IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case No: 23017/2022

In the matter between:

ORGANISATION UNDOING TAX ABUSE NPC (Registration number: 2012/064213/08)	Applicant
and	
NATIONAL ENERGY REGULATOR OF SOUTH AFRICA	First Respondent
KARPOWERSHIP SA COEGA (RF) PROPRIETARY LIMITED (Registration number: 2020/754336/07)	Second Respondent
KARPOWERSHIP SA SALDANHA BAY (RF) PROPRIETARY LIMITED (Registration number: 2020/754347/07)	Third Respondent
KARPOWERSHIP SA RICHARDS BAY (RF) PROPRIETARY LIMITED (Registration number: 2020/754352/07)	Fourth Respondent
KARPOWERSHIP SA (PTY) LTD	Fifth Respondent

FIRST RESPONDENT'S HEADS OF ARGUMENTS

OVERVIEW SUBMISSIONS

The applicant's ("OUTA") most celebrated case

1. Having carefully analysed OUTA's case, it is apparent that its case is anchored, fundamentally so, on the case of **Helen Suzman Foundation v**

Judicial Services Commission[1] ("**the Helen Suzman case**"). This case not only is it distinguishable on the facts, but it is also distinguishable on the legal principles enunciated therein.

2. In an unambiguous and clear terms, the Constitutional Court as per the judgment of Madlanga, J, who wrote for the majority, held as follows:

> **"[72] I do not quite comprehend why the JSC's concerns cannot be adequately addressed by a suitably framed confidentiality regime. The *only* reason given by the third judgment against a confidentiality regime is that confidentiality regimes are not foolproof. The judgment says:**
>
> > **"Even if access to the deliberations of the JSC are limited to the parties and their lawyers, the material in the deliberations is *likely* to find its way into affidavits and oral submissions made by the parties." (Emphasis added.)**
>
> **[73] This is not true of all confidentiality regimes. Some can and do impose very stringent conditions with the result that it becomes *unlikely* that the confidential material may be divulged beyond the category of people who should rightly have it. An example is the one that was formulated in *Bridon*. It limited—**
>
> > **"access to the confidential part of the Commission's record to legal representatives of the parties in the main application and one independent expert appointed by each party to assist in that application. In addition, these persons w[ould] only have access after they ha[d] signed a confidentiality undertaking in the form dictated by the order. In terms of that undertaking the signatory pledge[d] not to divulge the information that he or she obtained from the record to anybody outside the stipulated group of persons, which group *d[id] not include the parties themselves or any of their employees*. *The order further require[d] that any pleading, affidavit or argument filed in the main application be made up in two parts – a***

[1] 2018 (4) SA 1 (CC).

***confidential version and a non confidential version; that all references to confidential information be expunged from the non confidential version; and that access to the confidential version be reserved to permitted persons and the judge presiding in the main application*."** **(Emphasis added.)**

[74] For all we know the likely fears of, and potential harm to, JSC members and candidates appearing before them may be sufficiently dealt with by a similarly strict confidentiality regime. The *Bridon* example does not only deny access to the public, it also denies it to the parties themselves. The few individuals who do have access sign a confidentially undertaking not to divulge the information even to their clients. To the extent that the third judgment says the information could be divulged even in parties' submissions, it is a matter of relative ease for the regime to address that as well. The fact that – as was done in *Bridon* – something can workably be done with the content of affidavits illustrates this. Under these or similar circumstances, it would be grabbing at straws for one to continue to suggest that the JSC could still nurse realistic fears. At best, the likelihood of disclosure is minuscule and certainly not warranting the non-disclosure that the JSC is contending for. In each instance, all that would have to be done is to craft a regime with conditions that are suited to it.

[75] Although the third judgment makes a strong case for the JSC's claim, I remain unpersuaded that the required protection cannot be sufficiently provided by a suitable confidentiality regime.

[76] In this case must we then order disclosure subject to a confidentiality regime? Since no fact-specific claim of confidentiality was raised, I do not think it necessary to pronounce on a possible confidentiality regime."[2]

3. What is apparent from the *Helen Suzman* case is that "*no specific claim of confidentiality was raised*". Thus, the Constitutional Court in no ambiguous terms held that "*I do not think it necessary to pronounce on a possible*

[2] At paras 72 – 76.

confidentiality regime". Whereas, in casu, all parties advocate for a confidentiality regime, even though they do not agree on the terms of such a regime.

4. It therefore follows that the Constitutional Court did not disregard, in an appropriate case such as the one in casu, for a court to guide the parties in tailoring a confidentiality regime and/or even to give a judgment and order incorporating a confidentiality regime which would take into account the interest of justice and for parties to be able to reach finality, in that respect.

5. Even more fundamentally, the *Helen Suzman* case is not an authority on the aspect pertaining to whether or not parties may not conclude a confidentiality regime, such as in casu, where they are seeking to protect commercially sensitive financial information.

6. To the contrary, the Constitutional Court recognised that the concerns raised by the first respondent ("**NERSA**") pertaining to disclosure of sensitive third party information, that such concern may be addressed by the parties concluding a confidentiality regime and/or agreement.

7. The Constitutional Court recognised that the concerns raised by NERSA in not disclosing sensitive confidential information of a third party can be ameliorated by imposing any strict condition attached to such disclosure and contained in a confidentiality regime.

8. This, in our submissions should be the end of the matter.

The balancing of competing rights

9. The unfortunate approach adopted by OUTA in these proceedings is an approach of all or nothing. OUTA fails to recognise and appreciate the fact that there are competing rights which must be accordingly balanced by the honourable court having regard to the interest of justice.

10. While recognising and respecting the constitutionally entrenched rights of access to court and access to information, it is equally important to recognise and respect the constitutionally entrenched rights to freedom of trade and privacy.

11. The confidentiality regime which takes into account all relevant considerations and the competing rights is the one which ought to be advocated by OUTA and not simply to seek all information, relevant or not, to be disclosed which could have negative consequences to the third to fifth respondents ("**Karpowership**").

12. It would be irresponsible and reckless for NERSA, as a regulatory body to simply provide sensitive and confidential information of a party which has furnished such information, for same, to be treated confidentially, more so, without the consent of such a party.

13. In the case of **Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others**,[3] which matter is about the balance to be struck between competing rights. That is, on the one hand, the right to privacy and, on the other, the right of access to information.

14. In this matter, Kollapen, J, who wrote for the majority in the second judgment, at paragraph 129 held as follows when dealing with the balancing of rights:

> **"[129] Modern democracies are in many respects characterised by the challenge of competing interests, especially in diverse societies – such as ours. In this diversity, it is not uncommon for communal interests to stand in conflict with individual interests. It is also not uncommon for the interests of privacy and individual self-determination to stand in conflict with the collective public interest and the values of openness and transparency. When those interests and rights come into conflict, there is no magical hierarchy that one can resort to in order to resolve the conflict. The conflict is invariably approached through the lens of the Bill of Rights by balancing those rights and interests in the manner contemplated by the limitation exercise in section 36 of the Constitution."**

15. Viewed in its entirety, the majority held that the effect of applying the override would be:

    15.1. confidentiality would continue to be the default position; and

    15.2. the override would only apply in limited and closely defined circumstances, with a relatively high bar to lift confidentiality.

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[3] 2023 (5) SA 319 (CC).

The court's protection of a commercially sensitive information

16. The law as it relates to confidential information is built upon the equitable principle that a party who has received information in confidence, cannot take unfair advantage of it and must not use it to the detriment of the party who provided the information, without their consent.

17. In the case of **Caxton and CTP Publishers and Printers Limited v Novus Holdings Limited**,[4] Petse, AP, held as follows:

> **"[81] Permitting the production of confidential documents subject to appropriate limits is now firmly established in our law. As it was expressed by Mthiyane JA more than a decade ago in *Tetra Mobile Radio* (*Pty*) *Ltd v Member of the Executive Council of the Department of Works and others*[5]:**
>
> > **"… [I]f there was any apprehension on the part of the respondent regarding any specific document, that concern could be met by making an order similar to the one granted by Schwartzman J in *ABBM Printing & Publishing* (*Pty*) *Ltd v Transnet Ltd* [1998 (2) SA 109 (W) at 122I–J to 123A–B; 1997 (10) BCLR 1429; [1997] 4 All SA 94], where the parts of the documents in respect of which disclosure might result in breach of confidence were to be identified and marked as confidential and the applicant's attorney was prohibited from disclosing such parts to any other party, including the applicant, save for the purpose of consulting with counsel or an independent expert. In that way a fair balance could be achieved between the appellant's right of access to documentation necessary for prosecuting its appeal, on the one hand, and the third respondent's right to confidentiality, on the other."** (own emphasis)

[4] [2022] 2 All SA 299 (SCA), para 81.
[5] 2008 (1) SA 438 (SCA) para [14].

18. Having regard to the above, we submit that a way to balance these competing rights is for the parties to conclude a mutually acceptable confidential regime which would ensure that all relevant documents are before the honourable court.

Relevance

19. The *Helen Suzman* case and other cases relied upon by OUTA are not advancing a proposition to the effect that an applicant in a review application is entitled to have access to all documents to form part of the record of review.

20. The documents which ought to form part of the record are those documents which are relevant to the subject matter and would assist the court in performing its constitutionally entrenched review function, with the result that a litigant's right in terms of section 34 of the Constitution, to have a justiciable dispute decided in a fair public hearing before a court with all issues being ventilated, without infringing such right.

21. The paramount issue to be determined by the court is whether a broad request and/or demand for documents to be produced, meets the requirement of relevance. The Constitutional Court in the *Helen Suzman* case, held as follows:

> **"[27] In sum, I can think of no reason why deliberations as a class of information ought generally to be excluded from a rule 53**

record. For me, the question is whether deliberations are relevant, which they are, and whether – despite their relevance – there is some legally cognisable basis for excluding them from the record. This approach to what a record for purposes of rule 53 should be better advances a review applicant's right of access to court under section 34 of the Constitution. It thus respects the injunction in section 39(2) of the Constitution that courts must interpret statutes in a manner that promotes the spirit, purport and objects of the Bill of Rights …"[6]

22. It may well be that, after inspecting the documents under a confidential regime, OUTA may realise that the documents which it thought were relevant to advance its review application, are in fact irrelevant and as such, those documents and/or information will be adequately protected under such a regime and not to simply compel disclosure of information for the sake of doing so.

23. For a sensible treatment of the issues arising in this interlocutory application, we proceed to further address the following topics:

    23.1. a brief synopsis of material facts relevant to this application;

    23.2. the insurmountable hurdle and the reason why OUTA should fail in this application;

    23.3. NERSA as a regulatory body;

[6] At para 27.

23.4. the sound reasons and justification pertaining to why NERSA cannot be compelled;

23.5. conclusion.

A BRIEF SYNOPSIS OF MATERIAL FACTS RELEVANT TO THIS APPLICATION

24. During August 2020, the DMRE published a request for proposal in respect of the Government's Risk Mitigation Independent Power Procurement Programme ("**RMIPPP**") for the procurement of 2000MW new electricity capacity from a range of energy source technologies.[7]

25. In terms of the proposal, the successful bidders that were selected to provide such new generation electricity would have to obtain generation licences from NERSA and enter into 20-year power purchase agreements ("**PPA's**") with ESKOM.[8]

26. Karpowership SA, was selected as the preferred bidder for procurement of 450MW at Coega, 320MW at Saldanha Bay and 450MW at Richards Bay using floating storage regasification units ("**FRSU's**") – otherwise known as "powerships" – moored at these respective harbours to generate electricity.[9]

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[7] Founding Affidavit ("**FA**"), para 28, Caselines 013-11.
[8] FA, para 29, Caselines 013-11.
[9] FA, para 30, Caselines 013-11.

27. The second, third and fourth respondents are all wholly owned subsidiaries of the fifth respondent, Karpowership SA. Subsequent to the awarding of the bid to Karpowership SA by the DMRE, its three subsidiaries applied to NERSA for the requisite generation licences for generation at Coega, Saldanha Bay and Richards Bay respectively.[10]

28. Aggrieved by this outcome, OUTA then launched a review application to have the decision by NERSA to grant the generation licence to Karpowership reviewed and set aside. The review application was instituted during 26 April 2022.

29. Similarly, during 25 April 2022, a non-profit company based in Cape Town, Green Connection NPC ("**Green Connection**"), also issued a review application against NERSA and Karpowership under case number 23339/2022 in which substantially the same relief is sought, *albeit* on different grounds and with different emphases.[11]

30. On 24 May 2022, some correspondence was made by Karpowership to OUTA and the NERSA, summarily, in which it requested that a confidentiality regime be entered into prior to the Rule 53 record being

[10] FA, para 31, Caselines 013-11.
[11] FA, paras 32 - 33, Caselines 013-11 – 013-12.

shared.[12] On 27 May 2022, NERSA responded by indicating that the request accorded with its approach.[13]

31. During 30 May 2022, OUTA's attorneys responded by rejecting the confidentiality regime, citing that Karpowership attorneys should pinpoint documents they regard as confidential.[14] Further correspondence(s) then ensued between the parties.[15]

32. On 9 June 2022, Karpowership attorneys delivered a letter indicating their intention to write to the DJP to request a case management for issues arising thereof, among others, being the confidentiality regime.[16]

33. Similarly, on 13 June 2022, OUTA's attorneys responded by agreeing to the case management meeting and however disagreed with some aspects of Karpowership's letter. The main disagreement was the proposed confidentiality regime and countered it by indicating their own regime which should be followed.[17] On 17 June 2022, NERSA then filed a redacted Rule 53 record. This action prompted numerous correspondence to be exchanged between the parties regarding the proposed case management and OUTA's displeasure towards the redacted record.[18]

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[12] Second to Fifth Respondents Answering Affidavit ("**KAA**"), para 30, Caselines 019-8 – 9. **See also** Caselines 019-87.
[13] KAA, para 32, Caselines 019-9. **See also** Caselines 019-88.
[14] Caselines 019-89.
[15] Caselines 019-90 and Caselines 019-92.
[16] Caselines 019-97.
[17] Caselines 019-101.
[18] Caselines 019-121 to 019-150.

34. On 25 July 2022, the DJP granted a meeting between the parties which was to be held on 5 September 2022.[19] On 5 September 2022, a case management meeting was held were three (3) issues, namely consolidation; record and special allocation, were considered flowing from the GC's agenda and Karpowership's agenda.[20]

35. The DJP during the case management meeting, considered the issues of consolidation and record as per the agenda. The meeting was then adjourned with the DJP indicating that *"… please come when you have tried to sort out the issues so that I can manage what the parties could not sort out…"*.

36. On 12 December 2022, OUTA served on all parties a Rule 30A notice requiring that an unredacted record be filed.[21] On 23 January 2023, OUTA continued to lodge this application to compel the NERSA to file an unredacted record.[22]

THE INSURMOUNTABLE HURDLE AND THE REASON WHY OUTA SHOULD FAIL IN THIS APPLICATION

37. In **Grootboom v National Prosecuting Authority and another**,[23] the

[19] Caselines 019-153.
[20] Caselines 019-166 and Caselines 019-168.
[21] Caselines 011-5.
[22] Caselines 012-1.
[23] 2014 (1) BCLR 65 (CC) para 32.

Constitutional Court having observed a total disregard for its directions, stated that:

"I need to remind practitioners and litigants that the rules and courts' directions serve a necessary purpose. Their primary aim is to ensure that the business of our courts is run effectively and efficiently. Invariably this will lead to the orderly management of our courts' rolls, which in turn will bring about the expeditious disposal of cases in the most cost-effective manner. This is particularly important given the ever-increasing costs of litigation, which if left unchecked will make access to justice too expensive."

38. Also, the Labour Appeal Court in **Colett v Commission for Conciliation, Mediation and Arbitration and others**,[24] shared similar sentiments when it stated that:

"The directives of the Registrar are not only meant to assist in the management of cases in order to facilitate and enhance efficiency, but more importantly, they ensure that matters are expeditiously put through the system so that disputes may be resolved speedily and effectively. <u>Litigants should know that they ignore such directives at their own peril</u>." (Own emphasis)

39. In these heads of argument, NERSA sets out its central submissions in response to the case mounted by OUTA, in this application.

40. This is an application in terms of Rule 30A of the uniform rules of court, wherein OUTA is seeking to compel NERSA to make release to it, an unredacted Rule 53 record, alternatively, make available the unredacted

[24] [2014] 6 BLLR 523 (LAC) para 42.

record under the terms and conditions that the recipients thereof conclude a confidentiality regime agreement.

41. The crisp issue that this honourable court is called upon to adjudicate on is, whether, NERSA should be compelled to make available information and/or documentation belonging to Karpowership, which documents and/or information is deemed confidential.

42. Before this honourable court can entertain the merits of this application, OUTA must first deal with NERSA's point in *limine*, in that, it is contended by NERSA that this application is premature as the issue of the record is still under Judicial Case Management and serves before the DJP. It is noted that OUTA has sought to refute this basis in its replying affidavit, however, the argument advanced is meritless.

43. OUTA is however not correct in alleging that case management does not preclude it from bringing this application. NERSA's contention is that, OUTA is not precluded from bring this application, but the way it has went about launching this application, and undermining the integrity and capacity of the DJP, and the binding directions pertaining to the judicial case management process is out of chronological process and premature.

44. The DJP in adjourning the case management meeting prior to the launch of this premature application stated verbatim that: ***"… please come when you have tried to sort out the issues so that I can manage what the***

parties could not sort out…".[25] We submit that this was a directive by the DJP. It can be noted from the words above that the parties had to attempt to reach consensus amicably on the issues, and should they encounter any challenges or reach a stalemate, they must revert to the DJP for further management.

45. OUTA's misconceived understanding of the DJP's directive is the reason this honourable court is bombarded with this premature application.[26] The misunderstanding is self-perpetuated on an account of OUTA trying to twist the words of the DJP to best suit itself.

46. By reverting to the DJP, according to OUTA, was unnecessary as it is of a firm view that the DJP was still going to just manage the process by issuing a typical directive.[27] We submit that, even if he were to issue such directives, same must still be complied with as failure to adhere thereto amounts to non-compliance, similar to Rule 30A(1).

47. We further submit that the DJP in terms of Rule 37A(12)(e) can "*give directions for the hearing of opposed interlocutory applications by a motion court on an expedited basis*". In the circumstances, this premature

[25] Case management Record, para 25 – 5, Caselines 025-14 – 025-15.
[26] Replying Affidavit ("**RA**"), para 16.4, Caselines 024-12.
[27] RA, para 13, 16.4 and 16.5, Caselines 024-9 and 024-12.

application has denied the DJP an opportunity to alleviate congestion on the roll.[28]

48. Based on the above, this application is devoid of the provisions of uniform rules of court, specifically Rule 30A(1) and Rule 37A(12)(e). The contravention of the principles and requirements of Rule 37A(12)(e) amounts to the failure to adhere to this rule, and as such the step taken by OUTA should be penalised by way of adverse costs order, which costs are to include the employment of two counsel.[29]

49. In light of the aforesaid, we submit, with respect, that this should be the end of the matter having regard to all the evidence presented. In that regard, we reiterate that the application to compel is premature, and should be dismissed with costs.

50. We now deal with the merits of the interlocutory application, in the event our point *in limine* is not successful.

NERSA AS A REGULATORY BODY

51. NERSA is a regulatory authority established as a juristic person in terms of section 3 of the National Energy Regulator Act, 2004 (Act No. 40 of 2004).

[28] Rule 37A(2)(a).
[29] Rule 37A (12)(e).

52. NERSA's mandate is to regulate the electricity, piped gas and petroleum pipelines industries in terms of ERA, Gas Act, 2001 (Act No. 48 of 2001) and Petroleum Pipelines Act, 2003 (Act No. 60 of 2003).

53. The mandate of NERSA is derived from legislation governing and prescribing the role and functions of the regulator. NERSA's mission is to regulate the energy industry in accordance with government laws and policies, standards and international best practices in support of sustainable and orderly development.

54. NERSA has diverse regulatory functions and duties that are prescribed and described in various pieces of legislation, namely:

54.1. the regulation of construction of gas transmission, storage distribution, liquefaction and re-gasification facilities and the issuing of licences for that purpose in terms of section 4 of the Gas Act No. 48 of 2001, as well as the imposition and collection of gas regulatory levies in terms of section 2 of the Gas Regulator Levies Act No 75 of 2002;

54.2. oversight and enforcement of the regulation of generation, transmission, distribution, importation, exportation and trading in electricity and issuing licences for the lawful conduct of these activities in terms of chapter III of the Electricity Regulation Act No. 4 of 2006;

54.3. the regulation of construction, conversion and operation of petroleum pipelines, loading and storage facilities and issuing appropriate licences to applicants who wish to lawfully undertake these regulated activities, in terms of chapters 2 and 3 of the Petroleum Pipelines Act No. 60 of 2003.

55. This application ought to be viewed with reference to NERSA's mandate as provided for in the enabling legislation. As a regulator, NERSA has to consider competing interests and to apply its mind impartially as a regulator without fear or favour, but in the interest of the public at large while observing fair, transparent and lawful processes.

56. It is not NERSA's case that certain portions of the record be excluded. NERSA's case is that:

56.1. information furnished to it by Karpowership, was submitted and premised on an understanding that it would be treated confidential;

56.2. in instances such as, in *casu*, where the custodian and owners of the document objects to such information being disclosed, NERSA has no right to act contrary to such wishes and objections;

56.3. a way to balance these competing rights is for the parties to conclude a mutually acceptable confidential regime which would

ensure that all relevant documents are before the honourable court.

57. In this regard, OUTA's rights to access to court and access to relevant information, including its right to initiate these review proceedings would not in any manner be compromised and/or in any manner be substantially disadvantaged.

58. We should bear in mind that the purpose of the record in terms of Rule 53 read with the relevant provisions of PAJA is not to unduly expose sensitive and confidential information to a party's competitors, but to enable an applicant litigant and the court fully to assess the lawfulness of the decision- making process.[30] It further allows the applicant party to interrogate the challenged decision and, if necessary, to supplement its grounds of review.[31]

59. We therefore submit that a proper crafted confidential regime could achieve this objective without any incurrence of unnecessary litigation costs.

60. This application is perpetuated by the provisions of Rule 53(1)(b) which provide that the record must be dispatched to the Registrar within 15 days of receipt of the notice of motion. The central issue to be determined, as

[30] *Turnbull-Jackson v Hibiscus Court Municipality* 2014 (6) SA 592 (CC) at 608C-D.
[31] *Helen Suzman Foundation v Judicial Services Commission* 2018 (4) SA 1 (CC) at 10A.

noted above, is the confidentiality of the document and/or information included in the record.

61. Section 32 of the Constitution recognises that "*everyone has the right of access to (a) any information held by the state; and (b) any information that is held by another person and that is required for the exercise or protection of any rights*".[32] The Promotion of Access to Information Act 2 of 2000 ("**PAIA**") was promulgated to give effect to the realisation of this right.

62. The Constitutional Court in **Helen Suzman Foundation v Judicial Service Commission**[33] stated that:

> **"What forms part of the rule 53 record? The current position in our law is that — with the exception of privileged information — the record contains all information relevant to the impugned decision or proceedings. Information is relevant if it throws light on the decision-making process and the factors that were likely at play in the mind of the decision-maker. Zeffertt & Paizes make a comment on the exclusion of evidence on the grounds of privilege. That comment must surely be of relevance even to the exclusion of privileged information from a rule 53 record. After all, the content of a rule 53 record is but evidentiary in nature. The authors say that in the case of privileged information, the exclusion is based on the recognition that the general policy that justice is best served when all relevant evidence is ventilated may, in some cases, be outweighed by a particular policy that requires the suppression of that evidence. 18 The fact that documents contain information of a confidential nature 'does not per se in our law confer on them any privilege against disclosure."**[34]

[32] Section 32(1)(a) to (b) of the Constitution, 1996.
[33] 2018 (1) SA 1 (CC).
[34] *Helen Suzman* case para 17.

63. The court in **Comair Ltd v Minister for Public Enterprises**[35] stated that, documents that are privileged are not *per se* to be excluded from the record. If such documents are relevant, they should be included but their discovery could be limited by agreement between the parties or by order of court.[36]

64. We submit that the Constitutional Court in the *Helen Suzman* case might not have been persuaded to pronounce on a confidentiality regime.[37] However, the sentiment by Madlanga J that "…*Since no fact-specific claim of confidentiality was raised, I do not think it necessary to pronounce on a possible confidentiality regime*."[38] It would be different in a situation where the fact-specific claim of confidentiality is made.

65. The Supreme Court of Appeal in **MEC for Roads & Public Works, Eastern Cape & Another v Intertrade (Pty) Ltd**[39] stated that:

"The appellants could possibly resist discovery successfully, for example on grounds of privilege or relevance. If some of the documents sought by Intertrade cannot be obtained in terms of rules 53 and 35, this would mean that without resorting to PAIA, Intertrade would not be able to gain access to such documents. In my view, that may effectively place such documents outside the ambit of s 7(1)(c)."[40]

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[35] 2014 (5) SA 608 (GP).
[36] *Comair* case p618C.
[37] *Helen Suzman* case paras 72 to 75.
[38] *Helen Suzman* case para 76.
[39] 2006 (5) SA 1 (SCA).
[40] *Intertrade* case para 16.

66. According to section 7 of PAIA, it does not apply to records required for criminal or civil proceedings after commencement of proceedings where access to that record is already provided for in any other law.[41] Where records are obtained in contravention of this exception to PAIA, they are not admissible as evidence in criminal or civil proceedings except where the court determines that such exclusions will be detrimental to the interests of justice.[42] Therefore, the provisions of sections 36, 37, 64 and 65 of PAIA find application thereof.

THE SOUND REASONS AND JUSTIFICATION PERTAINING TO WHY NERSA CANNOT BE COMPELLED

67. The information that makes up the record that OUTA seeks to compel from NERSA, is confidential information belonging to Karpowership and at the time of its submission, it was understood by all parties concerned that it is deemed confidential and should be treated as such. The said information cannot willy-nilly be made public without the consent of Karpowership as it is mandatorily protected under PAIA. Should NERSA share such information, it will be opening itself to damages claim and litigation.

68. Karpowership has attempted to establish a confidentiality regime where in the requisite documentation can be disseminated to OUTA under the terms and conditions of a particular regime. The proposed regime is the one

[41] Section 7(1)(a) to (c) of Promotion of Access to Information Act 2 of 2000.
[42] Section 7(2).

influenced by the *Helen Suzman* case. OUTA has refuted the regime countless times citing various meritless reasons.

69. Our submission is that the issue before case management was to desist the release of the record without a proper confidentiality regime. Thus, since OUTA is persistent with its case, we submit that NERSA is mandated by sections 36, 37, 64 and 65 of PAIA to protect the confidential information it has received considering that the said information will prejudice and cause harm to Karpowership should it lend into OUTA without a proper confidentiality regime.

70. On that score, we submit that the NERSA cannot be compelled to produce an unredacted record. OUTA's only recourse at this time is to enter in a confidentiality regime with the parties in the review.

CONCLUSION

71. We submit that this honourable court ought to make a costs order against OUTA as this application is so devoid of merits. Such an order is to include the employment of two counsel.

ADV P MOKOENA SC

ADV T J MAKGATE

Counsel for the First Respondent

Chambers, Sandton
27 February 2024