

RE: APPEAL AGAINST THE DECISION TO REFUSE THE REQUEST FOR CONDONATION AND EXTENSION IN TERMS OF SECTION 47C OF THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT, 1998 (ACT NO.107 OF 1998): (PROJECT REF: 14/12/16/3/3/2/2006) IN RESPECT OF THE APPLICATION FOR ENVIRONMENTAL AUTHORISATION SUBMITTED BY KARPOWERSHIP SA (PTY) LIMITED FOR THE PROPOSED GAS TO POWER VIA POWERSHIP PROJECT AT THE PORT OF SALDANHA BAY

**INTERNAL NEMA APPEAL BROUGHT BY KARPOWERSHIP SA
(PTY) LTD**

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EXECUTIVE SUMMARY

1. This Appeal concerns the refusal by the Department of Forestry, Fisheries and the Environment (“**DFFE**”), for the request of condonation and extension in terms of Section 47C of the National Environmental Management Act 107 of 1998 (Act 107 of 1998) (“**NEMA**”); (Project Ref.14/12/16/3/3/2/2006) in respect of the application for Environmental Authorisation (“**EA**”) submitted by Karpowership SA (Pty) Limited (“**Karpowership**”) for the proposed gas to power via Powership Project at the Port of Saldanha Bay.

2. On 26 April 2023, a letter was sent to the Honourable Minister specifically requesting, in terms of Section 47C, that the Minister, in her capacity as the authority, requesting the Minister to:
 - 2.1. condone the submission of the Generic EMPR on a date to be notified by the Minister which is not more than 60 days from the date of the Minister’s decision; and

 - 2.2. extend the timeframe for the filing of the Generic EMPr to a date to be notified by the Minister which is not more than 60 days from the date of the Minister’s Decision.

3. On 23 May 2023, the Chief Director for Integrated Environmental Authorisations, DFFE refused Karpowership’s request made in terms of Section 47C, for the following reasons:
 - 3.1. Withdrawal of the Environmental Impact Assessment report (“**EIAr**”) and substituting it with the Generic EMPr, as the decision maker was of the

view that that the request refers only to the late submission of the generic EMPr and does not indicate how the requirements in terms of Regulation 23(1)(a) are to be met. The decision maker is of the opinion that compliance with Regulation 23(1) will not be achieved; and

- 3.2. Non-compliance with the requirement to use the Generic EMPr as contemplated in Government Notice No.435 as published in Government Gazette No.42323 on 22 March 2019 (“**Generic EMPr Notice**”), as the decision maker is of the opinion that the failure of the EAP to comply with the requirements of the Generic EMPr Notice should be regarded as a fatal flaw in the EIA process and that provisions of Section 47C cannot correct the flaw in the application of the EA. .
4. The Appellant in the matter is aggrieved by this decision of the DFFE to refuse the request for condonation and extension in terms of Section 47C of NEMA (“**the Condonation Refusal**”), in respect of the application for EA submitted by Karpowership for the proposed gas to power via Powership project at the Port of Saldanha Bay, and therefore formally submits this Appeal in terms of Section 43 of NEMA, as well as the NEMA Appeal Regulations, 2017 as amended.
5. At the outset and given the time constraints to serve and file this internal appeal, the Appellant reserves its right to supplement the grounds of appeal, should this be necessary.

INTRODUCTION

6. The sequence of this Appeal is as follows: -

PART A: Firstly, we shall set out the Appeal in context an introductory history pertaining to the causa for the Application itself.

PART B: Secondly, we shall the canvass the grounds advanced by the DFFE in refusing the request for condonation and extension in terms of section 47C of NEMA (Project Reference. 14/12/16/3/3/2/2006), in respect to the application for Environmental Authorisation (“**EA**”) submitted by Karpowership for the proposed gas to power via the Powership project at the Port of Saldanha Bay and provide the Appellant’s responses thereto.

PART C: Thirdly, we make submissions with regard to the individual grounds of this Appeal to substantiate that the decision by the DFFE is erroneous, and that the internal appeal should be upheld.

PART D: Fourthly, we conclude with our proposed relief as per the Appeal.

PART A: BRIEF HISTORY AND BACKGROUND REGARDING THE PROJECT’S EIA PROCESS

7. The Project’s EIA Process

7.1.1. The amended FEIAR was submitted to the CA on 6 January 2023 (“**the FEIAR submission**”). The Final EIA (“**FEIAR**”) submission was acknowledged by the CA on 9 January 2023.

7.1.2. On 7 March 2023, Green Connection submitted a complaint in terms of Regulation 13 of the EIA regulations and Section 23 of NEMA to the Competent Authority (“**CA**”) alleging that the engagement with Small Scale Fisheries (“**SSF**”) which was conducted during the EIA process, was a misrepresentation. The EAP consequently submitted its response to the CA on March 17 2023, acknowledgement of receipt from the DFFE was sent on 20 March 2023.

7.1.3. On 26 April 2023, the Appellant was informed that after the matter was duly investigated, in terms of 14(3) of the EIA Regulations, no evidence could be found to support the claims and the suspension was duly lifted.

7.2. In light of the lifting of the suspension, the Appellant was of the view that the following documents should be submitted to the CA to supplement the FEIAR:

7.2.1. Generic EMP’s for overhead electricity transmission and distribution infrastructure, as required for the triggering of the Listed Activity 11 of the Listing Notice 1 of the EIA Regulation;

7.2.2. and (this is after a 30-day PPP for registered I&AP's) and will incorporate comments and responses received from I&Aps. This was to ensure that the FEIAR document was robust.

7.3 Accordingly on 26 April 2023, the Appellant lodged the S47C condonation application with the Minister's office and withdrew the FEIAR to allow the Minister to process the Condonation application.

PART B: GROUNDS OF REFUSAL BY THE DFFE

8. The following reasons for the refusal are enunciated in the decision by the CA (italicised text), and the responses to each Reason (non-italicised text) are as follows:

a) Withdrawal of the EIAr and substituting it with the Generic EMPr:

I. "(1) on 26 April 2023, Triplo4 Sustainable Solutions withdrew the EIAr, which included the specialist reports and the EMPr for the gas to power via Powership Project at the Port of Saldanha (14/12/16/3/3/2/2006), to allow the competent authority to process the Section 47C NEMA request for condonation and extension.

II. On 26 April 2023, Karpowership Sa (Pty) Ltd requested condonation for the late submission of the Generic EMPr, as well as accompanying I&Aps' comments and responses thereto and extension of the period to submit the Generic EMPr.

- III. *Regulation 23(1)(a) of the EIA Regulations, 2014, as amended, (EIA Regulations) states that: “The applicant must within 106 days of the acceptance of the scoping report, or, where regulation 21(2) applies, within 106 days of the date of receipt of the application by the competent authority, submit to the competent authority-*
- An environmental impact assessment report inclusive of any specialist reports, and an EMPr, which must have been subjected to a public participation process of at least 30 days and which reflect the incorporation of comments received, including any comments of the competent authority”.*
- IV. *Your section 47C request refers only to the later submission of the Generic EMPr and does not indicate how all the requirements of regulation 23(1)(a), namely the requirement to submit an EIAR and specialist reports are intended to be met. As a result, if this request for condonation were to be granted, compliance with the requirements of regulation 23(1)(a) will not be achieved.*

Appellant’s Response:

The appellant did in fact meet the requirements of Regulation 23(1)(a) as the FEIAR was submitted within the 106 day period. The FEIAR was withdrawn so that the FEIAR could be supplemented with the Generic EMPr and listing notices will be clarified. It is not the appellant’s intention to re-do-any specialist studies.

Therefore, the Section 47C application is requesting a 60 day extension to undertake minor amendment to the EIA, These amendments will be highlighted in the EIA and will be sent to all registered I & A P’s for comment for a 30 day period. Therefore there will be full compliance with Regulation 23 and hence the

S47C condonation application was necessary to achieve such compliance. In terms of Section 47C the Minister may condone such time period.

b) Non-compliance with the requirements to use the Generic EMPr as contemplated in Government Notice No. 435 as published in Government Gazette No. 42323 on 22 March 2019 (Generic EMPr Notice):

- I. *“The Generic EMPr Notice, which identifies, in terms of section 24(5) of the NEMA a Generic Environmental Management Programme relevant to an application for substation and overhead electricity transmission and distribution infrastructure, which require environmental authorization as identified in terms of section 24(2) of the NEMA, was gazette on 22 March 2019 for implementation.*
- II. *For substation and overhead electricity transmission and distribution infrastructure, which such facilities trigger activity 11 of 47 of the Environmental Impact Assessment Regulations Listing Notice1 of 2014, as amended, and any other listed and specified activities necessary for the realization of such facilities, the generic EMPrs, contemplated in the Generic EMPr Notice must be used and submitted with the final report required by the EIA Regulations.*
- III. *The Competent Authority considers the failure of the environmental assessment practitioner to comply with the requirements of the Generic EMPr Notice as a fatal flaw in the Environmental Impact Assessment process and is of the opinion that the provisions of section 47C cannot be sued to correct a flaw in the application for the environmental authorization, especially since such a requirement came into effect in March 2019.”*

Appellant's Response:

9. The appellant admits that it will submit Generic EMPr's for the substation and transmission infrastructure.

10. In addition it wishes to highlight that the EMPr compiled by Triplo4 and included in the EIA was comprehensive and covered all the material issues and remediation measures required by the specialists.

11. Furthermore that the submission of the Generic EMPr's is in order to correct a minor administrative oversight, which process should never have the ability to de-rail a nationally important Strategic Integrated Project.

PART C: THE GROUNDS OF APPEAL

12. The Appellant's grounds of appeal consist of 2 grounds of appeal - related directly to the Reasons in the decision- compliance with Regulation 23 and compliance and submission of the Generic EMPr's The Appeal Grounds clearly show that the Reasons for refusal advanced by the CA are erroneous.

Appeal Ground 1 – Compliance with Regulation 23

13. The appellant did in fact meet the requirements of Regulation 23(1)(a) as the FEIAR was submitted within the 106 day period. The FEIAR was withdrawn so that the FEIAR could be supplemented with the Generic EMPr and listing

notices will be clarified. It is not the appellant's intention to re-do-any specialist studies.

14. Therefore, the Section 47C application is requesting a 60 day extension to undertake minor amendment to the EIA. These amendments will be highlighted in the EIA and will be sent to all registered I & A P's for comment for a 30 day period. Therefore there will be full compliance with Regulation 23 and hence the S47C condonation application was necessary to achieve such compliance. In terms of Section 47C the Minister may condone such time period.

Appeal Ground 2 – The submission of the Generic EMPr

15. The appellant admits that it will submit Generic EMPr's for the substation and transmission infrastructure.

16. In addition it wishes to highlight that the EMPr compiled by Triplo4 and included in the EIA was comprehensive and covered all the material issues and remediation measures required by the specialists.

17. Furthermore that the submission of the Generic EMPr's is in order to correct a minor administrative oversight, which process should never have the ability to de-rail a nationally important Strategic Integrated Project.

18. It is therefore clear that the decision maker erred in the decision and that the decision should be set aside by the Minister and that the condonation requested should be granted.

PART D: CONCLUSION AND RELIEF SOUGHT

RELIEF SOUGHT:

19. That the Appeal is upheld, and the decision for the refusal of the request for condonation and extension in terms of Section 47C of NEMA (project ref: 14/12/16/3/3/2/2006) in respect of the application for EA submitted by Karpowership SA (Pty) Limited for the proposed gas to power via Powership project at the port of Saldanha Bay be set aside.
20. Accordingly, that the S47C condonation (that was requested in the appellant's S47C application dated 26 April 2023) is granted and that the matter is referred back to the CA, so that the Appellant may undertake PPP for the Generic EMPr and submit the Generic EMPr (together with the comments and responses received) to the CA together with the entire EIA. Any changes to the EIA will be appropriately highlighted, for ease of reference so that the I & A P's are aware of the changes to the EIA since the PPP that was undertaken in October and November 2022. We wish to emphasize this last point as it was perhaps not clear in the appellant's letter dated 26 April 2023, that the appellant was requesting condonation to resubmit the entire EIA and the Generic EMPr, not just the EMPr.