence of perishables and other goods on the premises which would be destroyed in the absence of their being able to take repossession of such goods – with no harm resulting from the vacation of the premises pending the appeal by the parties found to have been in unlawful

[33] *Incubeta* para 22 confirmed in *University of the Free State v Afriforum and another* [2017] 1 All SA 79 (SCA) para 13.
[34] *Incubeta* para 24.
[35] 2021 ZAGPJHC 519.
[36] Good Cause Letter para 2.13.
[37] *T&M Canteen CC* para 13.

occupation. This was, however, not a finding that commercial and reputational losses alone and without more should warrant execution of the spoliation order, as is made clear by the court's reference to policy grounds as indicated above. If anything, this case is further indication of the emphasis by the courts that a factual finding of "exceptional circumstances" must be made with regard to the specific circumstances of the case.[38]

The importance of context

3.6. It is apposite that Karpowership cites language from LAWSA, included in *L v L* (A3008/2021) [2022] ZAGPJHC 21 (1 February 2022) to the effect that "good cause" is a term to be considered in "*the particular circumstances of each case"*. The statement summarises a series of cases dealing with section 8(1) of the Divorce Act, 70 of 1979 which enables rescission, variation or suspension of, *inter alia*, maintenance orders where a court finds there is "sufficient reason" to do so. The full text of the relevant LAWSA paragraph discusses how "sufficient reason" has been understood by the courts, referencing the specific debate in respect of this provision regarding "sufficient reason" required a "change of circumstances". This adds nothing to Karpowership's argument – save to emphasise the importance of interpreting the phrase "good cause" within the context of the legislation in which it appears.

3.7. As is clear from *Cool Ideas*, it is essential to have regard to the legislative context, including the purpose and policy design of a statute.

3.8. Karpowership has not presented an interpretation of "good cause shown" which has regard to the purpose and objects of NEMA, the appeal provisions, the EIA Regulations or the NEMA principles. Similarly, section 43(9) has not been properly contextualized, nor regard had to the particular role that NEMA has in giving effect to constitutional environmental rights or the rights to just administrative action which are embedded in the EA application and appeal process.

3.9. In the result, and with regard to what is stated above, we submit that the "test" contended for by Karpowership is without merit and should not be applied by the Minister in determining the section 43(9) appeal.

4. The proper interpretation of section 43(9)

4.1. Applying the approach to statutory interpretation set out in *Cool Ideas* requires that "good cause shown" is interpreted according to its ordinary grammatical meaning, with regard to the legislative purpose and context in which the phrase occurs.

4.2. On a plain reading, "to show good cause" indicates that an applicant bears the onus of demonstrating a sound, reasonable, or plausible explanation – where the sufficiency / soundness / plausibility of the explanation is assessed in the context of the purpose of the rule the applicant wishes to avoid and the factual circumstances placed before the court or other decision-maker (in this case, the Minister).

4.3. This approach is supported by *Madinda* and *Sello* in relation to condonation for non-compliance with notice obligations under the Institution of Proceedings Act. It is also supported by judicial interpretation of a wide range of statutes, rules and regulations dealing with, *inter alia*, condonation for non-compliance with rules, extensions of

[38] See *Ntlemeza* para 36-37 and cases cited therein, including *Incubeta*; *Knoop NO v Gupta (Tayob as Intervening Party*) [2020] JOL 49005 (SCA) para 46.

statutory time-periods and deadlines, dismissals or removals from office, initiation of regulatory inquiries and exemptions from the *de facto* legal position or default rule.

4.4. Thus, the Constitutional Court has held:

4.4.1. An applicant seeking an exemption under section 23(6) of the Security Act, 56 of 2001 from the pre-conditions for registration as a security service provider must show "good cause" by providing "good reasons" which are appropriate to the circumstances of the case and the legislative context.[39]

4.4.2. The Minister must provide a "legally sufficient reason" when determining whether to terminate the leadership of Armscor (which must be factually assessed), within the context of "*the Armscor Act*[40] *as a whole, with a particular focus on the objectives and functions of Armscor and the important role played by the members of the Board*".[41]

4.4.3. An applicant seeking to have an arbitration agreement set aside in terms of section 3(2) of the Arbitration Act. 42 of 1965 on "good cause shown", bears the onus of making a persuasive case for doing so.[42] An arbitration agreement might be set aside if it infringed constitutional rights, norms or protections or if the agreement was tainted by misconduct or irregularity. In all other cases, a court would require a "*truly compelling reason*", to set aside such agreement in order to avoid defeating the purposes of private arbitration.[43]

4.4.4. Section 62 of the Magistrates' Courts Act, 32 of 1944 (which requires "good cause shown" for staying a warrant of execution against immovable property) has been interpreted as "*placing a burden on the debtor whose home has been subject to a warrant of execution to approach a court and show good cause why the warrant ought to be set aside*".[44] Finding this burden insufficient to protect indigent debtors, the Constitutional Court read in to section 66(1)(a) which permitted execution in the first place, a requirement that a court "*consider all the relevant circumstances of a case to determine whether there is good cause to order execution"*.[45] The guidance regarding what such circumstances would be, included an extensive list of factual considerations pertinent to the context of a judgment debt and sale-in-execution including "*the circumstances in which the debt was incurred; any attempts made by the debtor to pay off the debt; the financial situation of the parties; the amount of the debt; whether the debtor is employed or has a source of income to pay off the debt and any other factor relevant to the particular facts of the case before the court"*.[46]

4.4.5. In the context of the Competition Tribunal's powers to condone non-compliance with the Competition Act, its rules and time-periods, the Constitutional Court stated:

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[39] *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others* 2007 (4) BCLR 339 (CC) at 358; 360-361.
[40] Armaments Corporation of South Africa Limited Act, 51 of 2003.
[41] *Minister of Defence and Military Veterans v Motau and others* 2014 (8) BCLR 930 (CC) para 54.
[42] *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the Time Being and another* 2016 (1) BCLR 1 (CC) (***De Lange***) para 36.
[43] *De Lange* para 37.
[44] *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (1) BCLR 78 (CC) (***Jaftha***) para 47.
[45] *Jaftha* para 55.
[46] *Jaftha* paras 56 to 60.

> *"[54] Condonation is not a mere formality – good cause must be shown. The concept of "good cause" is well-known in our law. A large body of jurisprudence has developed in our courts, particularly concerning rescission and condonation applications. The requirements for "good cause" are thus well-established. Courts are afforded a wide discretion in evaluating what constitutes "good cause", so as to ensure that justice is done. Ultimately, the overriding consideration is the interests of justice, which must be considered on the facts of each case. Factors germane to this enquiry may include: the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the issue(s) to be raised in the matter; and the prospects of success.*[47]

4.4.6. Courts therefore require that an applicant for rescission of a judgment "*show good cause"* understood in terms of the purpose for revoking recission and allowing the applicant to pursue its case. An applicant for rescission of a default judgment must therefore "*show good cause (a) by giving a reasonable explanation of his default; (b) by showing that his application is made bona fide; and (c) by showing that he has a bona fide defence to the plaintiff's claim which prima facie has some prospect of success"*.[48]

4.4.7. A party seeking a postponement of a matter which has already been set down for hearing before a court on a particular date must show that there is good cause for the postponement by furnishing "*a full and satisfactory explanation of the circumstances that give rise to the application".*[49]

4.4.8. Leave to appeal which has been struck from the roll may be granted if the applicant shows that it is in the interests of justice to reinstate the application for leave to appeal. In order to meet this requirement, the applicants must "*show good cause and provide a full explanation for their earlier conduct"*.[50]

4.4.9. Discussing the basis on which consent by an owner of land could revoke consent to occupy land, Moseneke J confirmed that termination of consent would require reasonable notice of termination and "good cause shown". While declining to define "good cause", he emphasized that good cause would not be present if the consequence of termination would be result in a denial of constitutional rights on the basis that "*Our courts have often held that an action*

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[47] *Competition Commission of South Africa v Pickfords Removals SA (Pty) Limited* 2020 (10) BCLR 1204 (CC) para 54. See also, with reference to the Consumer Protection Tribunal's ability to condone late filing of a supplementary affidavit in terms of section 150(e) of the National Credit Act, 34 of 2005 read with Rule 34(2) of the Tribunal Rules *National Credit Regulator v National Consumer Tribunal* [2024] 1 All SA 67 (SCA) para 35

[48] *Colyn v Tiger Food Industries t/a Meadow Feed Mills Cape* [2003] 2 All SA 113 (SCA) para 11 confirmed in *Ferris v Firstrand Bank Ltd* 2014 (3) BCLR 321 (CC) para 24. See also the requirements for common law rescission of a reasonable explanation for default and a bona fide case with some prospects of success, summarised in *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and others (Council for the Advancement of the South African Constitution and another as amici curiae)* 2021 (11) BCLR 1263 (CC) para 71. See also
Competition Commission of South Africa v Hosken Consolidated Investments Ltd and another 2019 (4) BCLR 470 (CC) para 34 interpreting "good cause" for condonation of delay as requiring a "reasonable explanation".

[49] *National Police Service Union v Minister of Safety and Security* 2001 (8) BLCR 775 (CC) para 4; *Lekolwane v Minister of Justice and Constitutional Development* 2007 (3) BCLR 280 (CC) (***Lekolwane I***) para 17; *Shilubana v Mwamitwa* 2007 (9) BCLR 919 (CC) paras 10-11. *National Police Service Union v Minister of Safety and Security* 2001 (8) BLCR 775 (CC) para 4.

[50] *Lekolwane v Minister of Justice and Constitutional Development* 2009 (2) BCLR 158 (CC) para 3; *Lekolwane I* para 18.

by a public authority which results in a denial of a constitutional right is not good cause".[51]

4.5. What is clear from each of these cases, is that the ordinary meaning of "good cause shown" requires that a party that seeks an exemption from the ordinary operation of the law, must provide a sound / reasonable / plausible explanation for why it should be exempted from the norm.

4.5.1. Without such explanation, a court (or decision-maker) is unable to exercise its discretion to allow the applicant to deviate from the ordinary rule of law.[52]

4.5.2. Moreover, for the explanation / reason / "cause" to be "good", it must provide a justification for deviating from the ordinary operation of law given the context, purpose and objects of the particular rule or legislative enactment.[53]

4.5.3. To the extent that a court or decision-maker is empowered to grant an exemption or condone non-compliance with a rule, these powers must be exercised "in the interests of justice". We emphasise that it will not be just if the exercise of such power is irrational, based on erroneous considerations, fails to give effect to the purpose and objects of the relevant enactment or has the effect of violating constitutional rights.

4.6. The legislative context of section 43(9) is thus critical to an assessment of what might constituted "good" reason when a party seeks to have the Minister direct that an EA not be suspended pending her determination of an internal appeal. In this regard:

4.6.1. Section 43 sets out the framework for internal (or administrative) appeals in respect of environmental decision-making. The general principles behind administrative appeals of this kind are to enable a politically accountable (and more objective) decision-maker to guard against administrative maladministration.[54]

4.6.2. Section 43(6) empowers the appeal authority (in this case, the Minister) to consider and then *"confirm, set aside or vary the decision, provision or directive or make any other appropriate decision…."*. This appeal power has been construed as "wide"[55] – in other words, the appeal may entail a complete rehearing and redetermination of the merits (including the ability to call for additional evidence or support).

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[51] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2009 (9) BCLR 847 (CC) para 158 per Moseneke J. See also *Malan v City of Cape Town*2014 (11) BCLR 1265 (CC) para 64.

[52] See also the discussion of "good cause" in *Dawood & Another, Shalabi & Another, Thomas & Another v Minister of Home Affairs and Others* 2000 (8) BCLR 837 (CC) paras 67-68; *Nabolisa v S* 2013 (8) BCLR 964 (CC) para 64 referring to a "satisfactory explanation"; *Food and Allied Workers' Union obo Gaoshubelwe v Pieman's Pantry (Pty) Ltd* 2018 (5) BCLR 527 (CC) para 62 referring to a "satisfactory explanation" for delay in terms of the Labour Relations Act; *Pheko and others v Ekurhuleni Metropolitan Municipality (Socio-Economic Rights Institute of South Africa as amicus curiae) (No 2)* 2015 (6) BCLR 711 (CC) para 43 (non-receipt of a notice of a court order being "good cause" for not being held in contempt of court).

[53] See the discussion of "good cause" for condonation of delay in the context of section 189A9(13) and (17)(b) of the Labour Relations Act, 66 of 1995 and the objective of a speedy resolution of disputes in *Steenkamp and others v Edcon Limited* 2019 (7) BCLR 826 (CC) para 73.

[54] See the discussion in Cora Hoexter and Glenn Penfold, *Administrative Law in South Africa* 3ed (Juta 2021) at 85-87.

[55] *South Durban Community Environmental Alliance v MEC for Economic Development, Tourism and Environmental Affairs: KwaZulu-Natal Provincial Government and another* [2020] 2 All SA 713 (SCA) para 7 citing *Magaliesburg Protection Association v MEC: Department of Agriculture, Conservation, Environment and Rural Development, North West Provincial Government* [2013] ZASCA 80; [2013] 3 All SA 416 (SCA) para 53.

4.6.3. Section 43(7) provides that any environmental authorisation, exemption or other decision is suspended by an appeal but that "*a directive or other administrative enforcement notice that is aimed at addressing significant harm to the environment"* is not suspended. The effect of this provision is that any decision which is not about remediating significant harm is automatically suspended by an appeal. This is logical in the context where decisions effectively permit some form of environmental harm to be undertaken (albeit mitigated / remediated).

4.6.4. Environmental authorisations are precisely this type of decision: they require that "*the potential consequences for or impacts on the environment of listed activities or specified activities must be considered, investigated, assessed and reported on to the competent authority….".*[56] The structure of Chapter 5, the EIA Regulations and Listing Notices read as a whole, contemplates that activities which require an EA will potentially cause harm to the environment. It is for this reason that risks must be assessed in an integrated manner[57] and a thorough investigation of potential impacts, avoidance, mitigation and remediation must be presented to the relevant administrative decision-maker.[58] The decision-maker is enjoined to consider a wide range of factors relevant to environmental impacts[59] and, in ensuring that development is socially, environmentally and economically sustainable[60] must ensure that ecosystem disturbance, loss of biodiversity, heritage sites, waste and negative impacts on the environment and on people's environmental rights are avoided, prevented, minimized and remedied[61] as well as adopting a risk-averse and cautious approach cognisant of the limitations of knowledge regarding environmental impacts.[62] It is in this way that environmental decision-making – including decisions regarding EAs and their appeals – may give effect to the constitutional right to have the environmental protected for the benefit of present and future generations.[63]

4.7. It is consonant with the overall scheme of NEMA and the approach to integrated environmental decision-making that where doubts are expressed in the form of an internal appeal against a particular decision, exemption or EA, it should be suspended until the second decision-maker, empowered in terms of section 43(6), should again apply the relevant considerations and principles to a particular application. This is what section 43(7) does.

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[56] NEMA, section 24(1).
[57] NEMA, section 2(4)(b).
[58] See the objectives of integrated environmental management in section 23(2) including those to: "*identify, predict and evaluate the actual and potential impact on the environment, socio-economic conditions and cultural heritage, the risks and consequences and alternatives and options for mitigation of activities, with a view to minimising negative impacts, maximising benefits, and promoting compliance with the principles of environmental management set out in section 2"* (section 23(2)(b)); "*ensure that the effects of activities on the environment receive adequate consideration before actions are taken in connection with them*" (section 23(2)(c) emphasis added); and "*identify and employ the modes of environmental management best suited to ensuring that a particular activity is pursued in accordance with the principles of environmental management set out in section 2"*(section 23(2)(f)). See also Regulation 2 of the EIA Regulations which sets out their purpose which is to enable decisions regarding environment authorisation "*in order to avoid or mitigate detrimental impacts on the environment, and to optimise positive environmental impacts, and for matters pertaining thereto.*"
[59] NEMA, section 24O.
[60] NEMA, section 2(3).
[61] NEMA, sections 2(4)(a)(i), (ii), (iii), (vi), (viii).
[62] NEMA, section 2(4)(a)(vii).
[63] Constitution, section 24(b).

4.8. Accordingly, there would need to be a very good reason to pre-emptively determine that an EA / directive / exemption should not be suspended in the period when an appeal authority is still considering whether it should be set-aside, varied or upheld. Such reason would necessarily need to support the directive principles in section 2 of NEMA (which include that of ensuring that environmental justice is achieved); the objectives of integrated environmental management; and the purpose of the EIA process which is to assess environmental impacts before development activities commence.

4.9. It is difficult to see how the requirement of meeting Commercial Close is sufficient to justify a departure from the legislative scheme. Karpowership has not taken the Minister into its confidence by explaining the relationship between the "non-suspension" of the EA and Commercial Close. However, we would have expected that the relevant condition precedent in a contract would require all necessary environmental permits and authorisations to be in place for Commercial Close to be met. The purpose of such a condition precedent, would surely be to ensure that the Project was viable prior to contractual finalisation and sign-off. It is thus entirely circular for Karpowership to utilise the imminence of Commercial Close to justify the non-suspension of EA. Moreover, such non-suspension would in any event not render the EA final or meet any contractual condition that all relevant permits be obtained.

4.10. In the absence of a properly motivated application by Karpowership which sets out the contractual context and implications on which it appears to rely, Karpowership has failed to meet the onus of showing good cause to have the Minister direct a departure from the ordinary operation of law and enable Karpowership to avoid the Automatic Suspension. Accordingly, the BLC requests that the Minister denies the section 43(9) Application.

5. Ad Seriatum Response to section 43(9) Application (dated 28 November 2023)

5.1. In this paragraph 5, we respond to specific statements made by Karpowership in its section 43(9) Application to the extent amplification of the position set out above is necessary. We do not respond to each and every allegation made by Karpowership – and such non-response should not be taken as a concession regarding the correctness of Karpowership's allegations and averments.

5.2. AD paragraphs 1.2 to 1.8

5.2.1. We note that in setting out the history of its EA application, Karpowership highlights that this is in fact its second EA application for the Project.

5.2.2. Karpowership has not, however, set out the context for Commercial Close, the relationship between Commercial Close and the requirement for an EA, nor the extensions provide for Commercial Close (which was, according to Eskom's announcement attached as "**BLC3**", originally to occur in June 2021). It has, further, not set out the steps taken by Karpowership to mitigate the consequences of a delay in obtaining its EA – or the counterparties with whom it must engage in order to avoid the consequences which it describes.

5.2.3. To the extent that "Financial", rather than "Commercial" Close is in issue, Karpowership has not clarified the distinction; the relationship between these milestones; how these relate to Preferred Bidder status; or any other details that may be relevant to its claims of "prejudice" and "irreparable harm". It has, equally, provided only the vaguest of claims in support of any kind of

explanation for the contractual and commercial context in which it argues for a temporary "non-suspension" of its EA while that authorisation is being re-considered through the section 43(1) appeal process.

5.3. AD paragraph 1.10

5.3.1. Karpowership makes the unfounded statement that "*the Biodiversity Law Centre's appeal does not comply with the Appeal Regulations*".

5.3.2. This statement is entirely unsubstantiated by Karpowership which, in addressing the "Legislative Provisions" in paragraph 2, does not refer in any way to the Appeal Regulations with which the BLC's appeal should have (and purportedly, did not) comply. Further, no further clarity is provided in paragraph 3 dealing with the BLC's appeal.

5.3.3. This is, in any event, an allegation to be raised in Karpowership's Responding statement (which has not been timeously delivered) – and not "through the back door" in correspondence seeking to circumvent the regulatory process.

5.4. AD paragraphs 2.1-2.3 and paragraph 5.2

5.4.1. Karpowership correctly highlights that section 43(7) of NEMA provides that an appeal automatically suspends the operation of an environmental authorisation.

5.4.2. As indicated in 2.2 above, the effect of section 4.3(9) is not to "cancel" the suspension, but to provide for an exemption to the Automatic Suspension rule.

5.4.3. However, Karpowership correctly points out, at paragraph 3 that the applicant for such an exemption must properly motivate such exemption on "good cause shown". In fact, Karpowership concedes that "*the generally accepted principle is that such directive is not simply 'there for the asking' and must be properly motivated"*. This is a correct statement of the law, as indicated in paragraph 0 above. Karpowership is thus fully aware of the onus it bears to demonstrate good cause through the supply of sustainable and plausible reasons.

5.5. AD paragraph 2.4

5.5.1. We note that the Applicant submitted its Good Cause Letter before the deadline for submission of appeals.

5.5.2. We can only conclude that the Applicant was well aware of the possibility of appeals against the authorisation that had been granted. It is difficult to escape the inference that the Applicant was aware of potential flaws in its application and/or the EA itself. The alternative is to consider that the Applicant has assumed that unmeritorious appeals will be filed – a position perhaps reflected in its casting of the BLC's appeal as "non-compliant" without any support.

5.5.3. We note in this regard that paragraph 1.9 of the "Section 43(2) Good Cause Letter" states 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*".

5.5.4. Notwithstanding this statement, paragraph 2.4 of the section 43(9) Application relies on the Section 43(9) Good Cause Letter to show that "*good cause clearly exists in this Project and that this is a case where a Section 43(9) application should be granted"*. As already discussed, Karpowership has neither

presented an appropriate "good cause" test, nor met the requirements of a properly motivated reason supporting its application for an exemption. It has merely referred to its obligation to meet Commercial Close by 31 December 2023 and further, invited the Minister to pre-emptively determine the merits of the appeals prior to her appeal decision by stating that each of the grounds raised by the BCL and CER appeals is "incorrect".

5.6. AD paragraph 2.5 to 2.6

5.6.1. As discussed extensively above, Karpowership's proposed "good cause" test is based on material errors of law and should not be adopted.

5.6.2. On the contrary, the good cause requirement places the onus on Karpowership to provide a clear, reasonable, sustainable and plausible explanation (or in Karpowership's words, a "*proper motivation"*) for the exemption it seeks. Such motivation needs to have regard to the purpose and objects of the EIA process, NEMA as a whole and the constitutional rights the environmental decision-making framework implements.

5.6.3. The sole factual support Karpowership provides is the statement that Commercial Close must be achieved by 31 December 2023 with execution due on 22 December 2023. Karpowership does not specify which "document" contains these deadlines. There are no details of the relevant contractual matrix, conditions requiring a valid EA for such purpose; steps taken by the Applicant to mitigate such effects in the case of appeal (of which it was clearly aware prior to the deadline for appeal being passed); how such steps had failed; the relationship between Preferred Bidder status, the EA and Commercial Close or any other specific factual details motivating factually why the Minister should depart from the default position which is to delay implementation of a permission to harm pending its final determination.

5.7. AD paragraph 2.7, paragraph 3 and paragraphs 5.1 to 5.2

5.7.1. The Applicant indicates that the purpose of its section 43(9) Application is not to respond to the Grounds of Appeal but to "*determine whether the Grounds of Appeal have impacted on the good cause motivation"*.

5.7.2. The high-water mark of the Applicant's argument is that each of the grounds of appeal raised by the BLC is "incorrect". In effect then, the Applicant is asking the Minister to pre-emptively determine that each of the grounds raised by the BLC could not be upheld on the merits. This would be prior to the Applicant delivering its Responding Statement, prior to the competent authority delivering its Responding Statement and in the absence of the benefit of being able to fully consider all relevant factors relevant to the appeal and original Decision.

5.7.3. It is circular to maintain that the Minister should regard the Grounds of Appeal (and thus the appeal *in toto*) as unmeritorious in advance of applying her mind to such decision. Were she to do so, she would be acting unlawfully, unreasonably and in a manner contrary to the requirements of procedural fairness structured by section 49 of NEMA read with the Appeal Regulations.

5.7.4. Accordingly, the Applicant is requesting that the Minister depart from the proper procedures and lawful processes set out in the relevant empowering legislation.

5.7.5. In the result, we do not deal with the allegations raised in paragraph 3 of the Applicant's letter, save to point out that they are entirely unsubstantiated and should be raised at the proper time and through the proper procedure. In circumstances where the Applicant has elected not to substantiate its allegations either with law or fact, we do not understand there to be any basis for the Minister departing from the *de facto* legal position, that the BLC's appeal (as well as the CER Appeal) has suspended the operation of the EA until such time as the appeal has been finally resolved.

5.8. **AD paragraphs 5.3 to 5.5**

5.8.1. We do not concede that the test put forward by Karpowership is correct in law, and consequently that the relative prejudice of Karpowership and the appellants are relevant to the Minister's determination under section 43(9). However, we address Karpowership's assertions regarding prejudice, in the event that these are, ultimately, considered by the Minister.

5.8.2. With regard to Karpowership's reference to "Commercial Close" to justify the prejudice it will suffer through an Automatic Suspension, we refer to paragraph 5.6.3 above. In addition, we note that Eskom's announcement has not referred to a loss of "Preferred Bidder status" but that it has sought new budget quotes. None of this is addressed by Karpowership – and it is in fact, not possible to determine whether the EA application itself may have become moot as a result of Eskom's announcement.

5.8.3. With regard to prejudice to "any party", Karpowership assumes that such party is limited to the appellants. As noted in paragraph 3.3 above, Karpowership's assumption appears to rest on the misapprehension that an environmental appeal is a dispute between those "pro" and "anti-development". This is not the case. The rights protected by the EIA requirements and regulations are ultimately those in section 24(b) of the constitution held by "*everyone*" and, moreover, relate to obligations placed on the Minister and DFFE to protect such rights. To the extent that prejudice is assessed, it should thus be considered in the context of whether the rights and principles applicable to the EIA process will be circumvented should the EA not be suspended pending the determination of the appeals. It should also be considered in light of the wider implications for other parties to the power-purchase arrangements in respect of treatment of the EA as effective, notwithstanding a pending internal appeal. This has not been done.

5.8.4. Insofar as prejudice to the BLC is a relevant consideration, we note that the need to address the section 43(9) Application itself has entailed considerable time and resources by an organisation that has, as its mandate, the protection of biodiversity in the public interest. In addition, Karpowership as sought to prejudice the BLC's appeal by attempting to "pre-litigate" the merits. This is an obvious prejudice to the BLC's rights to just administrative action as well as the specific rights arising from Chapter 5 of NEMA which contemplate "*adequate and appropriate opportunity for public participation in decisions that may affect the environment*".[64]

[64] NEMA, section 23(1)(d).

5.9. **AD paragraphs 5.6 to 5.10**

5.9.1. As already discussed, the BLC does not concede that a weighing of "relative harm" is the appropriate test for a properly motivated section 43(9) Application.

5.9.2. To the extent that the Minister does consider Karpowership's arguments, however, we have doubts as to the manner in which it has assessed the various "harms" involved.

5.9.3. First, while irreparable harm is undoubtedly that caused to the environment – it is also such harm caused to the rights to have the environmental protected for the benefit of present and future generations through the legislative process designed to enable sound environmental decision-making in accordance with the principles and rights of just administrative action. Any legislative provision permitting an exemption from the ordinary legal position must be rational and in this case, the harms may extend beyond harm to the physical environment and to the rights to have environmental decision-making transparently, rationally and lawfully carried out.

5.9.4. Second, insofar as "irreparable harm" concerns damage to the physical environment, Karpowership presumes a timeline for construction based on its implementation timetable that has not been provided, and assumes no delays in the Minister's decision-making process regarding the appeals. The fallacy in these presumptions is demonstrated by the timeline presented by Karpowership in paragraph 1 of the section 43(9) Application. Karpowership has not provided any detail regarding what it will do during the period in which the Minister is considering the appeals. There is thus no basis on which to evaluate what, if any, risk would be posed to the environment during this period.

5.9.5. Third, Karpowership's acceptance of "risks" set out in paragraph 5.8 is based on an assumption regarding the merits of the appeal i.e. that the EIA process in fact accurately and properly assessed risk. This has been placed in issue by the two appeals. It is, moreover, inaccurate to state that "*there were no significant impacts (or significant harm) predicted by the EIA*". This is precisely the reason mitigation measures – and an environmental offset – has been mooted. Moreover, while Karpowership has not detailed the contractual arrangements relating to Commercial or Financial Close, presumably the various contracts include warranties and guarantees with financial and legal implications for Karpowership (if not also state parties and the fiscus) should the Minister determine that the EA should be set aside. These considerations are entirely absent from Karpowership's motivation. The basis for Karpowership's assumption of risk is thus considerably flawed.

5.9.6. Fourth, Karpowership's reference to a guarantee is vague and writ in water. It is not for Karpowership to "guarantee" that it will stop implementation if the appeals are successful: if the appeals are successful, there will be no valid EA in place. Accordingly, Karpowership will be prohibited from further implementation of any listed activities relevant to the Project without an EA (in terms of section 24F(1) of NEMA). Were it to continue implementing such activities, there would be statutory consequences in terms of section 24G of NEMA (including rehabilitation requirements). Further, while Karpowership contemplates a "High Court review" against successful appeals, it fails to consider the consequences should the Minister confirm or vary the EA decision and such determination be taken on review to the High Court (with possibility

of subsequent appeal processes). Such procedural eventualities are always a possibility in relation to an EA application – and we would submit that this is precisely why it is rational to suspend an EA pending at least the conclusion of the administrative appeal provided for by section 43(1).

5.9.7. Fifth, the contentions made by Karpowership in the context of proposed construction are contradictory. On the one hand, Karpowership states that construction is not due to commence until March 2024, by which time the appeals should have been decided. On the other hand, Karpowership refers in paragraph 5.9. to rehabilitation of work that has been undertaken (although this is not detailed). It is therefore entirely unclear what Karpowership anticipates doing should the EA not be suspended pending the outcome of the appeals. For reasons set out in detail in the BLC's appeal, we have significant concerns regarding the implementation of the Karpowership project in Richards Bay. In the circumstances, and given the lack of clarity regarding what "implementation" of the EA pending determination of the appeals involves, a risk averse and cautious approach should be adopted and the EA should be suspended as required by the ordinary operation of law.

5.9.8. Sixth, Karpowership introduces the notion of "balance of convenience" in paragraph 5.10. This does not appear to be related to the test for which Karpowership contends. Moreover, Karpowership has not explained the "irreparable harm" it will suffer if the law takes its proper course in terms of section 43(7) of NEMA.

5.10. **AD paragraph 6**

5.10.1. Notwithstanding Karpowership indicating that the Good Cause Letter is not the section 43(9) Application, we note that in paragraph 6.1 Karpowership states that it "*concisely sets out the grounds for good cause*". Among the contentions that Karpowership does not repeat in the section 43(9) application is the effect of "*a failed Section 43(9)"* on the national interest.[65] This appears to be tied to the role of Karpowership's production of power in relation to the RMIPPPP.

5.10.2. The strategic nature of the Project was dealt with in the Minister's decision in relation to Karpowership's first EA appeal. In her reasons for decision, the Minister emphasised that the need for power and the strategic status of the proposed Project could not override the legislative requirements of section 24 of the Constitution, NEMA and the EIA Regulations – or her environmental obligations.[66]

5.10.3. Further, Karpowership has not provided a plausible explanation or "proper motivation" for why "non-suspension" of an EA which is subject to internal appeal is necessary for it to reach Commercial (or Financial) Close – nor provided the relevant detail to justify Karpowership's commercial concerns requiring an exemption from the ordinary application of the law.

5.10.4. On Karpowership's own test, it has not made a case for prejudice or irreparable harm to itself that is not of its own making. Moreover, its commercial concerns

[65] Good Cause Letter, para 3.5.1.

[66] See Minister, Forestry, Fisheries and the Environment (1 August 2022) Appeal Decision: Appeals Against the Decision of the Competent Authority to Refuse the Application for Environmental Authorisation submitted by Karpowership SA (Pty) Ltd in respect of the Proposed Gas to Power via Powership Project at the Port of Richards Bay, situated within the uMhlathuze Local Municipality in KwaZulu-Natal Province (Project Ref: 14/12/16/3/3/2/2007; Appeal Ref: LSA 207022) para 2.21; 2.136-2.137.

are insufficient to outweigh the prejudice and costs caused to the appellants as well as the DFFE – and potentially other parties with implications for the fiscus – should the proper environmental decision-making process not be followed.

5.10.5. In the result, the BLC submits that the Honourable Minister should not grant Karpowership's section 43(9) Application and that the EA should remain suspended pending the outcome of the Minister's determination of the BLC and CER appeals.

Yours Faithfully

The Biodiversity Law Centre

Per Kate Handley and Nina Braude

Nina Braude

Subject: RE: APPEAL AGAINST ENVIRONMENTAL AUTHORISATION | RICHARDS BAY KARPOWERSHIP | REF: 14/12/16/3/3/2/2007

From: Joshua Makhaza <JMakhaza@dffe.gov.za>
Sent: Tuesday, December 5, 2023 1:03 PM
To: Nina Braude <nina@biodiversitylaw.org>
Cc: Keorapetse Sekhaolelo <ksekhaolelo@dffe.gov.za>; Heloise Van Schalkwyk <HVanSchalkwyk@dffe.gov.za>; Kate Handley <kate@biodiversitylaw.org>; Farhana Patel <fpatel@dffe.gov.za>; Nosipho Nombewu <nnombewu@dffe.gov.za>
Subject: RE: APPEAL AGAINST ENVIRONMENTAL AUTHORISATION | RICHARDS BAY KARPOWERSHIP | REF: 14/12/16/3/3/2/2007

Dear Nina

My apologies for that. I have noted that.

Please be advised that 8 January 2024 is confirmed to be the date for the submission of the response.

Kind regards

Joshua Makhaza

From: Nina Braude <nina@biodiversitylaw.org>
Sent: Tuesday, December 5, 2023 12:58 PM
To: Joshua Makhaza <JMakhaza@dffe.gov.za>
Cc: Keorapetse Sekhaolelo <ksekhaolelo@dffe.gov.za>; Heloise Van Schalkwyk <HVanSchalkwyk@dffe.gov.za>; Kate Handley <kate@biodiversitylaw.org>; Farhana Patel <fpatel@dffe.gov.za>
Subject: RE: APPEAL AGAINST ENVIRONMENTAL AUTHORISATION | RICHARDS BAY KARPOWERSHIP | REF: 14/12/16/3/3/2/2007

Dear Joshua

Many thanks for your very quick response. We appreciate your granting the extension and also your facilitating our receiving the appeal form urgently.

We note that 6 January 2024 falls on a Saturday – and also that you have applied the ordinary "*dies non*" period for appeals. Could you confirm whether you perhaps meant to extend the date until 8 January 2024 (which is a Monday and the next working day after the end of the *dies non* period)?

Kind Regards
Nina

From: Joshua Makhaza <JMakhaza@dffe.gov.za>
Sent: Tuesday, December 5, 2023 12:18 PM
To: Nina Braude <nina@biodiversitylaw.org>; Keorapetse Sekhaolelo <ksekhaolelo@dffe.gov.za>
Cc: Heloise Van Schalkwyk <HVanSchalkwyk@dffe.gov.za>; Kate Handley <kate@biodiversitylaw.org>; Farhana Patel <fpatel@dffe.gov.za>

Subject: RE: APPEAL AGAINST ENVIRONMENTAL AUTHORISATION | RICHARDS BAY KARPOWERSHIP | REF: 14/12/16/3/3/2/2007

Dear Nina

The above refers.

Please pardon me for late response.

Your letter dated 1 December 2023 in relation to your request for an extended timeframe within which to provide a response to an application in terms of section 43(9) of NEMA by the applicant herein, refers.

We have considered your request for more time allowance and are amenable to the request for the submission of the response to the sec 43(9) application on 18 December 2023. Please however be informed that due to the closure of the appeal period which is between 15 December 2023 and 5 January 2024, we would therefore expect the response to be submitted on or before **6 January 2024** as a result of the closing of appeal period as indicated herein.

I will facilitate that you receive the appeal form urgently.

Kindly confirm should you be agreeable to the above.

Kind regards

J Makhaza
Appeals and Legal Review
Department of Forestry, Fisheries and the Environment
Pretoria
Email: JMakhaza@dffe.gov.za
Cell: 0664876995

"BLC2"

Nina Braude

Subject: RE: APPEAL AGAINST ENVIRONMENTAL AUTHORISATION | RICHARDS BAY KARPOWERSHIP | REF: 14/12/16/3/3/2/2007

From: Microsoft Outlook <MicrosoftExchange329e71ec88ae4615bbc36ab6ce41109e@biodiversitylaw.org>
Sent: Wednesday, November 22, 2023 10:53 PM
To: Kate Handley
Subject: Relayed: APPEAL AGAINST ENVIRONMENTAL AUTHORISATION | RICHARDS BAY KARPOWERSHIP | REF: 14/12/16/3/3/2/2007

Delivery to these recipients or groups is complete, but no delivery notification was sent by the destination server:

richardsbayksa@triplo4.com (richardsbayksa@triplo4.com)

Subject: APPEAL AGAINST ENVIRONMENTAL AUTHORISATION | RICHARDS BAY KARPOWERSHIP | REF: 14/12/16/3/3/2/2007

MEDIA STATEMENTS

Five budget quotes for four emergency procurement energy projects reached expiry date on 31 December 2023

January 5, 2024

Friday, 05 January 2024: The Risk Mitigation Independent Power Producer Procurement Programme (RMIPPPP) was launched by the Department of Mineral Resources and Energy (DMRE) in 2020 as an emergency energy procurement programme aimed at addressing the country's current energy challenges. The Independent Power Producer Office (IPPO) is the designated procurer for the RMIPPPP and Eskom Holdings SOC Ltd the designated buyer in line with the ministerial determination promulgated in 2020 by the Minister of Mineral Resources and Energy in terms of Section 34 of the Electricity Regulation Act.

The programme aimed to procure a total of 2 000MW from a range of dispatchable (mid-merit) technologies and energy sources including gas, solar photovoltaic (PV), wind, battery energy storage systems (BESS) and/or hybrid technologies. A total of eleven (11) preferred bidders were announced by the IPPO in 2021 and Eskom issued budget quotes for all eleven projects. Seven of those projects have since reached commercial close with the projects moving to the construction phase. The remaining four projects were issued with five budget quotes with one of the projects consisting of two gas and PV facilities located in the Eastern Cape and Northern Cape respectively.

Eskom wishes to inform the public that five budget quotes for the grid integration of the remaining four projects in the RMIPPPP expired on 31 December 2023 and will not be extended further. This is after several budget quote validity period extensions were requested and granted by Eskom in an effort to assist in ensuring the success of these projects.

Eskom finds the expiration of the budget quotes regrettable as these projects were aimed at bringing much-needed additional generation capacity to the grid to alleviate pressure on the power system and minimise the impact of loadshedding.

The four projects were expected to reach commercial close at the end of July 2021. However, over time, following the issuing of the original budget quotes in 2021, the IPP Office announced several postponements of the scheduled commercial close dates. Consequently, several budget quote validity period extensions were requested by customers and Eskom duly considered these requests and granted extensions.

In July 2023, the IPP Office indicated that the projects' long stop date for commercial close was fixed at 31 December 2023 and budget quotes' validity periods were further extended to 31 December

2023 to enable these projects to reach commercial close. Eskom subsequently advised all affected customers on 31 July 2023 that no further extensions would be granted beyond the 31 December 2023 date. All affected applicants signed an acknowledgement that no further extensions of budget quotes' validity periods would be granted.

Eskom's governance process requires projects to be delivered expeditiously within approved timelines, scope and costs. The affected budget quotes have been extended for periods ranging between 20 months and 30 months. Furthermore, the costs, timelines and scope of work(s) indicated in the budget quotes are no longer valid beyond 31 December 2023.

The table below summarises the affected projects, which include four gas-to-power facilities and a solar photovoltaic (PV) facility with a total export capacity of 1 600MW (and contracted dispatchable capacity of 1 400MW).

Province	IPP Project Name	BQ Expiry Date	Technology	Capacity(MW)
Eastern Cape	Coega Powership	31 December 2023	Gas	450
	Mulilo Coega Gas to Power Plant	31 December 2023	Gas	200
Western Cape	Saldanha Powership	31 December 2023	Gas	320
Northern Cape	Gemsbok PV (Nieuwehoop)	31 December 2023	Solar PV	180
KwaZulu-Natal	Richards Bay Powership	31 December 2023	Gas	450
			Total	**1 600**

Kindly note that: Gemsbok PV and Mulilo Coega Gas to Power Plant are from a single preferred bidder project and have a combined dispatchable capacity of 200MW. The effective total contracted dispatchable capacity for all affected projects is therefore 1 400MW.

The grid connection capacity that was provisionally reserved for these projects will revert to the pool of available capacity and will be allocated in accordance with the Interim Grid Capacity Allocation Rules to other projects that are ready to connect and generate much-needed electricity required by South Africa.

All affected customers have been duly informed of this decision and advised to apply for new budget quotes which Eskom will process accordingly.

ENDS

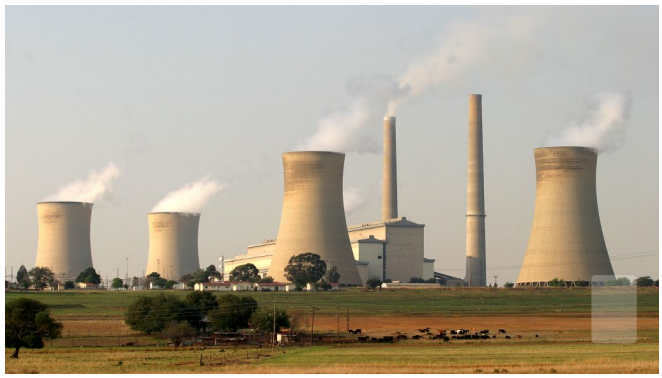
← PREVIOUS

Successful full load rejection test on Koeberg Unit 1

Similar Posts

As previously communicated, Stage 2 loadshedding will be implemented at 16:00 – 24:00 this afternoon and at the same time on Thursday afternoon

August 17, 2022



Stage 4 loadshedding will remain in force until 05:00 on Friday as Eskom works on returning units to service

April 19, 2022