



**MINISTER
FORESTRY, FISHERIES AND THE ENVIRONMENT
REPUBLIC OF SOUTH AFRICA**

Reference: LSA233259

APPEAL DECISION

APPEAL AGAINST THE DECISION OF THE CHIEF-DIRECTOR: INTERGRATED ENVIRONMENTAL AUTHORISATIONS TO REFUSE A CONDONATION AND EXTENSION REQUEST TO KARPOWERSHIP SA (PTY) LTD FOR THE SUBMISSION OF A GENERIC ENVIRONMENTAL MANAGEMENT PROGRAMME IN RESPECT OF THE ENVIRONMENTAL AUTHORISATION FOR THE PROPOSED GAS TO POWER VIA POWERSHIP PROGRAMME, WITHIN SALDANHA BAY LOCAL MUNICIPALITY, WESTERN CAPE

Karpowership (Pty) Ltd

Applicant / Appellant

Chief Director: Integrated Environmental Authorisations -
the Department of Forestry, Fisheries and the Environment

Competent Authority

Appeal: This is an appeal lodged against the decision of the Chief Director: Integrated Environmental Authorisations (CD: IEA/ Competent Authority) of the Department of Forestry, Fisheries and the Environment (the Department), taken on 25 May 2023, to refuse the application submitted by Karpowership (Pty) Ltd (the applicant) for condonation and extension of the timelines to submit a Generic Environmental Management Programme (GEMPr) in respect of the proposed gas to power via powership programme, within the Saldanha Local Municipality, Western Cape Province.

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1. BACKGROUND

- 1.1. On 05 October 2021, Karpowership (Pty) Ltd (the applicant/ appellant) lodged an application for an EA with the competent authority (CA) of the Department in respect of the proposed gas to power via powership programme, within the jurisdiction of the Saldanha Local Municipality, Western Cape Province.
- 1.2. The appellant commissioned Triplo4 Sustainable Solutions, as an Environmental Assessment Practitioner (EAP) to undertake the Environmental Impact Assessment (EIA) process in respect of the above EA application.
- 1.3. On 26 April 2023, the EAP withdrew the Final EIA Report (FEIAR) and Environmental Management Programme Report (EMPr) in support of the application for EA and he submitted an application in terms of section 47C of the National Environmental Management Act, 1998 (Act No. 107 of 1998) (NEMA), as amended, for condonation and extension of the period to submit a generic EMPr to the CA for consideration and decision-making purposes.
- 1.4. On 23 May 2023, the CA refused to grant the appellant's application for condonation and extension in terms of section 47C of the NEMA, as amended.
- 1.5. The procedure for the submission of appeals as contemplated in section 43(1) of NEMA is clearly outlined in Regulation 4(1) of the National Appeal Regulations, 2014, as amended (2014 Appeal Regulations) which stipulates that:

"An appellant must submit the appeal to the appeal administrator, and a copy of the appeal to the applicant, any registered interested and affected party and any organ of state with interest in the matter within 20 days:"

(a) from the date that the notification of the decision for an application for an environmental authorization or a waste management licence was sent to the registered interested and affected parties by the applicant".

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- 1.6. Regulation 4(1) prescribes the period within which the appellant is required to submit an appeal to the appeal administrator. Such an appeal ought to be submitted in accordance with provisions of Regulation 4(2) of the 2014 Appeal Regulations. In this matter, the appeal ought to have been noted on or before 12 June 2023.
- 1.7. On 24 May 2023, the Directorate: Appeals and Legal Review (Appeals Directorate), within the Department, received an appeal from the appellant against the decision of the CA to refuse condonation and extension request for an extension of the timeframe to submit the generic EMPr (*"the extension request"*).
- 1.8. On 19 June 2023, the Appeals Directorate received comments in support of the appeal by the appellant from the following:
 - 1.8.1 West Coast Black Business Alliance (WCBA);
 - 1.8.2 Integrated Coastal Energy Alliance;
 - 1.8.3 Requa Enterprises; and
 - 1.8.4 Cliff Vraagom
- 1.9. On 14 July 2023, the CA submitted their responses to the appeal grounds.
- 1.10. The appellant's appeal is premised on the following grounds:
 - 1.10.1 Compliance with Regulation 23; and
 - 1.10.2 Submission of the generic EMPr.

2. REASONS FOR THE APPLICATION

The applicant submits as follows:

- 2.1. On 6 January 2023, they submitted an amended final environmental impact assessment report (FEIAR) to the CA.
- 2.2. On 7 January 2023 the Green Connection submitted a complaint in terms of Regulation 14 of the 2014 Environmental Impact Assessment (2014 EIA Regulations) and section 23 of NEMA to the CA,

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wherein it alleged that the EAP misrepresented the public participation Process (PPP) engagement with small scale fishers (the complaint). This necessitated that a suspension be imposed on the EIA application process relating to the proposed Saldanha gas to power project.

- 2.3. The EAP addressed its response to the complaint to the CA on 17 March 2023.
- 2.4. On 26 April 2023, the CA informed the appellant that the complaint had been investigated in terms of Regulation 14(3) of the 2014 EIA Regulations and it was found to be without merit.
- 2.5. On 26 April 2023, the appellant addressed its application in terms of section 47C of NEMA for condonation and extension of the period to submit a generic EMPr to the CA, wherein it sought the following: (i) approval of an extension for the submission of a generic environmental management programme as well as accompanying interested and affected parties (I&APs) comments and response thereto, and (ii) condonation for the late submission of the generic EMPr as well as accompanying I&APs comments and response thereto.
- 2.6. The request was based on the following:
 - 2.6.1. The appellant only became aware that a generic EMPr might be required when it received the CA's refusal decision for the proposed Ngqura project on 7 March 2023. Although it was of the view that all of the project issues were comprehensively covered in the EMPr, which it had submitted with the FEIAR, based on the Ngqura Record of Refusal, it decided to submit the generic EMPr as a precautionary measure.
 - 2.6.2. It also decided, based on the Green Connection complaint and the lifting of the suspension, to submit the generic EMPr in respect of an overhead electricity transmission and distribution infrastructure, in respect of listed activity 11 of listing notice 1 of the 2014 EIA Regulations, to a 30-day PPP for registered I&APs to submit their comments, and to allow the applicant to incorporate it in the comment and response report as part of the supplemented FEIAR to conclude the EA application process.
- 2.7. The extension and condonation request was thus sought to enable the appellant to submit the generic EMPr for a 30-day period of PPP with I&APs, to supplement the comment and response report of the revised FEIAR with such relevant comments received regarding the generic EMPr, and to submit the

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generic EMPr and such comments received to supplement the EMPr which was submitted to the CA together with the FEIAR on 6 January 2023.

- 2.8. Section 24 of NEMA provides that to give effect to the general objectives of integrated environmental management laid down in Chapter 5 of NEMA, 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 except in respect of those activities that may commence without having to obtain an environmental authorisation in terms of the NEMA.

3. GROUNDS OF APPEAL, COMMENTS AND RESPONSES

- 3.1. The appellant submits as follows:

Compliance with Regulation 23

- 3.1.1. The time frames required by Regulation 23(1)(a) were complied with as the FEIAR was submitted within the prescribed 106-day period. The FEIAR was, however, withdrawn in order to supplement it with the generic EMPr and there was no intention on their part to re-do any specialist studies.
- 3.1.2. The section 47C of NEMA application for a 60-day extension was for the purpose of effecting "*minor amendments to the EIA*" which would be sent to all registered I&APs for comment for 30 days in compliance with Regulation 23 and therefore the section 47C condonation application was necessary to achieve such compliance.

The submission of the generic EMPr

- 3.1.3. They intend to submit a GEMPr for the substation and transmission infrastructure. (Listed Activity 11).
- 3.1.4. The EMPr compiled by Triplo4 was comprehensive and addressed all material issues and remediation measures required by the specialists.

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3.1.5. The submission of the GEMPr was to correct a “*minor administrative oversight*”, which should “*never have the ability to de-rail a nationally important Strategic Integrated Project*”.

3.1.6. Furthermore, “*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*”.

3.2. The CA submits as follows:

Compliance with Regulation 23

3.2.1. The section 47C request received only refers to the late submission of the Generic EMPr and does not indicate how all of 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.

3.2.2. The appellant's extension request states as follows:

3.2.2.1. In point 4.1.2-

“As has been established above, the request for the extension and condonation is to allow the Applicant to ensure all elements from the published generic EMPr are fully incorporated into the project's EMPr and to ensure registered I&APs are granted 30 days to comment thereon.”

3.2.2.2. In point 4.1.3 -

“The applicant requests 60 days in order to do the 30 day PPP and submit the Generic EMPr together with relevant I & A P comments to the CA.”

3.2.2.3. In point 7.5.1 and 7.5.2-

*“7.5.1 The Minister condones 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 hereon; and
7.5.2 The Minister extends 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 hereon.”*

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3.2.3. The information provided in the ground of appeal does not correspond to the request for condonation submitted for decision making. In addition, the condonation request does not speak to the clarification of the listing notices.

The submission of the generic EMPr

3.2.4. The CA considers the EAP's failure to comply with the requirements of the Generic EMPr to be a fatal flaw in the EIA process and it is of the opinion that the provisions of section 47C cannot be used to correct a flaw in the application for environmental authorisation, especially since such a requirement came into effect in March 2019.

3.2.5. If the appellant believes that the EMPr submitted by Triplo4 is comprehensive and that it covered all the material issues and remediation measures required by the specialists, then there would be no need for it to withdraw the EIAr and to request for condonation to submit a generic EMPr.

3.2.6. Furthermore, in point 4.1.4 of the extension request the appellant states as follows:

"The applicant only became aware of the fact that a Generic EMPr might be required when it received the Record of Refusal for Coega on 7 March 2023. Although the Applicant believes that all of the project issues have been comprehensively covered in the Triplo4 EMPR which was submitted with the FEIAr, out of an abundance of caution and based on the Coega Record of Refusal, the Applicant may be required to submit the Generic EMPr."

3.2.7. This statement is incorrect as the requirement to comply with the Generic EMPr came into effect from March 2019. Regulation 13(1)(b) of the EIA Regulations state as follows:

"(1) An EAP and a specialist, appointed in terms of regulation 12(1) or 12(2), must-
(b) have expertise in conducting environmental impact assessments or undertaking specialist work as required, including knowledge of the Act, these Regulations and any guidelines that have relevance to the proposed activity;"

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3.2.8. Furthermore, the 2014 EIA Regulations, as amended states that *“Where a government notice gazetted by the Minister provides for a generic EMPr, such generic EMPr as indicated in such notice will apply.”*

3.3. Other Appellants

3.3.1. The Appeals Directorate has advised that several other purported appeals were lodged against the refusal decision. I am informed that these purported appeals were received outside the 20-day prescribed timeframe for the lodgment of appeals and that they were not in the prescribed format provided for in the 2014 Appeal Regulations.

3.3.2. In this regard, I considered Regulation 4(1) and 4(2) of the 2014 Appeal Regulations.

3.3.2.1. Regulation 4(1) of the 2014 Appeal Regulations prescribes that an appellant must submit an appeal together with a copy thereof to any registered interested in affected party and any organ of state with an interest in the matter within 20 days from the date that the notification of the decision was sent to the applicant by the competent authority or the date that notification of the decision was sent to the registered interested and affected parties by the applicant.

3.3.2.2. Regulation 4(2) of the 2014 Appeal Regulations prescribes that an appeal must be submitted in writing in the form obtainable from the appeal administrator and must be accompanied by a statement setting out the grounds of appeal, supporting documentation which is referred to in the appeal submission, and a statement including supporting documentation by the appellant to confirm compliance with regulation 4(1).

3.3.3. Considering that these other appeals do not comply with Regulation 4 of the 2014 Appeal Regulations, I am unable consider them. To do so would be ultra vires (outside of the scope of) my authority and therefore unlawful.

3.4. Comments from I&APs

3.4.1. The I&APs commented as follows:

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3.4.1.1. The West Coast Black Business Alliance (WCBA) represents Small Medium Micro Enterprises (“SMMEs).

3.4.1.2. They are *“seeking to work towards creating an environment that assists businesses to grow and function optimally to enable economic growth and foster community building”*.

3.4.1.3. Their submissions are a statement of their support for the project and their concern for the *“possible loss of business, employment and economic opportunities the project could have for their members and communities in Saldanha”* should it be refused.

3.4.1.4. While they recognise the importance that EIAs are properly done within the regulatory framework, they are concerned about the decision to refuse Karpowership’s application for extension of time. It appears to them that *“the Department is looking for any little reason to reject this project, despite Karpowership having provided all the necessary information to address environmental concerns”*.

3.4.1.5. The project could be an important contributor for small businesses and the wider community, and the Department is *“out of touch”* with the reality that communities in Saldanha Bay face *“on a day-to-day basis”*.

3.4.1.6. The refusal decision is *“anti-developmental”* and lacks an appreciation that South Africa (SA) needs more of these projects. They are concerned about the Department’s *“use of administrative obstacles to block the project”* and that the Department is not aware of the needs of communities and seek only to *“address the concerns of smaller segments such as the green lobby groups- even though environmental issues of the Karpowership report were comprehensively addressed and well within the standards set within regulation”*. They contend that such decision-making leads communities to lose confidence in government.

3.4.1.7. The Department is requested to reconsider its refusal to grant Karpowership additional time to do what it needs to so that the project can be implemented and the Department’s decisions impact people’s livelihoods and is driving away investments.

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- 3.5. I note that the I&AP's submissions and comments proclaim their support for the appellant's proposed project. Their concerns with the refusal of the condonation application relate to the implications of the decision on the day-to-day challenges of the Saldanha community. These comments do not address the merits or reasons for the CA's decision.
- 3.6. Moreover, Regulation 4 of the 2014 Appeal Regulations prescribes the process and procedure for an appeal submitted terms of section 43 of NEMA. Regulation 4 of the 2014 Appeal Regulations do not make provision for comments from I&APs. Considering that these comments do not comply with Regulation 4 of the 2014 Appeal Regulations, I am unable consider them. To do so would be ultra vires (outside of the scope of) my authority and therefore unlawful.

4. EVALUATION

Compliance with Regulation 23

- 4.1. It is apparent that the appellant lodged its application for an EA and submitted its EIAr and EMPr timeously within the 106-day period as required by Regulation 23 of the 2014 EIA Regulations. The EA application included the EIAr together with Specialist Studies and an EMPr. This is not in dispute.
- 4.2. The reason relied upon by the CA for refusing the first appellant's request for an extension of the time period to submit an amended EIAr and Generic EMPr as set out in paragraph (iv) of its refusal decision is that the request does not "*indicate how all the requirements of regulation 23(1)(a) will be met should condonation be granted.*"
- 4.3. In my view, such reason is neither reasonable nor justifiable as section 47C of NEMA (extension or condonation of time periods) does not require an application made in terms of that section to set out an explanation on how all the requirements of regulation 23 (1)(a) will be met. The section provides only that:

"The Minister or an MEC may extend, or condone a failure by a person to comply with, a period in terms of this act or a specific environmental management Act, except a period which binds the minister for MEC."

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- 4.4. The ultimate responsibility to ensure that an application for an EA complies with the requirements and time periods (which may be extended or condoned) is that of the appellant. A failure to meet the prescribed time periods in the absence of any extension being granted, will result in the application lapsing.
- 4.5. I determined further that there is no justification for the CA's conclusion that should the application for condonation be granted "*compliance with the requirements of regulation 23(1)(a) will not be met*".
- 4.6. This ground of appeal is accordingly upheld.

Submission of the generic EMPr

- 4.7. The CA's second reason for refusing the application for condonation is based on the appellant's failure to utilise a Generic EMPr as published in Government Gazette number 42323 of 22 March 2019, as required for substations and overhead electricity transmission and distribution infrastructure which triggers activity 11 of the 2014 EIA Regulations.
- 4.8. The CA considered that failure to be "a fatal flaw" and believed section 47C "*cannot be used to correct a flaw in the application for environmental authorization...*"
- 4.9. The first appellant, despite having submitted an EIA and EMPr timeously, subsequently withdrew these documents and applied for the extension of time and condonation in terms of section 47C of NEMA for the late submission of the Generic EMPr and EIA together with comments and responses of I&AP's on the Generic EMPR, which would be subjected to a 30 day PPP.
- 4.10. The first appellant asserts that:
- 4.10.1. The request for the extension and condonation was necessitated by the suspension imposed on the EIA application process due to a complaint by the Green Connection, which was lifted on 26 April 2023, and that it only became aware that it may be required to submit a Generic EMPR after the Ngqura Record of Refusal.

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4.10.2. Its initial submission of its EIA together with an EMPR (which was later withdrawn), “was comprehensive and covered all the material issues and remediation measures required by the specialist.”

4.10.3. The generic EMPr would correct minor administrative oversight and that such “process should never have the ability to de-rail (sic) a nationally important Strategic Integrated Project.”

4.11. I also considered the following facts:

4.11.1. The appellant submitted its initial EIA together with an EMPr timeously, which it later withdrew for purposes of its section 47C application;

4.11.2. The purpose of the section 47C application is for the submission of a Generic EMPr, after it has been subjected to a public participation process.

4.12. I therefore conclude that the applicant's withdrawal of the initial EIA and EMPr was to facilitate the section 47C request for the submission of a Generic EMPr and, in the present circumstances of this matter, it did not constitute an attempt to “correct a fatal flaw in the application for authorization.” The appellant sought to correct an “administrative oversight” prior to an assessment of its application and decision thereon being made. In different circumstances the outcome may be different.

4.13. In light of the above, I uphold this ground of appeal.

5. DECISION

5.1 In reaching my decision on this appeal, I have taken into consideration the following aspects:

5.1.1 The FEIAR and EMPr that was submitted by the appellant to the CA, dated 6 January 2023;

5.1.2 The appellant's application for extension and condonation of the timeframes in terms of section 47C of NEMA, dated;

5.1.3 The CA's refusal decision of the CA extension request of 23 May 2023 (the refusal decision);

5.1.4 The appellant's appeal submitted on 24 May 2023;

5.1.5 The CA's comments submitted on 14 July 2023;

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5.1.6 Relevant case law; and


5.1.7 Relevant provisions of NEMA, 2014 EIA Regulations and 2014 Appeals Regulations.

5.2 In terms of section 43(6) of NEMA, I have the authority, after considering the appeal, to confirm, set aside or vary the decision, provision, condition or directive or to make any other appropriate decision.

5.3 Having carefully considered the abovementioned information and reasons, I have decided to uphold the appeal by the appellant for the reasons as stated above. Consequently, I set aside decision of the CD: IEA to refuse to grant a condonation and extension request by the applicant to submit the generic EMPr as required by the Regulations together with comments and responses of I&APs on the Generic EMPr within 60 days of date of notification of my decision within which period, the appellant must subject the generic EMPr to a 30 day PPP with registered I&APs and supplement the comments & responses report.

5.4 In arriving at my decision in this internal appeal, I have not responded to every statement set out in the appeal. However, where a particular statement is not directly addressed, the absence of such a response thereto, should not be misconstrued to mean that I agree with or abide by the statement made out in the appeal.

5.5 Should the appellant not be dissatisfied with any aspect of my decision, they are at liberty to approach a competent court of law to have this decision judicially reviewed. The judicial review proceedings ought to be instituted within 180 days of notification hereof, in accordance with the provisions of the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000).



MS B D CREECY, MP

MINISTER OF FORESTRY, FISHERIES AND THE ENVIRONMENT

DATE: 22/7/2023