

BEFORE THE PORTS REGULATOR OF SOUTH AFRICA

COMPLAINT NO: RC2018/02/0036

APPEAL NO: RA2018/08/15

In the matter between:

AVEDIA ENERGY (PTY) LTD

COMPLAINANT/APPLICANT

and

TRANSNET NATIONAL PORTS AUTHORITY

FIRST RESPONDENT

SUNRISE ENERGY (PTY) LTD

SECOND RESPONDENT

SALDEHCO (PTY) LTD

THIRD RESPONDENT

NATIONAL ENERGY REGULATOR

OF SOUTH AFRICA

FOURTH RESPONDENT

RECORD OF DECISION

INTRODUCTION

1. This matter commenced before the Ports Regulator on the 4th of August and thereafter proceeded on the 1st September 2020 to 5th September 2020, culminating with argument by each party on Saturday, 5th September 2020. Several witnesses were led by the parties in the advancement of their cases and such witnesses were cross-examined by the opposing party's legal counsel in terms of the directives issued by the Regulator for the conduct of the proceedings. Prior to the commencement of the hearing on the merits on 2nd September 2020 the TNPA and Sunrise had brought applications *in limine* challenging the *locus standi* of Avedia to proceed with the hearing as well as for the recusal of the Ports Regulator to preside over this matter due to what was termed as "*institutional bias*" on its part pursuant to the release of a Section 30(5) Report by a previous Regulator on the legality of the concession agreement entered into between the TNPA and Sunrise. These matters were heard on 4th August 2020, ruled on and a formal Record of Decision ("ROD") was delivered dismissing the challenges.
2. Each witness that testified before the Tribunal had prepared a witness statement which was introduced and accepted by the Tribunal as forming the basis of the relevant witness' evidence. Such statements formed part of the formal record of evidence and were sequenced by being afforded exhibit numbers. Each witness' legal representative was then allowed to adduce further evidence from each witness in support of its case. Fifteen minutes had been afforded for this purpose. Opposing Counsel was then afforded an hour to

cross-examine each witness. Thereafter, Counsel whose witness it was, was afforded the opportunity to re-examine the witness to clarify issues that may have arisen through cross-examination. The Regulator is satisfied that through this process procedural fairness was achieved. It is important to mention that no party complained about the procedure adopted by the Regulator, although a complaint had been made with regard to the time afforded in respect of some witnesses. The Regulator is however satisfied that each party was allowed some latitude in this regard.

3. In addition to the affidavits filed by the Parties in the complaint and the appeal we have considered the evidence in the prior court proceedings and the various statements provided to us in advance of the hearing.
4. At the hearing Avedia led the evidence of Atose Aguele, Claude Thackwray and Bernard Bruyere. The TNPA led the evidence of Vernal Jones, Quentin Kordom and David Kuhn. Sunrise led the evidence of Ravinash Papli, Bathlo Harmse, Owen Tavener-Smith, Dr. Lucian Burger and Pieter Coetzee.
5. The panel has considered all of the information and evidence made available to it and our Ruling is based on a careful consideration thereof. We were inundated with documents most of which contained repetitive information and detail to varying degrees. We have, however, carefully sifted through it and our conclusions are based on an analysis of all relevant information placed before us.

6. The Regulator wishes to thank all of the legal representatives who participated in the proceedings for their cooperation and assistance in ensuring that the proceedings proceeded as smoothly as possible and for the in-depth debates that assisted us in being able to arrive at our decision.
7. It is important to mention that though Saldehco and NERSA had been cited as parties to these proceedings they chose not to actively participate therein. Their legal representatives “watched” the proceedings throughout.

BACKGROUND

8. Avedia Energy (Pty) Ltd (“Avedia”) is the Complainant/Appellant in these proceedings before the Ports Regulator of South Africa (“PRSA”). The Transnet National Ports Authority (“TNPA”) is the First Respondent. Sunrise Energy (Pty) Ltd (“Sunrise”) is the Second Respondent. Saldehco (Pty) Ltd (“Saldehco”) is the Third Respondent and the National Energy Regulator of South Africa (“NERSA”) is the Fourth Respondent. As stated earlier Saldehco and NERSA chose not to actively participate in the hearing and chose, instead, to “watch” the proceedings. When the matter commenced there were five separate applications that Avedia had lodged with the Regulator. The first related to a complaint against the TNPA in terms of Section 47 of the National Ports Act, Act No. 12 of 2005 (“Ports Act”) registered under Case No: RC2018/02/0036 for failing to discharge its statutory mandate and its concomitant obligations under the Ports Act. The second related to an appeal against the TNPA’s decision taken on the 28th June 2018 refusing it permission to continue to offload bulk

LPG quayside from ship-to-truck pending its interconnection to the Sunrise pipeline. Avedia had previously been granted permission by the TNPA to offload bulk LPG at the General Maintenance Quay (“GMQ”). The appeal was registered under Case No: RA2018/08/15. Avedia lodged the appeal on the 7th August 2018 seeking a further extension of three months to the permission to offload bulk LPG quayside. The third, fourth and fifth matters related to interim relief being sought by it to offload quayside on the 23rd October 2018, the 20th December 2019 and the 20th March 2020.

9. At the commencement of these proceedings Avedia informed the Regulator that it was abandoning certain of its complainants and that it was persisting only with its appeal against the TNPA’s decision of the 28th June 2018 and it still sought permission to offload quayside until the interconnection to the Sunrise pipeline had been effected. Avedia estimated that it would take approximately six months for the interconnection to be completed if all parties cooperated in good faith to do so. The gravamen of the relief sought by Avedia was thus the following:

- 9.1. that the Regulator sets aside the TNPA’s decision of the 28th June 2018 refusing it permission to offload quayside pending the interconnection. Coupled to the issue of the interconnection was the issue of the transfer of the land from Sunrise to the TNPA;

- 9.2. that the TNPA is ordered to permit Avedia access to the Port of Saldanha for the purposes of offloading bulk LPG quayside from ship-to-truck pending interconnection to the Sunrise pipeline;
 - 9.3. that the aforementioned permission be granted for a period of six months as, in its estimation and based on the evidence of Mr. Atose Aguele, this would be a reasonable time frame to complete the interconnection and that Avedia be directed to commence all necessary works to give effect to the interconnection; and
 - 9.4. that the TNPA and Sunrise take all necessary steps to have the land described as "*Portion D*" in the concession agreement entered into between them in terms of Section 56 of the Ports Act transferred to the TNPA and that the Port of Saldanha is extended in its geographical jurisdiction to include Portion D.
10. The TNPA and Sunrise opposed the granting of this relief and the gravamen of their arguments were to the effect that Avedia had been the creator of its own misfortune by dragging its feet to effect the interconnection, that the relief it sought had been "*moot*" or that the relief sought could not be granted for various "*technical*" reasons which included issues like non-compliance with time frames to lodge appeals, mootness of the relief sought, and *lis pendens*. The Tribunal shall deal with this in greater detail below.

**THE LEGISLATIVE FRAMEWORK GOVERNING THE REGULATOR, THE TNPA
AND THESE PROCEEDINGS**

11. Various legislative frameworks governed these proceedings. They included the National Ports Act, 12 of 2005, the Port Rules dated the 6th March 2009, the Petroleum Pipelines Act, 60 of 2003, the Regulatory Principles of the Ports Regulator dated 6th August 2009 and the Directives of the Ports Regulator issued in terms of section 30(3) of the National Ports Act.

12. Section 29 of the Ports Act deals with the establishment of the Regulator as an independent ports regulatory body which is vested with legal personality. The functions of the Regulator are governed by Section 30. The main functions are listed as:
 - 12.1. the exercise of economic regulation of the ports system in line with government's strategic objectives;

 - 12.2. the promotion of equity of access to the ports as well as to the facilities and services provided within the ports; and

 - 12.3. the monitoring of the activities of the Ports Authority (the First Respondent) to ensure that it performs its functions in accordance with the Act.

13. The Regulator is also enjoined by Section 30(2) to hear appeals and complaints contemplated in Sections 46 and 47 of the Ports Act as well as to investigate

complaints contemplated in Section 48, to promote regulated competition within the ports as well as to regulate the provision of adequate, affordable and efficient port services and facilities.

14. Section 41 enjoins the Regulator to make decisions after pursuing a procedurally fair process wherein every affected party has been afforded the opportunity to submit their views. It is also obliged to give written reasons for its decision.
15. Section 46 deals with appeals. It stipulates that any port user or licensed operator whose rights are adversely affected by a decision of the TNPA may appeal against the decision to the Regulator and that after considering the appeal the Regulator shall confirm, set aside, vary or substitute the decision of the TNPA with its own.
16. Section 47 and 48 governs the manner and mechanism by which complaints against the TNPA are handled by the Regulator. It is important to note that Section 48(1) enjoins the Regulator to conclude its investigation “*as speedily as possible.*” Sections 49, 50 and 51 governs the manner in which hearings are conducted before it. Section 52 empowers the Regulator to determine its own procedure during a hearing having had due regard to the circumstances of the case.

17. Section 53 and 54 empowers the Regulator to grant interim orders, to interdict any conduct or action, to declare any agreement or portion thereof to be void or to condone any breach of its rules and procedures on good cause shown.

18. The Ports Act, in turn, cites as its objects:
 - 18.1. the promotion of the development of an effective and productive South African ports industry that is capable of contributing to the economic growth and development of our country;

 - 18.2. the establishment of appropriate arrangements to support the governance of ports;

 - 18.3. the promotion and improvement of efficiency and performance in the management and operation of ports;

 - 18.4. the enhancement of transparency in the management of ports; and

 - 18.5. the promotion of the development of an integrated regional production and distribution system in support of government's policies.

19. Section 10 directs that all ports in South Africa fall under the jurisdiction of the Authority. Section 11 regulates the functions of the Authority. Amid the vast array of functions listed in Section 11, the Regulator wishes to highlight the following functions for the purposes of this Ruling:

- 19.1. plan, provide, maintain and improve port infrastructure [s11(1)(a)];
- 19.2. maintain the sustainability of the ports and their surroundings [s11(1)(f)];
- 19.3. regulate and control navigation within port limits and the approaches to ports, regulate and control the entry of vessels into ports as well as their stay, movements or operations in and departures from ports, regulate and control the loading, offloading and storage of cargo, regulate and control the development of ports, regulate and control the enhancement of safety and security within the port limits [s11(1)(g)];
- 19.4. ensure that adequate, affordable and efficient port services and facilities are provided [s11(1)(h)];
- 19.5. exercise licensing and controlling functions in respect of port services and port facilities [s11(1)(i)];
- 19.6. ensure that any person who is required to render any port services and port facilities is able to provide those services and facilities efficiently [s11(1)(j)];
- 19.7. promote efficiency, reliability and economy on the part of the licensed operators in accordance with recognised international standards and public demand [s11(1)(k)];

- 19.8. promote the achievement of equality by measures designed to advance persons or categories of persons historically disadvantaged by unfair discrimination in the operation of facilities in the ports environment[s11(1)(l)];
 - 19.9. provide, control and maintain vessel traffic services [s11(1)(o)];
 - 19.10. promote the use, improvement and development of ports [s11(1)(p)]; and
 - 19.11. promote greater representivity, in particular to increase the participation in terminal port operations of historically disadvantaged persons [s11(1)(r)].
20. Section 11(2) enjoins the Authority:
- 20.1. to undertake any other activities within a port that encourages and facilitates the development of trade and commerce for the economic benefit and interest of the national economy [s11(2)(a)];
 - 20.2. provide any service, including a port service or the operation of a port facility, which is required for the safe, efficient and orderly operation or management of a port [s11(2)(c)]; and

- 20.3. perform such other functions as may be necessary in order to achieve the objects of this Act [s11(2)(d)].
21. Section 11(4) enjoins the Authority “*as an operator of last resort*” to “*do everything reasonably necessary for the effective and economic management, planning, control and operation of ports.*”
22. Section 12 deals with the aims of the Authority. Section 12(a) enjoins the Authority to “*conduct business in a manner designed to achieve the objects of this Act and which does not jeopardise the national interest.*” Section 12(c) enjoins the Authority “*to enable the port users to access the port system in the most efficient way possible.*” Section 12(d) enjoins the Authority to “*satisfy all reasonable demands for port services and facilities.*”
23. Section 12(e) enjoins the Authority to “*coordinate the general activities of the ports*” and Section 12(f) enjoins the Authority to “*ensure that orderly, efficient and reliable port services, including safe and secure cargo-storage and cargo-handling facilities, are provided to port users.*” Section 12(h) enjoins the Authority to “*promote and undertake the necessary measures to enhance safety and security of life and property in ports.*”
24. The Regulator has intentionally quoted from the Ports Act as the provisions are directly relevant to this matter. We highlight the powers, duties, obligations and expectations of the Authority designed to facilitate the effective management of Ports in the interest of the development of the economy and the greater public

interest. It is more than adequately empowered to do all things and to take all steps necessary to facilitate and improve port conditions for the benefit of a world-class economy. What the Authority seems to have missed in this instance is a realisation of its obligations entrusted to it in terms of the Ports Act. It appears, disturbingly so, to have adopted a supine or armchair position in respect of its duties, functions and obligations concerning this matter. The attitude of the Authority was underlined by the statement made by its witness, Mr. Quentin Kordom, when he stated under cross-examination when asked about the Authority's obligations towards Avedia that "*Enough has been done for this customer and it should now come to an end.*" This is a "customer" that had invested over R300 million into the South African economy and which had made common purpose with the South African government to develop the LPG framework for the country in general but for the Western Cape in particular. The Western Cape is constantly experiencing LPG shortages to the detriment of business operations and private sector interests.

25. Mr. Kordom's attitude was further reflected in the stance by the Authority when Avedia and Sunrise, at the instance of the Regulator, had attempted to find common ground in order to settle the dispute. The Authority deliberately chose to adopt a nonchalant disposition to the negotiations and chose to sit on the side lines with folded arms. Avedia and Sunrise were forced to abandon the negotiations because as the Regulator was told "*no prospects of a successful outcome could be achieved without the involvement of the Authority.*" This attitude of the Authority was reflected in the letter it wrote to the Regulator echoing this sentiment. This should not be the stance adopted by the Authority.

Its powers and obligations quoted extensively above from the Ports Act obliges it to work tirelessly and to do all things necessary for the enhancement and improvement of port activity and the South African economy. This will not happen if the Authority chooses to walk around the Port with its hands in its pockets and refuses to cover itself with grease and grime in the interests of a wider South African interest. It is imperative that a mindset shift is inculcated into the Authority in order for it to realise the objects of the Act and to align itself with Government's vision to grow the economy successfully. As a wise sage had uttered and reminded all of us that "*you cannot climb the ladder of success with your hands in your pocket.*" That is a recipe for disaster. This dispute between Avedia and Sunrise could easily have taken a different turn had the Authority acted as it was empowered to do. It could easily have sat down with the parties and directed a successful outcome to the benefit of all concerned.

THE MERITS

26. Sunrise was awarded a concession by the TNPA in June 2013 to construct, fund and operate a liquid petroleum gas ("LPG") facility in the Port of Saldanha through a procurement process under Section 56 of the Ports Act. Section 56 reads in part:

"56. (1) The Authority may enter into an agreement with any person in terms of which that person, for the period and in accordance with the terms and conditions of the agreement, is authorised to –

(a) design, construct, rehabilitate, develop, finance, maintain or operate a port terminal or port facility, or provide services relating thereto;

- (b) provide any other service within a port designated by the Authority for this purpose;**
- (c) perform any function necessary or ancillary to the matters referred to in paragraphs (a) and (b); or**
- (d) perform any combination of the functions referred to in paragraphs (a), (b) and (c).**
- (2) An agreement concluded in terms of this section must provide for the Authority to monitor and annually review performance with regard to the operation of the terminal or facility and the provision of the relevant services in terms of a performance standard specified in the agreement.**
- (3)**
- (4)**
- (5) An agreement contemplated in subsection (1) or (4) may only be entered into by the Authority in accordance with a procedure that is fair, equitable, transparent, competitive and cost-effective."**

27. Sunrise proceeded to apply to NERSA for licences to operate the LPG facility. Sunrise was to build a multi-buoy-mooring ("MBM") facility out at sea as well as a storage facility on a piece of land situated outside the Port limits. The MBM was to be connected to the storage facility by means of a pipeline which, in part, traversed the TNPA property. NERSA is the authority that grants licenses for such operations in terms of the Petroleum Pipelines Act, 60 of 2003 ("PPA"). Section 20(i)(j) and (k) thereof allow NERSA to update licence conditions allowing interconnections with the facilities of other licensees allowing for third party common-user access. Such was the licence granted to Sunrise.

28. Avedia is an importer and trader in LPG. It built a storage facility outside the Port of Saldanha and it appears to be common cause that an amount in excess of R300 million had been expended by it to construct the facility. Avedia had applied for and received various licences from NERSA to conduct its business. The gravamen of the conditions accompanying the licence was to the effect that Avedia would interconnect with the Sunrise pipeline and that, pending interconnection, it would be allowed to offload LPG quayside directly from ship-to-truck and then be allowed onward conveyance to its storage facility. It was always a licence condition that such quayside offloading would be temporary and that its “*temporariness*” was tied to the construction of the Sunrise pipeline as well as the interconnection by Avedia therewith or thereto to its facility.
29. This appears to be what caused the nub of the dispute between Avedia and Sunrise and the TNPA. For some strange reason Sunrise had been seized with the notion that its Section 56 agreement with the TNPA had afforded it an exclusive concession in respect of LPG import and storage in the Port of Saldanha and that it was not obliged to afford third party interconnection. It said as much when, in September 2017, it objected to Avedia’s application to NERSA for an amendment to its licence conditions relating to its storage facility. NERSA dismissed Sunrise’s objection by stating that Sunrise’s position promoted a monopoly in respect of LPG importation and that NERSA was averse thereto and that it was obliged to promote competition. In acting as it did NERSA stated that it was “*enhancing the security of the supply of LPG into the country in general and in the Western Cape in particular.*”¹

¹ See Page 151 of the Core Bundle.

30. Avedia was allowed to offload LPG from ship-to-truck until the Sunrise facility had been constructed and commissioned. Several such shipments were offloaded by Avedia with the requisite permission and management by the TNPA. These shipments were allowed to be offloaded at the GMQ. During June 2018 Avedia applied to the TNPA to offload an LPG shipment quayside. The TNPA wrote a letter to Avedia dated 28th June 2018 informing it of its decision not to allow it to continue to offload quayside for various reasons. It must be pointed out that this decision appears to have been linked to the completed and commissioned Sunrise facility. It did not take cognizance of the fact that Avedia had not yet connected to the Sunrise facility and that its licence condition from NERSA had afforded it that right. It is this decision of the 28th June 2018 that forms the foundation of the appeal before the Regulator. The TNPA had, in its letter of the 28th June 2018, given Avedia two reasons for not allowing it further permissions to offload quayside. The first was that the GMQ was no longer available and the second was that Avedia had been dragging its heels in order to effect interconnection to the Sunrise pipeline.
31. However, as the appeal process unfolded the TNPA seemed to introduce and rely heavily on the aspect of risk as its motivation not to allow quayside offloading. This appears to have been the main thrust of its challenge during these proceedings and much was made and said by its witnesses at the hearing about risk and dangers inherent in quayside offloading of LPG which, it contended, was a very volatile and highly inflammable substance capable of ignition and explosion with catastrophic outcomes. We accept that the mobile loading facility is not the optimal method for the off-loading of LPG, but believe that the aspect of risk and danger has been exaggerated. Significantly safety

was not cited as one of the reasons given for the refusal by the TNPA in its decision refusing the extension of the authorisation to off-load LPG from ship to truck on 28 June 2020. We will deal with this issue later in this ROD.

32. In the proceedings before us it was submitted that Avedia's claims or relief sought should be dismissed by the Regulator on a plethora of grounds. The TNPA's Counsel listed no less than twelve of these. These had dovetailed with those of Sunrise in opposing the relief sought by Avedia. The TNPA mentioned the following salient objections:

32.1. the interim relief applications;

32.2. Avedia's application for condonation for the late lodging of its complaint and appeal;

32.3. the appeal is moot and otherwise incompetent;

32.4. the complaint and its expansion;

32.5. Avedia's right to offload at the berth in terms of its mobile offloading

32.6. the Sunrise facility falls outside the scope of Avedia's NERSA licence, and beyond the borders of the port, and is not access to the port;

32.7. Avedia's obligation to interconnect;

32.8. Avedia's tariff dispute with Sunrise;

32.9. the contractual obligation on Sunrise to transfer the land;

- 32.10. Sunrise's concession and terminal are invalid, and linked thereto the admissibility of the two reports, the SKX report and the PRSA's Section 30(5) report;
 - 32.11. an alternative berth to the GMQ; and
 - 32.12. safety issues relating to quayside offloading of LPG.
33. Having regard to Avedia informing the Regulator that it was abandoning certain aspects of its relief sought what, to our minds, remained alive as issues for determination by the Regulator were:
- 33.1. condonation for the late lodging of its complaint and appeal;
 - 33.2. the appeal being moot and otherwise incompetent;
 - 33.3. Avedia's right to offload at the berth in terms of its mobile offloading licence;
 - 33.4. the Sunrise facility falls outside the scope of Avedia's NERSA licence, and is not accessible to the port;
 - 33.5. Avedia's obligation to interconnect;
 - 33.6. the contractual obligation on Sunrise to transfer the land;
 - 33.7. an alternative berth to the GMQ; and
 - 33.8. safety issues relating to quayside offloading of LPG.

34. Most of the aforementioned live issues can be comfortably and competently intertwined with others resulting in not more than four or five main issues for the Regulator to consider. These are:
- 34.1. condonation;
 - 34.2. the mootness or otherwise of the appeal and its competence;
 - 34.3. the failure of Avedia to interconnect;
 - 34.4. the contractual obligation on Sunrise to transfer the land;
 - 34.5. Avedia's right to offload quayside pending interconnection at a berth other than the GMQ and the safety issues connected or related thereto.
35. In respect of the contractual obligation on Sunrise to transfer the land the Regulator was informed that Sunrise had no reservations about transferring the land and that the said transfer "*was imminent.*" Avedia's Counsel accepted this assurance and informed the Regulator that it would not be tied to this issue any further having regard to the assurances given. The Regulator accepts such assurances, but believes that the transfer should be effected sooner rather than later in the interests of finality and certainty.

Condonation

36. It is common cause that Avedia's appeal had been filed late. Avedia has, as stated earlier, appealed against the decision of the TNPA in its letter dated 28th June 2018 refusing it further permission to offload quayside. Avedia lodged its

appeal against this decision on the 7th August 2018. Directive 8(1) requires that a port user who wishes to appeal against a decision of the Authority must do so within fifteen days after receiving the written decision.

37. In its affidavit before the Regulator Avedia sought condonation for the late filing of its notice of intention to appeal and submitted reasons for such late filing. Section 54(1)(b) of the Ports Act empowers the Regulator to “*condone any breach of its rules and procedures on good cause shown.*” Before such condonation is granted all that the Regulator needs to do is to assess the reasonableness of the explanations given for the failure to timeously lodge the appeal. Section 19 of the Directives issued in terms of Section 30(3) of the Ports Act dated 6th August 2009 reiterated this power of the Regulator to grant condonation. The Regulator is mindful of the objective standard required by our Courts to grant condonation. We are, however, alive to the fact that the standard required of the Regulator is less stringent than that of a Court of Law. This contention finds support in Section 16(e) of the Directives which enjoins the Regulator to conduct the hearing with “*a minimum of legal formalities.*” In considering whether or not to grant condonation the Regulator has taken into account a number of factors including, but not limited to, the degree of non-compliance, the reasons given for the non-compliance, the prospects of success on appeal, the importance of the matter, the impact of the decision appealed against on the Appellant, the public at large and the economies of the Western Cape and South Africa, the respective prejudice to the parties affected by the grant of condonation, the convenience of the Panel as well as the impact of the decision appealed against on the functions of the Port of Saldanha as well as the alignment with the objects of the Ports Act.

38. The appeal was approximately fifteen working days late. In our view the delay is not significant, having regard to the reasons afforded by the Appellant. There are significant issues that arise in these proceedings and to non-suit a party for an insignificant delay would not be in the interests of justice or the proper administration of the Ports. Insofar as this appeal is concerned the Regulator places much store on the explanation given by Avedia that at the time the parties had been preoccupied with an urgent High Court application which required its full and undivided attention.
39. We accept that in not granting the condonation, Avedia would suffer substantial prejudice especially of a financial nature. Avedia has, as mentioned above, invested in excess of R300million in the development of its LPG storage facility. The LPG users in the Western Cape would also suffer substantial prejudice. The impasse between the parties has had an obvious negative ripple-effect on the supply of LPG in the Western Cape as well as on the price of the commodity. The Regulator was informed that the price of LPG is amongst the highest in the world. We have no reason to doubt this assertion. It is, therefore, in the public interest not to refuse condonation. The Authority and Sunrise have not demonstrated any prejudice that they would suffer. More importantly, the Regulator has drawn the inescapable inference that by not raising the issue of condonation as a point *in limine* in the hearings as it did other issues the Authority had not placed any significant store on this issue. If it had it would have raised it at the commencement of the proceedings. Instead it simply glossed over it as an issue during argument leading us to believe that it did not have faith in the substance of the submission. We thus find that Avedia has provided sufficient reasonable grounds to allow the Regulator to conclude that

it is in the interests of justice to grant condonation for the late filing of the appeal.
Condonation is thus granted.

Mootness of the Appeal

40. The TNPA and Sunrise contend that the appeal is moot because the relief sought in the appeal was for a three month's extension commencing on the 1st July 2018. The extension would thus have lapsed on the 1st October 2018. For that reason they contend that the appeal can no longer have legs. Above and beyond this the TNPA and Sunrise contend that the appeal is "*incompetent*" because "*no decision*" had been taken by the TNPA and, as such there was no competent appeal before the Regulator. Avedia's response to this argument is that the three months extension must run from the date of the Regulator's ruling on the appeal. It had not been anticipated that the appeal process would drag out for such a long period of time. Avedia contends that this outcome would have a practical effect. The Regulator agrees with Avedia on this point and finds that for as long as the appeal stands to be decided upon it remains "*alive*" and is not "*moot*."
41. Furthermore, the contention that the appeal is "*incompetent*" because no decision had been made by the TNPA which qualified to be appealed against is without foundation. On the 28th June 2018 the TNPA took a decision refusing Avedia any further permissions to offload LPG quayside directly from ship-to-truck and communicated this decision in writing to Avedia. This was even before Avedia could interconnect with the Sunrise pipeline as required by its licence to do thus impacting on Avedia's rights to conduct business in terms of its valid

licence conditions. We find that the decision taken by the TNPA on the 28th June 2018 was a decision capable of being appealed against by Avedia. Section 46(1) of the Ports Act stipulates that *“any ports user or licensed operator whose rights are adversely affected by a decision of the Authority may appeal against that decision to the Regulator in the manner directed under Section 30(3).”* *“Decision”* must be given its widest meaning possible. There is no rational basis for giving it a restrictive formalistic meaning in the context of a curial decision. Avedia is a *“port user”* and a *“licensed operator.”* The decision taken by the TNPA *“adversely affected its rights”* both in terms of its licence and its ability to conduct business. The appeal is thus competent and not moot in our finding.

Avedia’s Alleged Failure to Interconnect

42. Avedia’s alleged failure to interconnect with the Sunrise pipeline was one of the reasons given by the TNPA in its letter of the 28th June 2018 refusing Avedia further permission to offload quayside. The papers are replete with complaints and counter-complaints made by the parties concerning the delay in effecting interconnection. In the Panel’s view it serves little purpose to traverse these complaints in this decision, save to state that all parties must, to some extent, bear some of the blame for the failure to interconnect to date and none of the parties can usurp the moral high ground for themselves. For example, each party seemed to believe that the other should have identified the interconnection point. In the Panel’s view the identification of the interconnection point required cooperation from each party. The interconnection would take place on TNPA land and the TNPA would have to provide the right of access/wayleaves for the

Avedia pipeline. The pipeline belonged to Sunrise and it had the right to be consulted on where the interconnection should take place. In this regard we believe Mr. Coetzee was disingenuous when he suggested that the location of the interconnection point was solely within the TNPA's purview. Similarly, Avedia was a role-player in this decision-making process given that it would need to effect the interconnection and undertake the works.

43. The Regulator is not able to decide if Avedia initially provided inadequate working plans and diagrams for the interconnection. Certainly by 2015 the interconnection had been designed to a sufficient standard to satisfy Mr. Bruyere, the representative of DEC (SA). Mr. Bruyere reviewed the documents and proposed a form of interconnection which he states would have satisfied the necessary international standards. His design was not accepted by Sunrise, who he states was *"not negotiable at all"*. The Regulator is not able to decide if Sunrise was being obstructive and unreasonable in its demands with regard to the interconnection works, and unreasonably required *"Rolls Royce"* standards. However we did take cognisance of the fact that Mr. Bruyere was a relatively independent expert and had broader experience of other countries. He also pointed out that as the pipeline is now buried underground the interconnection is technically far more complicated. We accept that it was Sunrise's facility and it was entitled to determine the interconnection standards that should apply, and that it is preferable to bury such pipelines for various reasons, including safety, as testified on behalf of Sunrise. It was, however, obligated to permit the interconnection with the pipeline, as its licence conditions required. However, the poor relationship between the parties at the time the construction was

underway meant that Avedia was not properly consulted with regard to the interconnection and interconnection has become more complicated.

44. The general contention on the part of the TNPA and Sunrise was to the effect that Avedia created its own misfortune by refusing or delaying interconnection with the Sunrise pipeline, and that its real intention was to continue to offload LPG quayside in order to gain an economic advantage. In our view this is not supported by an analysis of the facts.
45. Avedia holds a number of licences issued to it by NERSA to operate an LPG storage facility, to construct an LPG pipeline as well as to operate a mobile LPG loading facility quayside to offload LPG directly from ship-to-truck. This latter licence is worded in part as follows at Paragraph 6 thereof:

“This method will be utilised as an interim measure until construction of the Sunrise loading facility and its axillary pipeline, as well as the Avedia interconnection to the same, has been completed and commissioned.”

46. The wording of this condition is clear and unambiguous. Avedia was afforded the right to offload quayside until the occurrence of two events. The first was the construction of the Sunrise loading facility and its auxiliary pipeline and the second was the Avedia interconnection to Sunrise’s pipeline having been completed and commissioned. After the completion of the Sunrise loading facility and the auxiliary pipelines but before Avedia could complete its own pipeline construction and interconnection to the Sunrise pipeline the TNPA issued its decision contained in the letter of the 28th June 2018. This decision was clearly in violation of Avedia’s licence conditions and appears to have been

designed solely to compel Avedia to utilise Sunrise's storage facility at rates that were not economic for Avedia given its different business model. The reason of alleged failure to interconnect was thus clearly contrived by the TNPA to give a measure of credence to its decision not to allow further quayside offloading to Avedia by ascribing sole blame to it for failing to effect the interconnection. The Regulator rejects this contention and finds that blame can be readily spread across the board and holds all three parties culpable for the failure to interconnect with the greater apportionment of blame being made to lie at the doorstep of the TNPA and Sunrise for various reasons.

47. Firstly, at the time the TNPA took the decision of the 28th June 2018 it had not approved the wayleave to allow Avedia to build its pipeline. We are cognizant of the fact that Avedia could not commence with the construction of its pipeline without this wayleave being signed off. Documentation comprising emails expressing concern for this delay on the part of Avedia populate the bundles before us. Avedia was only given this wayleave during the latter part of 2018. The Safety Health and Environment Site Access Certificate No. 1 (which is marked as DK12) was only signed and dated the 30th November 2018. It is not clear when Avedia received the signed copy. What is significant to mention, though, is that this period is known to be an extremely difficult one for construction activity in South Africa. Most companies are preparing to shut shop for the Christmas holidays and it is extremely difficult to obtain effective and efficient services during the time. One would expect that the requirements listed in this certificate could only be obtained by Avedia towards the end of January 2019 or the beginning of February 2019 as most industries only get back to full stream *circa* the middle of January. This is important to highlight because the

requirements listed in the Certificate are extensive, cumbersome and varied. The contract scope included *“the construction of the LPG pipeline which included surveying, setting out, excavating, placement of pipeline, welding, backfilling, support services and all associated required civil works.”* It is clear from these requirements listed in the Certificate that this work could only be completed in the latter part of 2019. Minutes of meetings highlighted during the hearing showed objectively that even towards the end of 2019 the three parties were still haggling about technical issues required for approval pre-construction.

48. More importantly, Sunrise completed the construction of the pipeline from the sea to its facility and proceeded to bury it without permitting the interconnection as required by its operating licence. The TNPA must have been party to this ploy and consented to it because it is extremely difficult to fathom why it would have failed to ensure that Sunrise carried out its obligations to build the interconnection point for Avedia and other third-party users. This omission is so blatant that it defies common sense. This occurred shortly after the Durban High Court had reminded Sunrise that it was obliged to build an interconnection point for Avedia and other third-party users. More importantly, the TNPA was aware and alive to the fact that this interconnection point was to be built on land owned by it but did nothing to police or enforce its fabrication. There are many other instances that can be highlighted to demonstrate culpability on the part of the TNPA and Sunrise and not just Avedia. One that jumps out at one is the appointment of Mr. Bernard Bruyere of the Belgian entity DEC as the independent expert agreed upon by all three parties to find a solution to the interconnection impasse. Avedia paid for the services of DEC. But what transpired after Mr. Bernard Bruyere produced his report is both startling and

disturbing. Sunrise rejected his report as introducing a *“third solution.”* Sunrise allegedly expected DEC to examine the two models proposed and to decide on which one as the more appropriate one. This was far from the truth. All three parties signed off on the mandate afforded to DEC and were obliged to accept its outcomes. Sunrise chose not to. And the TNPA sat back and did nothing to enforce the findings. It did nothing to persuade Sunrise to accept the report and to implement it. DEC and Mr. Bernard Bruyere had been contracted by all three parties to find a solution. To reject its outcomes because it did not suit Sunrise smacks of hypocrisy and disturbing dilatory behaviour. Avedia on the other hand, though being remiss in other instances, had demonstrated an urgency to interconnect. This urgency had been frustrated by Sunrise as the *“owner of the pipeline”* and by the TNPA as the enforcement agency. Avedia had secured all of the requisite piping at a cost of about R10million, had procured all the valves required for the construction of the pipeline and the interconnection, had procured professional services at great cost, had completed excavation works and had laid a portion of the pipeline, procured and paid for EIA reports and approvals, engaged Civils 2000 to trench the pipeline right up to the commencement of the TNPA land. It had also sought and obtained the necessary approvals from the Roads Department, the Local Municipality, proceeded to initiate the HAZOP study, etcetera, etcetera.

49. It is thus disingenuous for the TNPA and Sunrise to blame Avedia for the failure to interconnect. We find that the TNPA and Sunrise had ganged up on Avedia to make it virtually impossible for it to effect interconnection. The contention that the blame for failing to interconnect should be laid solely at Avedia’s door is rejected.

50. It seems to us that the prior litigation between the parties soured the relationship. It also appeared to us that each party sought to gain from the delayed interconnection. In the Panel's view all three parties had been obstructive and in one way or another sought to benefit from the failure to interconnect. Avedia has not been helped by the lengthy period between the lodging of the complaint and appeal and the determination thereof.
51. We prefer to look forward and note that the parties have made progress with the designs and plans for the interconnection.
52. It was evident in these proceedings that Avedia is in a financially precarious position. The interim solution offered by Sunrise is not suitable as, we were informed, it would substantially increase Avedia's operating costs. Avedia has explained the substantial investment that it has made and the loss that it would suffer if it is required to use the facility offered by Sunrise in the interim pending interconnection. Its evidence is that it would incur substantial losses and have to close. In so doing it would lose costs already invested in plant and equipment. For these reasons we believe that Avedia should be given one further interim authority to offload on a temporary basis at the quay side in order to complete the interconnection. This should not be construed as an open-ended authority afforded to Avedia. It must urgently take all the necessary steps to ensure that the interconnection is effected within the interim period afforded to it. Similarly the other parties must cooperate with Avedia to ensure that the interconnection is effected. It goes without saying that during the interim period Avedia must comply with all applicable regulatory and safety standards and directions.

53. On 23rd January 2020 NERSA granted Avedia an amendment to its licence for the construction of its liquefied petroleum gas pipeline in Saldanha. It approved the change in the internal diameter of the LPG pipeline from 200mm to 250mm. It also granted Avedia an extension from the initial 62 months to 86 months to complete the construction of the pipeline. In our calculation this extension extends until the end of September 2021 for Avedia to complete the construction of its interconnecting pipeline. It would be foolhardy of the Regulator not to align itself with the proactivity displayed by NERSA to assist Avedia to surmount its hurdles. It goes without saying that this action taken by NERSA has been taken in the interests of the South African economy as well as the interests of the general public of the Western Cape and the commercial users of LPG in the Province. It is also a decision that appears to be taken in the general interest of the LPG industry in South Africa. It behoves the TNPA to do likewise and align itself with the thinking evinced by NERSA. To this end we cannot over-emphasise the need for the TNPA to work closely with NERSA to ensure that all stumbling blocks relating to the completion of the Avedia interconnection and its storage facility are turned into stepping stones.

The Contractual Obligation to Transfer the Land

54. As stated above the complaint is limited to Sunrise's failure to transfer the immovable property to the TNPA. This is not as strongly expressed as the original complaint which argued that as no active steps had been taken to comply with the concession agreement insofar as the transfer of land was concerned the concession agreement lapsed. However the essence of the complaint remains – no active steps have been taken to comply with the

concession agreement insofar as the transfer of land. The concession agreement provided that an agreement was to be concluded for the transfer of land. On termination of the agreement Sunrise would vacate and hand back the terminal to the Authority. This is especially important in that the land in question is currently located outside of the port area and, we were advised, would in due course be incorporated into the port area.

55. Mr. Coetzee (on behalf of Sunrise) gave evidence that a land sale agreement has been concluded but that transfer of the land has not yet taken place. His statement was that the land sale agreement does not stipulate the date by which transfer was to take place. He explained that in the context of challenges to the concession agreement and what he believed to be irregular actions the transfer of the land was *“held in abeyance”*. The TNPA has stated that there is a valid agreement in terms of which Sunrise is obliged to transfer the land, Sunrise has not refused to transfer the land and (we are told) *“the process for the transfer of the land is being attended to, and Sunrise intends to transfer the land to the Authority”*. We accept the TNPA’s assurances in this regard. However in the Panel’s view there is merit in the concern that the transfer of the land has not yet taken place. The Panel does not agree with the submission in Sunrise’s Heads of Argument that Avedia has not established that its rights or interests will be affected by the failure to transfer the land and that Avedia has not established that the TNPA has failed to carry out its statutory obligations. Avedia is being required to interconnect to a pipeline that leads to a facility intended to be within the port. It has an interest in that the interconnection will connect with a pipeline that leads to a facility not yet within the port, but intended to be within the port. The failure to effect the transfer goes to the TNPA’s functions and

obligations under the Port Act. The Section 56 Agreement relates to port services and port facilities, the management and administration of which form part of the functions of the Authority under Section 11 of the Ports Act. The complaint deals with the performance of obligations under the agreement, which obligations are important for the management of Ports and for port users. In failing to ensure that the transfer of the land was effected timeously it is the Panel's view that the TNPA failed to carry out its functions. The concession agreement was the outcome of administrative action on the part of the TNPA to secure port services and port facilities. It was at all times intended that the land on which the facility was constructed would be transferred to the TNPA, incorporated into the area of the port and ultimately be restored to the TNPA when the terminal was restored to the TNPA at the end of the operational period.

56. To the extent that no specific time period was provided this should have occurred within a reasonable period. In the Panel's view the concession agreement was concluded in June 2013. We understand that the facility was fully operational from 2016. In the Panel's view the failure to do so within a reasonable time constitutes a failure by the TNPA of its functions under Section 11 of the Ports Act. For these reasons the complaint is upheld but only to the extent that the TNPA has failed to ensure that the transfer of the land was timeously effected. We accordingly intend to order that the TNPA and Sunrise ensure that the land in question is transferred to the TNPA as soon as is reasonably possible. There can be no prejudice in this regard in that the Regulator has been assured that there is a valid contract for the transfer of land and that the transfer of the land "*is imminent.*"

The Non-Availability of the GMQ and Other Berthing Facilities to Allow Avedia to Offload Quayside

57. The non-availability of the GMQ to Avedia for offloading quayside was the second reason given by the TNPA in its letter of the 28th June 2018. Avedia had previously been given permission by the TNPA to offload quayside using the GMQ. However, as stated by it, this berth was no longer available because it had been handed over to Saldehco which was the new concessionaire in terms of an agreement entered into between it and the TNPA. For this reason, so the argument went, the TNPA was no longer able to accommodate any of Avedia's requests to offload quayside as no berths were available for this any longer within the Port of Saldanha.
58. Two things need to be mentioned at this point. The first is that despite the letter of the 28th June 2018 the TNPA continued on no less than 3 occasions to allow Avedia to offload LPG quayside directly from ship-to-truck. The second is that Saldehco had entered into a lease agreement with Avedia to use the GMQ to offload quayside when it was feasible to do so. The TNPA immediately challenged Saldehco as being in breach of its concession agreement and forced it to withdraw or cancel its agreement with Avedia. This clearly demonstrates the *mala fides* around the Avedia issue on the part of the TNPA. More importantly, however, it demonstrates that, with an equal playing field, the GMQ could be made available to Avedia to offload quayside if pure commercial interests were allowed to drive or dictate processes within the Port.

59. The inexplicable hostile standoff adopted by the TNPA towards Avedia is further mirrored in its letter on the 2nd September 2020 sent by its Attorneys to the Regulator and which was clearly intended to pour cold water on the settlement negotiations urged by us throughout the proceedings. The TNPA reiterated steadfastly that no berths were available (or maybe, would be made available) for Avedia to offload quayside pending interconnection. This cannot be so. If it is so then it can only be as a result of poor or uninspired port management. One of the core functions or duties of the TNPA in terms of the Ports Act is to manage ship movements into the Port of Saldanha. This is referred to above. It cannot be said that every berthing space within the port is occupied around the clock. With proper and intelligent ship scheduling within the port ample opportunity could be created for Avedia to offload two or three shipments of LPG per month within the port of Saldanha pending interconnection.
60. The Port of Saldanha is known as a “*common-user*” port. This being so, its operations are driven largely by the principle of “*first come, first served.*” Scheduling plays comfortably into this principle and creates the basis for orderly management of port usage and operations. The Multi-Purpose Terminal (“MPT”) is also available for this purpose, as can be gleaned from Mr. Thackwray’s witness statement. The MPT has been used to offload LPG quayside since about 2011 and has been used recently to allow Avedia to do so. The TNPA states that this terminal is no longer available as it has been leased out to Transnet Port Terminals for it to conduct its own business. We were informed that it is acceptable business practice within the Port or Transnet Port Terminals to sublet its facility for a pre-ordained period to another port user for a fee. This is another solution. But the TNPA refuses to entertain it. We also

heard during the testimony of Mr. Jones that Berth 201 is not always occupied and conceded that it was open for a substantial period as we write this ruling. This would be more than adequate time to offload a shipment of LPG. We thus do not accept the blanket assertion made by the TNPA that “*no berths are available*” within the Port of Saldanha to offload quayside. We find that this assertion is motivated by an undisclosed malicious agenda designed to frustrate Avedia in its beneficial access to the port. The TNPA is clearly not working in the interests of a common South Africa agenda to enhance the economy but seems to have wittingly or unwittingly allowed itself to take sides in the acrimonious or vitriolic relationship between Avedia and Sunrise. If it has done so, then it is clearly in breach of its statutory mandate to serve the broader interests of our country and not the narrow ones of a port user fearful of open competition.

Risk and Safety Concerns

61. The TNPA has, as an afterthought, woven the narrative of risk and safety concerns, into its decision of the 28th June 2018. This aspect has been elevated to the status of an intolerable bogeyman by the TNPA and Sunrise. All of their witnesses before the Tribunal have latched onto this aspect and paraded it as a unified narrative in an endeavour to convince us that it is a plausible reason not to allow quayside offloading of LPG. We reject this narrative as being unnecessarily exaggerated and self-serving.
62. Firstly, we accept that there is an inherent risk and safety concern in offloading LPG quayside. This risk and safety concern is ever-present when doing so even

at the MBM because of the fact that LPG is a volatile and temperamental substance capable of ignition and explosion if not handled with due care and diligence. We were drawn to the Beirut disaster by the parties and told that this may be a possible outcome within the Port of Saldanha should Avedia be allowed to offload quayside. As previously stated, we believe this is exaggerated and the safety risks were not sufficient to prevent prior authorisations granted to Avedia and other parties. In any event, we are of the view that the safety risks can be managed, as previously done. We also wish to point out that ports are deemed to be “*hazardous zones*.” Every activity carried out within the confines of the port carry with it a measure of risk and is accompanied by the concomitant safety concerns. This would include the docking of ships, the tugboat operations, the utilisation of quayside cranes, the offloading of containerised LPG, the driving of a vehicle quayside, the smoking of a cigarette, the offloading of heavy-duty cargo, etcetera, etcetera.

63. What is required in each and every instance is the necessary care and skill to be aware of such risks and safety concerns and, more importantly, for the TNPA to be adequately prepared to manage and mitigate every situation that may occur. The same situation existed when the TNPA allowed Avedia (and others) to off load using the same method.
64. We do not minimise the safety risks, but believe they can be managed. For the TNPA to sit back and simply tell the Regulator that it would not be prepared for an unexpected LPG explosion within the port is unacceptable and is tantamount to a dereliction of duty. It is the statutory obligation for the TNPA to be reasonably prepared to handle even the most serious eventuality within the port

and must have a safety management plan to do so. It is enjoined by the Ports Act to do so.

65. We find that offloading of LPG provides no higher risk than any other port activity. We have been informed by witnesses that more than 80 shipments of LPG have been delivered quayside in Saldanha. There appears to have been a single common cause incident involving a truck with a faulty hose. This faulty hose was detected outside the port precincts. We were also told about the risk inherent in the use of an ageing rig to offload LPG. This very same rig has been repeatedly used by all the parties (and others) both at Saldanha and in the Cape Town harbour.
66. What we find highly troubling is the attempt by the TNPA to use the issue of risk as a major concern for its decision to prohibit quayside offloading of LPG when, as late as in May 2018, it was espousing the narrative that it was safe to offload LPG quayside, that the activity did not compromise the safety of the port and that there had not been any unfavourable incidents in the past connected to this activity. This narrative is contained in broad-brushed strokes in two letters written by the TNPA dated the 22nd November 2017 and the 14th May 2018 and which letters found their way into the witness statement of Mr. Jones. What makes the TNPA suddenly adopt a diametrically opposed position on risk and safety? It did not attempt to explain this contradiction. We must, therefore, accept that it represents the official TNPA position on risk and safety inherent in the quayside offloading of LPG and that its latest stance before the Regulator is contrived in order to support its defeatist position taken against Avedia and echoed by Mr. Quentin Kordom as reflected above.

67. The Regulator accepts that the “ship to truck” method is not optimal, but we were concerned that the risks were overstated for the purposes of these proceedings, particularly against the background of the prior authorisations granted to Avedia and to the other parties referred to in the evidence. Mr Kordom (the TNPA’s Safety Health and Environmental Manager) was inflexible in his evidence and evasive in cross-examination and reluctant to admit that Avedia had in the past arranged for a safety and fire team in certain instances and that future off-loading could be addressed on that basis as and when required.
68. We are gravely concerned about the stance adopted by the TNPA both in these proceedings and at the Port of Saldanha in particular. It appears to have reduced itself to a miniscule player that would readily mulct itself in the dust of the competitive arena created by port users instead of rising above these disputes and managing the port in keeping with its lofty mandate to represent the interests of the South African Government, its economic agenda and the interests of the wider public interest. We hope that this ruling would evince a re-awakening and a re-alignment within the organisation in the interests of a prosperous South Africa.

COSTS

69. Avedia has submitted that the Regulator should order that the TNPA and Sunrise pays the costs of the proceedings before us jointly and severally including the cost of Counsel.

70. We have considered Avedia's submissions and find that it would not be inappropriate to make a costs order against the TNPA in this instance. Compelling circumstances exist for us to do so.
71. We have mentioned throughout this Ruling how the TNPA has abdicated its statutory responsibility to manage and secure the port. We have been critical of its inability or reluctance to manage the dispute between Avedia and Sunrise effectively. Had it done so, these proceedings would not have been required. Rather than to find a solution to the impasse the TNPA chose rather to flex its muscles by challenging the authority of the Regulator by seeking its recusal.
72. This conduct was unfathomable in the context of the statutory regime within which both entities are supposed to perform. Both are creatures of the Ports Act. The Legislature has seen the need for both to exist and interact in order to further the objectives of best practices within the ports in support of Government's vision for a growing economy.
73. Instead, the TNPA has sought to pit itself against the Regulator in a manner that serves to defeat this objective. A week was wasted in these proceedings just in the determination of the recusal application and the *locus standi* challenge. A further week had to be added to these proceedings.
74. Disturbingly, most of the witnesses called by it and Sunrise occupied us with the issues around risk and safety. What the TNPA lost sight of was the fact that it is enjoined by the Ports Act to ensure that risk is minimised and that the port

remains a safe environment whilst continuing to allow those activities that are designed to advance the economy. The importation and availability of LPG in the country is one such activity.

75. It is disturbing, indeed, to have heard the views expressed by Mr. Jones and Mr. Kordom both on safety and risk within the port as well as their views relating to the Regulator. What one read between the lines of their testimony was that they were omnipotent within the precincts of the port and could do as they pleased, even if this was clearly detrimental to efficient port management and the advancement of Government's objectives. This cannot be so. The TNPA's attitude demonstrated a clear dereliction of duty in our view.
76. When the proceedings commenced in the second week the Regulator repeatedly requested the parties to make every effort to attempt to settle the dispute. Avedia and Sunrise attempted to grasp the nettle but returned and informed the Panel that all their efforts would be in vain because the TNPA has elected not to participate in the settlement talks. Once again, it chose a supine, armchair approach, despite the Panel's requests.
77. It thereafter caused a letter to be written to the Panel reiterating its position not to participate in attempting to settle the dispute. It was its responsibility to do so. Section 11(4) of the Ports Act referred to earlier in this Ruling states that *"the Authority as an operator of last resort must do everything reasonably necessary for the effective and economic management, planning, control and operation of ports."* (our underlining).

78. It was more than “*reasonably necessary*” for the TNPA to attempt to settle the dispute between Avedia and Sunrise, even at the eleventh hour. It chose not to. Its conduct appears more to have been directed towards the Regulator’s persistent requests for the parties to settle the dispute. It did not wish to be seen to be helpful.
79. Had it done so we believe that the prospects of settling the dispute early in these proceedings was a real possibility, given the attitude displayed by Avedia and Sunrise.
80. This attitude displayed by the TNPA throughout these proceedings warrants, in our unanimous view, that it be visited with a costs order. We find that an appropriate costs order may also serve as a wake-up call to the TNPA to begin to take seriously its mandate as extensively laid out in the Ports Act. Not to do so would have the inevitable consequence of the destruction or emaciation of our ports as the chief economic driver of our country’s vision for a better and prosperous economy.
81. The TNPA is accordingly ordered to pay 50 percent of the costs occasioned by this hearing limited to the days on which the matter had been set down for hearing. Such costs are to include the costs of Counsel. We make no order as to costs against Avedia and Sunrise.

THE RULING

Having said that, we make the following Ruling:

1. That the late lodging of the complaint and appeal by the Complainant/Appellant (“Avedia”) are hereby condoned;
2. That Avedia’s appeal against the decision of the First Respondent (“TNPA”) refusing Avedia’s request for an extension of the LPG offloading authorisation, as contained in the TNPA’s letter dated 28th June 2018, is upheld;
3. That the TNPA grants Avedia temporary authorisations to offload LPG quayside at the Port of Saldanha directly from ship-to-truck for transportation to Avedia’s storage facility and permits it to do so until the interconnection to the Second Respondent’s (“Sunrise”) pipeline is effected and commissioned (“the Temporary Authorisations”), and that the TNPA grants to Avedia the requisite site access certificates to permit it to do so;
4. That the activities undertaken by Avedia in terms of the Temporary Authorisations granted hereunder shall at all times be subject to its compliance with all applicable statutory and regulatory health and safety requirements;
5. That the Temporary Authorisations mentioned in Paragraph 4 above shall endure for a period of six (6) months from the date of this Record of Decision, provided that any party may approach the Regulator for an extension of such

period in the event that interconnection and the commissioning thereof have been delayed for reasons outside of Avedia's control;

6. That, subject to reasonable timing and other conditions determined by it, the TNPA makes available a berth or berths within the Port of Saldanha to Avedia for it to conduct its quayside offloading of LPG pending the interconnection and commissioning thereof;
7. That the TNPA ensures that the interconnection point is fabricated by Sunrise and Avedia at a pre-designated point on the TNPA land prior to the expiration of the period of six (6) months afforded to Avedia to offload LPG quayside;
8. That the TNPA ensures that the interconnection point is fabricated in terms of the design prepared by DEC and agreed upon by Sunrise and Avedia in or about March 2019;
9. That the TNPA is ordered to proactively manage and police the interconnection process and the commissioning thereof in order to ensure that Avedia's offloading of LPG quayside is for the minimum amount of time possible;
10. That the TNPA exercises its statutory obligations contained in the Ports Act to ensure that safety standards are adhered to in the offloading of LPG quayside in order to minimise the risk of accidents;

11. That the TNPA and Sunrise are ordered to effect transfer of the land described as Portion D in the Concession Agreement entered into between them within three (3) months of this Order into the name of the TNPA;
12. that Avedia takes all necessary steps required of it to ensure the safe offloading of LPG quayside during this period; and
13. That the TNPA (the First Respondent) is ordered to pay 50 percent of the costs occasioned by the Regulator, the Complainant/Appellant and the Second Respondent as follows:
 - (a) the costs and wasted costs for the days of the hearings held, and to have been held, on the 3rd, 4th and 5th August 2020; and
 - (b) the costs for the days of the hearings held on the 1st September to the 5th September 2020,such costs to include the costs of Counsel, including the costs of the Counsel appointed by the Regulator, but excluding the costs of preparation.

DATED AT PRETORIA ON THIS 16th DAY OF SEPTEMBER 2020.

DR. TSHISIKHAWE MUNYAMA
TRIBUNAL CHAIRPERSON

TRIBUNAL MEMBER
S KABELO

I CONCUR

TRIBUNAL MEMBER
S MATOLENGWE

I CONCUR

TRIBUNAL MEMBER
K SELANE

I CONCUR

DATED AT PRETORIA ON THIS 16th DAY OF SEPTEMBER 2020.



DR. TSHISIKHAWE MUNYAMA
TRIBUNAL CHAIRPERSON



TRIBUNAL MEMBER
S KABELO

I CONCUR



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I CONCUR



TRIBUNAL MEMBER
K SELANE

I CONCUR