

RE: APPEAL AGAINST THE DECISION TO REFUSE 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 ENVIRONMENTAL AUTHORISATION SUBMITTED BY KARPOWERSHIP (PTY) LIMITED FOR THE PROPOSED GAS TO POWER VIA POWERSHIP PROJECT AT THE PORT OF SALDANHA BAY

RESPONDING STATEMENT

BY THE GREEN CONNECTION AND NATURAL JUSTICE: LAWYERS FOR COMMUNITIES AND THE ENVIRONMENT

1.

1. Introduction

This Responding Statement is submitted by the Green Connection and Natural Justice in response to an Internal Appeal lodged by Karpowership SA (Pty) Limited ('the Appellant') against a decision by the Department of Forestry, Fisheries and the environment (DFFE) to refuse the Appellant's request for condonation and extension in terms of section 47C of the National Environmental Management Act, 1998 (NEMA).

2.

2. The Responding Parties

The Green Connection is a registered non-governmental organisation, that believes that economic growth and development, improvement of socio-economic status and conservation of natural resources can only take place within a commonly understood framework of sustainable development. The Green Connection aims to provide practical support to both the government and non-governmental/civil society sectors, which are an integral part of sustainable development.

3.

Natural Justice: Lawyers for Communities and the Environment, a non-profit organisation specialising in environmental and human rights law in Africa – with a focus on the pursuit of social and environmental justice for local and indigenous communities. Natural Justice offers direct support to local and indigenous communities impacted by the ever-increasing demand for land and resources, through legal empowerment.

4.

The Green Connection and Natural Justice are referred to collectively herein as 'the Respondents'.

5.

The Respondents are interested and affected parties who participated in the appellant's environmental impact assessment (EIA) application process *inter alia* in their own interests and in the interest of protecting the environment.

6.

3. Responding Statement and Appeal Response Report

The Appellant has submitted two appeal documents, namely an Internal Appeal document and an Appeal Response Report (the latter simply reproduces the two grounds of appeal relied upon by the Appellant).

7.

In light of the above, Respondents hereby submit their Responding Statement together with their Appeal Response Report (Annexure A).

8.

4. Point *in limine* – The EIA application was withdrawn / has lapsed and the Competent Authority is *functus officio*

The Respondents note that as a consequence of the Appellant's final Environmental Impact Assessment Report (FEIAR) having been withdrawn by its environmental assessment practitioner (EAP), the Appellant's application for environmental authorisation was deemed by the Competent Authority (namely the Department of Forestry, Fisheries and the Environment (DFFE)) to have been withdrawn and closed from the Department's side. In other words, the application lapsed as a result of the FEIAR being withdrawn in the absence of an extension having been granted in terms of regulation 3(7) of the Environmental Impact Assessment Regulations¹ (EIA Regulations) and the Competent Authority correctly deemed it as having lapsed. It is respectfully submitted further that, as a consequence, DFFE is *functus officio* and should have refused to consider the Appellant's application for condonation and extension in terms of section 47C of NEMA.

9.

The Appellant does not dispute that its FEIAR was withdrawn. For example, in paragraph 13 of the Internal Appeal the Appellant states that 'The FEIAR was withdrawn...'.

¹ GNR. 982 of 4 December 2014: *Environmental Impact Assessment Regulations, 2014* (as amended).

10.

This withdrawal is also referred to in DFFE's *Reasons for Refusal* of the Appellant's section 47C Condonation Application dated 23 May 2023 (see Annexure B):

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...'.²
(underlining added)

11.

In addition, DFFE confirmed in a letter to the Green Connection's legal representative dated 24 May 2023 (see Annexure C) that:

...the Environmental Impact Assessment Report dated 06 January 2023 was withdrawn by the environmental assessment practitioner (EAP) on 26 April 2023 and the Competent Authority confirmed in its acknowledgement of 02 May 2023 that the application is now deemed withdrawn and the application is closed on the Department's side. (underlining added)

12.

It is therefore clear from the above that the Appellant's FEIAR was withdrawn, and that the Competent Authority deemed the application for environmental authorisation withdrawn and closed from its side.

13.

The Competent Authority's decision to deem the application as having been withdrawn and closed from its side is consistent with Regulation 45 of the NEMA EIA Regulations, which stipulates as follows:

Failure to comply with requirements for consideration of applications

An application in terms of these Regulations lapses, and a competent authority will deem the application as having lapsed, if the applicant fails to meet any of the timeframes prescribed in terms of these Regulations, unless extension has been granted in terms of regulation 3 (7).
(underlining added)

14.

The Respondents submit that the 'relevant prescribed timeframe' in the context of this application for environmental authorisation (which was remitted back to the Competent Authority following the Minister's 2 August 2022 Appeal decision) is the date that was agreed upon by the Competent Authority, the Appellant and the EAP, namely 13 January 2023:

² At paragraph (a)(i).

- a) Draft Minutes (dated 5 September 2022) of a pre-application meeting held on 24 August 2022 between DFFE, the Appellant and the EAP (see Annexure D) record the following:

15. In terms of timeline, MS [Millicent Solomons, DFFE] stated that because this was a Pre-Application meeting the DEIAR would be due 106 days from the date of the meeting (24 August 2022) and therefore would be due on 9 December 2022...

[Note: after the meeting, this issue was subsequently investigated in more detail by both parties and it was agreed that the kick-off would be from approval of the Project Plan and Minutes on 6 September 2022 and the FEIAR would be due on 13 January 2023 as per the letters attached hereto.] (underlining added)

- b) A letter dated 25 August 2022 from the EAP to DFFE (see Annexure E) motivates for the prescribed 106 day timeframe for submission of the FEIAR to commence on 6 September 2022 (rather than the date of the pre-application meeting):

5. It is our humble request that the 106 day period should commence on approval of the Minutes from the Pre-Application meeting and the approval of the EIA Project Plan with timelines, which we will prepare and submit to you by no later than 09H00 on the 6th September 2022. According to the 2014 EIA Regulations, The FEIAR will then be due on 12th January 2023.

6. We are advised by our legal counsel that our request is supported by the provisions Regulation 23(1) of The 2014 EIA Regulations which states that:
- (1) 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
- (a) An environmental impact assessment report inclusive of any specialist report and an EMPr, which must have been subjected to a public participation process of at least 30 days

Regulation 21(2) states that:

Subject to Regulation 46 and if the findings of the scoping report is still valid and the environmental context has not changed, the submission of a scoping report as contemplated in sub regulation (1) need not be complied with-

- (a) In cases where a scoping report was accepted as part of a previous application for environmental authorization and the application has lapsed or was refused because of insufficient information;

7. This would allow compliance with the 2014 EIA Regulations (and the Minister's Appeal Decisions) and allow the applicant and the specialists a reasonable chance to address the gaps identified in the EIA.

- c) A letter dated 29 August 2022 from DFFE to the EAP (see Annexure F) confirmed receipt of the EAP's abovementioned letter requesting additional time for the commencement of the remitted EIA process. DFFE state further as follows:

The Department hereby confirms that the due date for the submission of the Environmental Impact Assessment reports for the abovementioned projects in accordance to Regulation 23(1)(a) of the EIA Regulations, 2014 as amended will be 13 January 2023... (underlining added)

15.

According to the Appellant's Internal Appeal document, the amended FEIAR was submitted to the Competent Authority on 6 January 2023 (and DFFE acknowledged receipt thereof of 9 January 2023).

16.

It is clear from the above that the relevant prescribed timeframe (as agreed by the Competent Authority, the Appellant and the EAP) for submission of the FEIAR was 13 January 2023.

17.

While the Appellant initially complied with this timeframe by submitting an FEIAR to the Competent Authority on 6 January 2023, the EAP appointed by the Appellant withdrew the FEIAR on or about 26 April 2023. The legal consequence of the withdrawal of the FEIAR is that following the withdrawal of the FEIAR, and in the absence of a prior written extension of the relevant prescribed timeframe (13 January 2013), the Appellant's application for environmental authorisation was no longer in compliance with the relevant prescribed timeframe. In accordance with Regulation 45 of the EIA Regulations, the application lapsed and will be deemed by the Competent Authority to have lapsed. As mentioned above, the Competent Authority accordingly deemed that the application for environmental authorisation was withdrawn and closed from its side.

18.

The Respondents submit that the EIA Regulations promulgated by the Minister provide specific remedies that could, but were not, utilised by the Appellant:

- a) Firstly, the Appellant could have - prior to 13 January 2023 - given notification in writing to the Competent Authority as contemplated in sub-regulation 23(1)(b) of the NEMA EIA Regulations³

³ Regulation 23(1) of the NEMA EIA Regulations provides as follows:

Submission and consideration of environmental impact assessment report and supporting documents to competent authority

(1) 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:

(a) an environmental impact assessment report inclusive of any specialist reports, an EMP, a closure plan in the case of a closure activity and where the application is a mining application, the plans, report and calculations contemplated in the Financial Provisioning

that the FEIAR documents would be submitted within 156 days of acceptance of the scoping report (or in this case within 156 days of the 6 September 2023 ‘kick off’ date agreed to by the Competent Authority and the Appellant). To the Respondent’s knowledge, the Appellant never gave any such notification;

- b) Secondly, the Appellant could have – prior to the withdrawal of the FEIAR and the consequent lapsing of the application for environmental authorisation - requested the Competent Authority to, in writing, extend the relevant prescribed timeframe in accordance with sub-regulation 3(7) of the NEMA EIA Regulations. Sub-regulation 3(7) provides as follows:

In the event where the scope of work must be expanded based on the outcome of an assessment done in accordance with these Regulations, which outcome could not be anticipated prior to the undertaking of the assessment, or in the event where exceptional circumstances can be demonstrated, the competent authority may, prior to the lapsing of the relevant prescribed timeframe, in writing, extend the relevant prescribed timeframe and agree with the applicant on the length of such extension. (underlining added)

To the Respondent’s knowledge, the Appellant never requested the Competent Authority to extend the relevant prescribed timeframe (i.e. 13 January 2023), and the relevant prescribed timeframe was never extended.

19.

The draft Minutes (dated 5 September 2022) of the pre-application meeting held on 24 August 2022 between DFFE, the Appellant and the EAP show that the Competent Authority not only brought the abovementioned provisions to the Appellant’s attention, but also cautioned the Appellant as follows:

15. ... DFFE cautioned KPS not to wait until 9 December⁴ to submit as this date could not be extended in the normal course. This date could only be extended in terms of the EIA

Regulations, which must have been subjected to a public participation process of at least 30 days and which reflects the incorporation of comments received, including any comments of the competent authority; or

- (b) a notification in writing that the documents contemplated in subregulation 1 (a) will be submitted within 156 days of acceptance of the scoping report by the competent authority or where regulation 21 (2) applies, within 156 days of receipt of the application by the competent authority, as significant changes have been made or significant new information has been added to the documents, which changes or information was not contained in the original documents consulted on during the initial public participation process contemplated in subregulation (1) (a), and that the revised documents contemplated in subregulation 1 (a) will be subjected to another public participation process of at least 30 days.*

⁴ Subsequently changed to 13 January 2023 after the Competent Authority and the Appellant/EAP ‘...agreed that the kick-off would be from approval of the Project Plan and Minutes on 6 September 2022’. See paragraph 15 of the Draft Minutes (dated 5 September 2022) of the pre-application meeting held on 24 August 2022 between DFFE, the Appellant and the EAP.

Regulations under Regulation 23(1)(a) and (b) - new information or Regulation 3 (7) – extraordinary circumstances... (underlining added)

20.

Thus in the absence of the Appellant having given notification in terms of sub-regulation 23(1)(b) of the NEMA EIA Regulations (which could have extended the prescribed timeframe by an additional 50 days), and in the absence of the Competent Authority having extended the prescribed timeframe, prior to the lapsing thereof, in accordance with sub-regulation 3(7) and as contemplated in regulation 45 of the NEMA EIA Regulations, the application for environmental authorisation lapsed upon withdrawal of the FEIAR by the EAP (the Appellant's application for environmental authorisation no longer complied with the relevant prescribed timeframe), and the Competent Authority deemed it to have lapsed (or in the words of the Department, *'the application is now deemed withdrawn and the application is closed on the Department's side'*).

21.

The legal consequence of the withdrawal and resultant lapsing of the application for environmental authorisation is that DFFE is no longer the functionary vested with the authority to consider the EIA application or exercise any powers in relation thereto: DFFE is *functus officio*.

22.

Accordingly, the Respondents submit that DFFE was not legally competent to consider the Appellant's application for condonation and extension in terms of s47C of NEMA.

23.

The Respondents therefore submit that DFFE should have declined to consider the Appellant's NEMA s47C application.

24.

For the reasons set out above, the Respondents respectfully submit that the appeal should be dismissed and that the lapsing of the application for environmental authorisation should be confirmed.

25.

Notwithstanding the above, and in the event that the Minister takes the view that DFFE was competent to consider the Appellant's application in terms of section 47C of NEMA notwithstanding

the application for authorisation having lapsed (which competence the Respondents dispute), the Respondents make further submissions below relating to the grounds of relief relied upon by the Appellant.

26.

5. Response to Appeal Ground 1 – Non-compliance with Regulation 23

It is noted that the Appellant avers that it did *'in fact meet the requirements of Regulation 23(1)(a) as the FEIAR was submitted within the 106 day period'*.

27.

However, while the Appellant was in compliance with the requirements of Regulation 23(1)(a) by submitting an FEIAR on 6 January 2023 (i.e. before the 13 January 2023 relevant prescribed timeframe), the subsequent withdrawal of the FEIAR by the EAP on 26 April 2023 resulted in the Appellant no longer being in compliance (i.e. the Appellant was non-compliant with the 106 day requirement of Regulation 23(1)(a)).

28.

The Appellant states in paragraph 2 of its Internal Appeal document that 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:

- Condone the submission of the Generic EMP_r 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
- Extend the timeframe for the filing of the Generic EMP_r to a date to be notified by the Minister which is not more than 60 days from the date of the Minister's decision.

29.

The Respondents note that a copy of this letter has not been put up by the Appellant as a supporting document to its Appeal (as required by regulation 4(2)(b)(ii) of the National Appeal Regulations).⁵

30.

In its *Reasons for Refusal* of the Appellant's s47C Condonation Application dated 23 May 2023, the DFFE points out that the Appellant's section 47C request *'refers only to late submission of the Generic*

⁵ GNR.993 of 8 December 2014, as amended.

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.'

31.

Based on the above, it is evident that the Appellant's section 47C condonation request did not seek condonation for the subsequent late submission of an amended FEIAR (i.e. submission after the 13 January 2023 relevant prescribed timeframe). Even assuming that the late submission of an amended FEIAR could be condoned by way of section 47C (which the Respondents dispute, given that the withdrawal of the FEIAR resulted in the lapsing of the application as specifically contemplated in Regulation 45 of the NEMA EIA Regulations, the Appellant's failure to request condonation for the subsequent late submission of an amended FEIAR was a fatal flaw in its section 47C application.

32.

It is also noted that the Appellant indicates that the FEIAR was withdrawn so that it '*could be supplemented with the Generic EMPr and listing notices will be clarified*'. The Respondents submit that section 47C does not empower the Minister (or her delegate) to condone the clarification of listing notices.

33.

In light of the above, it is submitted that DFFE (assuming that it was competent to consider a section 47C application after the application for authorisation has lapsed, which the Respondents dispute – see the Respondents' point *in limine* above) correctly refused to grant condonation on the basis that the Appellant's section 47C condonation request failed to indicate how the Appellant would meet the requirements of regulation 23(1)(a) – i.e. the Appellant failed to request condonation to submit its amended FEIAR after the expiry of the prescribed 106 day timeframe on 13 January 2023.

34.

Accordingly, the Respondents submit that the Appellant's averment that its '*section 47C application is requesting a 60 day extension to undertake minor amendment to the EIA*' is not supported by the available facts. Furthermore, regardless of the process that the Appellant belatedly sets out in this Appeal (namely that the '*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*'), the Appellant's averment that '*[t]herefore there will be full compliance with Regulation 23 and hence the S47C condonation application was necessary to achieve*

such compliance' is simply incorrect – the 106 day timeframe contemplated in regulation 23(1)(a) expired on 13 January 2023.

35.

In the premises, the Respondents respectfully submit that the Minister should dismiss this ground of appeal.

36.

6. Response to Appeal Ground 2 – The submission of a Generic EMPr

It is unclear what the Appellant means by stating that it 'admits' that it will submit Generic EMPr's for the substation and transmission infrastructure.

37.

The Respondents note the Appellant's averment that the EMPr compiled by Triplo4 and included in the EIA was comprehensive and covered all material issues and remediation measures required by the specialists. It is unclear to the Respondents whether or not the Appellant is suggesting the EMPr submitted with the FEIAR met the requirements of GN 435 of 22 March 2019. If so, it is difficult to understand from the information available to the Respondents why the EAP withdrew the Appellant's FEIAR (inclusive of the EMPr) and specialist studies.

38.

Notwithstanding the above, the facts as they stand are that the Appellant's FEIAR and EMPr were withdrawn by the EAP.

39.

In its *Reasons for Refusal* of the Appellant's s47C Condonation Application dated 23 May 2023, the Competent Authority indicates that it '*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 used to correct a flaw in the application for environmental, especially since such a requirement came into effect in March 2019*'.

40.

The Respondents submit that the Competent Authority is clearly correct that GN435 was applicable:

the listed activities identified in the [subsequently withdrawn] FEIAR included Listing Notice 1 Activity 11. And in terms of GN 435, applications for environmental authorisation for substation and overhead electricity transmission and distribution infrastructure, when such facilities trigger *inter alia* activity 11 of Listing Notice 1, must use the generic EMPr for substation infrastructure for electricity transmission and distribution set out in Appendix 1 of the GN435 and the generic EMPr for overhead electricity transmission and distribution infrastructure set out in Appendix 2 of GN435. It is therefore a mandatory legal requirement.

41.

It is noted that the Appellant characterises its failure to comply with this mandatory requirement by referring to it as '*a minor administrative oversight, which process should never have the ability to derail a nationally important Strategic Integrated Project*'. The Respondents submit that a mandatory legal requirement cannot be characterised as a 'minor administrative oversight'. Furthermore, the Appellant simply makes the bald allegation that this oversight should never have the ability to derail a nationally important Strategic Integrated Project. No evidence, or legal argument for that matter, has been put before the Minister in this Appeal to substantiate this allegation.

42.

Furthermore, while section 47C empowers the Minister to extend, or condone a failure by a person to comply with, a period in terms of NEMA, the Competent Authority is correct that section 47C cannot be used to correct a flaw in the application for environmental authorisation.

43.

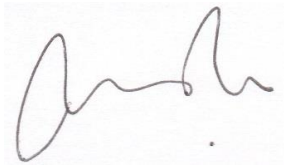
In the premises, the Respondents submit that the Competent Authority was correct in refusing the Appellant's request for condonation to belatedly submit a generic EMPr (after its application for environmental authorisation had already lapsed), and respectfully submit that the Minister should dismiss this ground of appeal.

44.

7. Relief Sought

For the reasons set out above, the Respondents respectfully submit that the appeal should be dismissed and that the lapsing of the application for environmental authorisation should be confirmed.

Date: 19th June 2023



Adrian Leonard Pole

Adrian Pole Attorneys

13 Quarry Road • Assagay • KwaZulu Natal • SA

P O Box 671 • Hillcrest • 3650

Mobile: 082 340 8534 | Email: adrian@adrianpole.co.za