

**NOTICE OF APPEAL IN TERMS OF SECTION 96(1) OF THE MINERAL  
AND PETROLEUM RESOURCES DEVELOPMENT ACT, 2002**

**CENTRE FOR ENVIRONMENTAL RIGHTS**

**APPELLANT**

IN RE:

**MINISTER OF MINERAL RESOURCES AND ENERGY**

**DECISION-MAKER**

**DIRECTOR-GENERAL:  
DEPARTMENT OF MINERAL RESOURCES AND ENERGY**

**DECISION-MAKER**

**MINERAL SANDS RESOURCES (PTY) LTD**

**RIGHT HOLDER**

**TORMIN MINERAL SANDS (PTY) LTD**

**RIGHT HOLDER**

---

**NOTICE OF APPEAL AGAINST DECISION TAKEN IN TERMS OF SECTION 102 OF  
THE MINERAL AND PETROLEUM RESOURCES DEVELOPMENT ACT, 2002 (ACT  
28 OF 2002) TO EXTEND MINING OPERATIONS AT THE TORMIN MINE IN  
RESPECT OF PROPERTIES IN THE MAGISTERIAL DISTRICT OF VAN  
RHYNSDORP**

---

**INTRODUCTION**

1. This is an appeal against the decision of the Minister of Mineral Resources and Energy (*“the Mining Minister”*), or any delegated official, to grant written consent to Mineral Sands Resources (Pty) Ltd (*“MSR”*) and Tormin Mineral Sands (Pty) Ltd (*“Tormin Mineral Sands”*) to extend mining operations at Tormin Mineral Sands Mine (Tormin Mine), on the West Coast of South Africa, near Lutzville.

2. MSR and Tormin Mineral Sands hold mining rights<sup>1</sup> in respect of the Tormin Mine on the West Coast of South Africa, which is operated by MSR. The mining rights which were approved by the Department of Mineral Resources (*“the DMR”*) in November 2008 in terms of sections 22 and 23 of the Mineral and Petroleum Resources Development Act, 28 of 2002 (*“the MPRDA”*) allow for a mining area of 119.9 hectares.
3. It is important to note that MSR is a subsidiary of Mineral Resource Commodities (*“MRC”*), which has its principal and registered office in Australia with company shares listed on the Australian Securities Exchange (ASX).
4. Over the years there has been significant resistance to the mining operations at the Tormin Mine from the local community and environmental groups, owing to the environmental sensitivity of the area, and findings of non-compliance with mining and environmental laws by regulators.
5. MSR has made various unlawful attempts to significantly expand its mining operations. The attempts which are the subject of this application pertain to a proposed extension of the mining operations which entails extending the Tormin Mine by an additional 188.7 hectares to mine an additional strip of coastline north of the current operations (a further ten beaches), to conduct inland “strand line” mining on the Farm Geelwal Karoo 262, and to construct additional processing plants, stockpile areas, industrial yards, parking and laydown areas (*“the mining extension”*).
6. On 12 April 2018 MSR lodged two applications for purposes of the mining

---

<sup>1</sup> MR 162 and MR 163.

extension:-

- 6.1. an application to the DMR for an amendment of its existing mining right in terms of section 102(1) of the MPRDA;<sup>2</sup> and
  - 6.2. an application to the DMR in terms of section 24 of the National Environmental Management Act, 107 of 1998 (“NEMA”) and the National Environmental Management: Waste Act, 59 of 2008 (“NEMWA”), read with regulation 21 of the Environmental Impact Assessment Regulations, 2014, as amended (“*the 2014 EIA Regulations*”), for an Integrated Environmental Authorisation (“IEA”) in respect of the mining extension.
7. On 7 June 2019, the DMR granted MSR an IEA in terms of NEMA in respect of the mining extension. The Centre for Environmental Rights (“*the CER*”) appealed against that decision. On 26 March 2020, the Minister of Environment, Forestry and Fisheries (“*the Environment Minister*”) dismissed the CER’s appeal.
  8. On 14 September 2020, while the CER was preparing for the launch of judicial review proceedings in the High Court of South Africa in respect of the Environment Minister’s decision to dismiss the CER’s appeal and to uphold the decision to grant the IEA (subject to one variation), the CER became aware of an Australian Stock Exchange (ASX) release dated 11 September 2020 (attached as **Annexure 1**), posted on the website of MSR’s parent company, MRC.

---

<sup>2</sup> The CER has never had sight of this section 102 application. In the appeal decision of the Minister of Environment, Forestry and Fisheries referred to in paragraph 5, reference is made to MSR having made this application to the DMR on that date.

9. It appears from that recent ASX release issued by MRC that MSR commenced mining pursuant to the granting of the mining extension IEA and the DMR's approval of the section 102 mining right amendment on or about 11 September 2020.
  
10. The ASX release, titled 'Commencement of Mining at Tormin Western Strandline', further states that "*Mining has commenced within two months of receipt of the approvals to expand the mining and processing operations at Tormin.*" (Own emphasis)
  
11. Having seen the 11 September 2020 ASX release, in particular the information about the "recently granted S102 Mining Right," the CER then proceeded to look through the other prior ASX releases and then discovered an ASX release dated 2 July 2020 (attached as **Annexure 2**) which states that:

*"Mineral Commodities Ltd ("MRC" or "the Company") and its empowerment partner, Blue Bantry Investments 255 (Pty) Ltd, are pleased to announce that their South African subsidiary, Mineral Sands Resources ("MSR") has received notification from the Department of Mineral Resources and Energy – South Africa ("DMRE") that its Application to amend (expand) the mining right at Tormin under Section 102 of the Mineral and Petroleum Resource Development Act No 49 of 2008 ("MPRDA") has been approved."*
  
12. This was the first time that the CER became aware that approval had (according to MRC) been granted to MSR in respect of its application under section 102 of the MPRDA to amend the mining right.
  
13. Despite the CER being a registered interested and affected party in the IEA

process and its appeal to the Environment Minister, and having addressed various correspondence to the DMR and Mining Minister prior to the granting of the IEA, noting its objections to MSR's proposed expansion, neither the Mining Minister nor the DMRE notified the CER that the DMRE had granted MSR an amendment to the mining right in terms of section 102 of the MPRDA.

14. Accordingly, the CER hereby appeals, in terms of section 96(1) of the MPRDA read with Regulation 74 of the Regulations to the MPRDA (*"the Regulations"*), against the Minister/DMRE's decision to approve MSR's application for an amendment of its mining right in terms of section 102 of the MPRDA.
15. The CER submits that the amendment of the mining right should be set aside in its entirety and, given the environmental sensitivity of the area, the decision to grant consent to the amendment of the mining right should be suspended pending the outcome of this appeal. In this regard, the CER is simultaneously with this appeal, submitting a request to the Minister for the suspension of the section 102 amendment decision in terms of section 96(2) of the MPRDA.
16. The grounds of appeal are set out below.

## **THE PARTIES**

17. **CENTRE FOR ENVIRONMENTAL RIGHTS ("CER")** is a non-profit organisation registered in terms of the laws of the Republic of South Africa with NPO registration number 075-863 and a Law Clinic registered with the Legal Practice Council. The CER's mission is to advance the realisation of environmental rights as guaranteed in section 24 of the Constitution of the Republic of South Africa, by providing support and legal representation to civil society organisations and

communities who wish to protect their environmental rights, and by engaging in legal research, advocacy and litigation to achieve strategic change. The CER operates principally from its premises situated at Springtime Studios, 1 Scott Road, Observatory, Cape Town.

18. **MINISTER OF MINERAL RESOURCES AND ENERGY (“THE MINING MINISTER”)** is the person to whom an appeal lies in terms of section 96(1)(b) of the MPRDA against an administrative decision taken in terms of the MPRDA by the Director-General and is empowered to grant written consent for amendments of, inter alia, mining rights in terms of section 102 of the MPRDA.
19. **DIRECTOR-GENERAL: DEPARTMENT OF MINERAL RESOURCES & ENERGY** is the person to whom an appeal lies in terms of section 96(1)(a) of the MPRDA against an administrative decision taken in terms of the MPRDA by a Regional Manager or any other officer to whom a power has been delegated under the MPRDA.
20. **MINERAL SANDS RESOURCES (PTY) LTD (“MSR”)** is a private company registered in terms of the laws of South Africa, with registration number 2001/016755/07 and with its registered address at 1st Floor, Block A, The Forum, North Bank Lane, Century City, Cape Town. MSR is the 50% owned South African subsidiary of **Mineral Resource Commodities (“MRC”)**, which has its principal and registered office in Australia with company shares listed on the Australian Securities Exchange (ASX).
21. **TORMIN MINERAL SANDS PTY (LTD) (“TORMIN MINERAL SANDS”)** is a private company registered in terms of the laws of South Africa, with registration number 2005/024160/07 and with its registered address at 1st Floor, Block A,

The Forum, North Bank Lane, Century City, Cape Town.

## LODGING OF THE APPEAL

22. Section 96(1) of the MPRDA states that:

*“Any person whose rights or legitimate expectations have been materially and adversely affected or who is aggrieved by any administrative decision in terms of this Act may appeal within 30 days [of] becoming aware of such administrative decision....”* (Own emphasis)

23. As mentioned above, the CER only became aware on 14 September 2020 that the DMR had granted MSR an amendment to the mining right in terms of section 102 of the MPRDA. The CER was preparing for the judicial review of the Environment Minister’s decision to dismiss CER’s appeal against the IEA for the mine extension, when MRC’s ASX announcement about the commencement of mining in the extension area, was discovered.

24. Having only become aware of the Minister/DMRE’s decision to grant MSR’s application to extend the mine in terms of section 102 of the MPRDA, on 14 September 2020, the lodging of this appeal is within the 30-day timeframe prescribed by section 96(1) of the MPRDA.

25. To the extent that Regulation (74(1)) of the Regulations require a person who appeals in terms of section 96 to do so within 30 days after he or she became aware of the decision “or should reasonably have become aware of the decision”, that regulation is *ultra vires* section 96(1) of the MPRDA. In any event, the CER could not reasonably have become aware of the decision because neither MSR, nor the Minister or the DMRE notified the CER of the decision, despite the CER

having clearly placed on record in the correspondence referred to below that public participation should be conducted for any amendment process in terms of section 102 of the MPRDA (whilst reserving its rights that reliance on section 102 of the MPRDA is unlawful in these circumstances).

26. In the alternative to the above, if it is found that the CER should reasonably have become aware of the decision earlier (which is denied), the CER submits that any such late lodging of this appeal as there may have been should be condoned. The DMR did not notify the CER of the decision, despite the CER having placed its interest on record with the DMRE and the Minister. MSR also did not notify the CER despite the CER's repeated contentions that it is unlawful to apply for an extension of a mining right in terms of section 102 of the MPRDA in the circumstances pertaining to the Tormin Mine.
  
27. It is also in the public interest that this appeal be decided because of the environmental significance of the site, and the manner in which section 102 of the MPRDA is to be properly interpreted in light of the section 24 environmental right in the Constitution and NEMA.

## **BACKGROUND**

### **The Tormin Mine and MSR's mining rights**

28. MSR has operated the Tormin Mine on the West Coast of South Africa, near the town of Lutzville, since 2013.
  
29. MSR and Tormin Mineral Sands hold two mining rights in respect of the Tormin

Mine. The first mining right, with reference number 162MR, is in respect of the beach area adjacent to the farm Geelwal Karoo No 262, and covers an area of 95.8932 hectares. (A copy of that mining right is attached as **Annexure 3**). MSR and/or Tormin Mineral Sands holds another mining right with reference number 163MR. The CER does not have a copy of that mining right.

30. MSR applied for a renewal of its two mining rights in August 2018, and in its Quarterly Activities Report of December 2019<sup>3</sup>, MRC indicated that it had received renewals of its mining rights, 10107MR and 1010MR (formerly known as 162MR and 163MR), for a further 10 years in September 2019.

#### **MSR's applications to expand the Tormin Mine**

31. Over the last 7 years, MSR has applied to the DMRE for various applications in attempts expand its footprint at the Tormin Mine.

#### **Prospecting Rights Applications**

32. In 2017, MSR applied for two prospecting rights<sup>4</sup> along the beach and surf zone north of its current Tormin operations, and adjacent and inland from its current operations. Those prospecting rights applications were refused by the DMR (Western Cape Regional Office) on the grounds that the Department was not satisfied with the manner in which the public participation process and environmental impact assessment was conducted.<sup>5</sup>

---

<sup>3</sup> Page 6, available at: <https://www.asx.com.au/asxpdf/20200131/pdf/44dp2knw37cb2s.pdf>.

<sup>4</sup> These applications bear the reference numbers WC30/5/1/1/2/10226PR and WC30/5/1/1/2/10229PR respectively.

<sup>5</sup> Page 3, Decision for the refusal of an Environmental Authorisation Ref No. WC30/5/1/1/2/10226PR, and page 3, Decision for the refusal of an Environmental Authorisation Ref No.

33. MSR submitted an appeal against the refusals of the environmental authorisations in respect of those applications, and the then Department of Environmental Affairs (“DEA”) dismissed MSR’s appeal.<sup>6</sup>
34. MSR then proceeded to re-apply for two prospecting rights<sup>7</sup> over the same areas. MSR stated that it was doing so “[a]s another precautionary measure, and in order to protect the tenure of the two Prospecting Rights that were refused by the DEA Appeal decision”.<sup>8</sup>
35. On 28 January 2019 and 5 February 2019 respectively, the MSR was granted environmental authorisations for those prospecting rights in respect of the following areas North of the current Tormin operations:
- 35.1. The remaining extent of the Farm Geelwal Karoo 262 (“the Inland Strand”); and
  - 35.2. Ten beaches owned by the South African government, near the farm Graauw Duinen No 153 (“the Northern Beaches”).
36. The CER appealed against the granting of those environmental authorisations on the basis of, *inter alia*, environmental concerns relating to the properties under application. Those appeals were dismissed by the Minister of Environment in November 2019.

---

WC30/5/1/1/2/10229PR.

<sup>6</sup> Preliminary Final Financial Report for the year ending 31 December 2016, at page 7, available at: <https://www.asx.com.au/asxpdf/20170301/pdf/43gg2nwrhpccws.pdf>.

<sup>7</sup> These applications bear the reference numbers WC30/5/1/1/2/10261PR and WC/30/5/1/1/2/10262PR.

<sup>8</sup> MRC’s Quarterly Activities Report December 2016, at page 5, available at: <https://www.asx.com.au/asxpdf/20170127/pdf/43fkdbfk9117rd.pdf>

37. In MRC's Quarterly Activities Report of December 2019<sup>9</sup>, it indicated that MSR had recently been granted those prospecting rights, and that it would commence drilling at the Northern Beaches and the Inland Strand areas as early as February 2020.
38. It must be noted that, in addition to these prospecting rights, there are an additional two prospecting rights applications and applications for environmental authorisation currently under consideration by the DMR: one for an area to the south of the Tormin Mine, bordering the sensitive Olifants estuary, and the other for an area 30km North-West of the town of Lutzville.<sup>10</sup>

#### **MSR's Amendment Applications**

39. In an attempt to circumvent the refusals of those initial prospecting rights applications in 2016, MSR had concurrently applied for an amendment of its mining right and Environmental Management Programme ("*EMPr*") under section 102 of the MPRDA, in relation to the same areas covered by the prospecting rights ("the initial section 102 amendment application").
40. MRC's Quarterly Report of December 2016 stated that "*[t]he Company is well advanced with this EMP 102 Amendment Application and, if granted, will provide a much shorter timeline to access and mining of the applicable areas. An EMP 102 Amendment allows the applicant to expand its existing mining operations based on its current approved mining tenure*".<sup>11</sup>

---

<sup>9</sup> Page 2.

<sup>10</sup> These applications bear the reference numbers WC30/5/1/1/2/10240PR and WC30/5/1/1/2/10259PR.

<sup>11</sup> Page 5.

41. On 24 January 2017, registered interested and affected parties, including the CER, were notified of MSR's intention to extend the Tormin Mine in terms of the initial section 102 amendment application. The CER was notified of this through SRK Consulting, who MSR had appointed as its environmental assessment practitioners to undertake the Environmental Impact Assessment ("EIA") process in terms of NEMA for its application.
  
42. The Background Information Document (BID) (attached as **Annexure 4**) pertaining to the initial section 102 amendment application indicated that MSR intends to extend mining operations into the following areas:
  - 42.1. Ten beaches adjacent to Remainder Graauw Duinen 152, and Portions of farm Klipvley Karoo Kop 153, along a stretch of coastline north of Tormin Mine, totalling 28.7 ha;
  - 42.2. A 90 hectare area on the farm Geelwal Karoo 262 comprising a 75 ha inland mining area; and
  - 42.3. A 15 ha infrastructure expansion area.
  
43. As is evident from the above, the areas covered by MSR's initial section 102 amendment application were substantially the same as those areas covered by MSR's two prospecting rights applications.
  
44. The BID also stated that *"in terms of Section 102 of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA), MSR must therefore apply to the Department of Mineral Resources (DMR) for an amendment of their existing Mining Rights and EMPr. An EMPr can be amended or varied with the written consent of the Minister of Mineral Resources."*

45. On 22 November 2017, however, the DMR refused MSR's application for an EA for the initial section 102 amendment application, at the Scoping Phase, citing the undertaking of a section 24G process in terms of NEMA for the rectification of unlawful activities. MSR then appointed SRK to undertake a section 24G application process (to rectify unlawful activities), in terms of NEMA and the Regulations. (It must be noted here that the CER appealed the granting of an EA for MSR's section 24G application in July 2019, and the CER has recently been informed that that appeal is still under consideration by the Department of Environment, Forestry and Fisheries ("*DEFF*").
46. With SRK Consulting still as its appointed environmental assessment practitioners, MSR then proceeded to resubmit (as set out in paragraph 6 above):
- 46.1. an application to the DMR for an amendment of its existing mining right in terms of section 102(1) of the MPRDA; and
  - 46.2. an application to the DMR in terms of NEMA and NEMWA, read with regulation 21 of the 2014 EIA Regulations, for an Integrated Environmental Authorisation (IEA) in respect of the mining extension.
47. A copy of SRK's notification to interested and affected parties, dated 12 April 2018, of the refusal of MSR's initial section 102 amendment application at the scoping phase, and MSR's subsequent reapplication for an amendment and for an IEA, is attached as **Annexure 5**.
48. According to the Executive Summary of the Environmental Impact Assessment Report (attached as **Annexure 6**) for MSR's re-application for amendment of

section 102 of its mining right<sup>12</sup>, the new extension application is in respect of the following areas:

- 48.1. Ten beaches adjacent to Remainder of Graauw Duinen 152, and Portions of Farm Klipvley Karoo Kop 153, along a stretch of coastline north of Tormin Mine comprising 43.7 ha mining and ~6 ha for haul road widening;
  - 48.2. Inland “strand line” mining area on the Farm Geelwal Karoo 262, inland of the existing processing plant comprising 75 ha for mining; and
  - 48.3. An infrastructure / plant expansion area of 64 ha adjacent to the existing processing plant to accommodate additional processing plants, stockpile areas, industrial yards, parking and laydown areas.
49. On 7 June 2019 the DMR granted the IEA to MSR for its section 102 amendment application.
50. As mentioned above, the CER lodged an appeal against the granting of the IEA in July 2019 (attached as **Annexure 7**), and that appeal was dismissed by the Environment Minister in March 2020. In that appeal, the CER raised its objection to MSR’s reliance on section 102 of the MPRDA in order to expand its Tormin Mine.
51. In the Environment Minister’s decision to dismiss the appeal (attached as **Annexure 8**), she responded that:

---

<sup>12</sup> This application bears the DMR reference number WC 30/5/1/2/2/162 & 163 MR.

51.1. *“In their comments on this ground of appeal, the DMR submits that the expansion of an authorised mining area is empowered by section 102 of the MPRDA and this process is a subject of a mining right and administered through the MPRDA, and as such this ground of appeal should be advanced through the MPRDA process.”*; and

51.2. *“In evaluating this ground of appeal as well as responses thereto, I have taken note of the concerns raised by the appellant regarding the use of section 102 of the MPRDA to expand the authorised mining area, I have taken note that this ground of appeal deals with the application for mining right. This application is lodged and processed separately and in terms of the MPRDA. IEA was applied for and granted by the DMR in terms of NEMA and the 2014 EIA Regulations. For these reasons, I concur with the DMR this ground of appeal should have been brought in terms of the MPRDA, not section 43 (1A) of NEMA.”* (Own emphasis)

52. The CER is in the process of launching an application in the Western Cape High Court in terms of the Promotion of Administrative Justice Act, 3 of 2000 (“PAJA”) to have the Environment’s Minister’s appeal decision reviewed and set aside, as well as the DMR’s decision to grant the IEA.

### **The CER’s Objections to the Proposed Extension at Tormin Mine**

53. The CER objected to all of the abovementioned prospecting applications and section 102 amendment applications by MSR.

54. During 2017 and 2018, the CER addressed numerous correspondences to SRK Consulting, the DMR, and the Mining Minister, setting out the CER's objections to MSR's proposed extension plans and applications.
55. On 31 January 2017 the CER wrote to the then Mining Minister and the DMR, highlighting MSR's attempt to substantially expand its operations at Tormin Mine through concurrent applications for prospecting rights and the amendment of its mining rights (attached as **Annexure 9**). The CER pointed out that MSR was engaging in a cynical attempt to circumvent the refusals of its initial prospecting rights applications through an application in terms of section 102 of the MPRDA for an amendment of its mining right over the same areas as that of the prospecting rights. On 24 February 2017, the CER also wrote to SRK Consulting along the same lines (attached as **Annexure 10**).
56. SRK responded to the CER in an email of 17 March 2017 (attached as **Annexure 11**), stating that with regards to the legality of the section 102 application, it was appointed to undertake the EIA process in terms of NEMA for the mine expansion and was not dealing directly with the application in terms of section 102 of the MPRDA, and as such, SRK would be guided by the DMR's response to MSR on whether the pursued application approach is feasible.
57. Pursuant to receiving MSR's Scoping Report for its initial section 102 amendment application, the CER wrote to SRK Consulting again on 29 May 2017, raising concerns regarding the lawfulness of the scoping and environmental impact assessment (EIA) process for the expansion of the Tormin Mine (attached as **Annexure 12**).

58. On 1 June 2017 and 13 July 2017 respectively, the CER wrote follow-up letters to the DMR (attached as **Annexures 13 and 14**), reiterating its objection to the unlawfulness of MSR's proposed expansion plans through an application for amendment of its mining right in terms of section 102 of the MPRDA, but nonetheless, calling for public participation as a minimum requirement for procedural fairness insofar as the DMR persists in its consideration of MSR's amendment application. The CER emphasized that it would not be possible to conduct public participation unless the section 102 application is made available to the public for this purpose.
59. The DMR responded to the CER in a letter of 21 July 2017 (attached as **Annexure 15**) stating, in relation to the legality of MSR's application, that:
- 59.1. *"It is MSR's prerogative to apply for section 102 application which is within their constitutional right to do so";*
- 59.2. *"There is nothing that precludes MSR applying for section 102, and that there is no advantage nor do they prejudice anyone by applying for 102 instead of a new application for a mining right";*
- 59.3. *"DMR has an obligation to review and decide on each application lodged and it must be noted that each application is administered on its merits."*
- and
- 59.4. MSR's application in terms of section 102 of the MPRDA cannot be approved unless the company has obtained an environmental authorisation for mining, and that MSR has an obligation to conduct public participation in terms of that EIA process.
60. The CER responded to the DMR on 14 August 2017 (attached as **Annexure 16**)

requesting that the DMR confirm whether its position is that MSR is required to obtain an environmental authorisation for mining for its section 102 MPRDA application, and that the DMR will not approve the application without that environmental authorisation.

61. The CER wrote to the DMR again on 20 February 2018 (attached as **Annexure 17**) drawing its attention to recent statements made by MSR's parent company, MRC, to its shareholders about its proposed expansion plans for the Tormin Mine, in particular claims made about agreements reached between the company and the DMR. The CER asked the DMR to confirm whether it had provided MSR with any assurances in relation to its expansion plans.
62. The CER received no further correspondence from the DMR after the DMR's 21 July 2017 letter.
63. To date, the CER has not had sight of MSR's alleged "application" to the DMR for the amendment of its mining right in terms of section 102 of the MPRDA.
64. The CER has also to date not been notified by the Mining Minister, DMRE, SRK Consulting or MSR, that the Mining Minister or the DMRE has granted consent to MSR for an amendment to its mining right(s) in terms of section 102 of the MPRDA.
65. As mentioned in the introduction, the CER first came to know of the Mining Minister, or the Mining Minister's delegated authority's consent to MSR's section 102 amendment application through the ASX releases on MRC's website, while

preparing for its judicial review against the IEA on 14 September 2020.

## **GROUNDS OF APPEAL**

66. The evidence set out above supports the grounds of appeal below against the decision to grant consent for the amendment of MSR's mining right(s) in terms of section 102 of the MPRDA in order to extend the Tormin Mine.

### **I. The section 102 MPRDA amendment application is unlawful (first ground of appeal)**

67. The CER contends that granting a section 102 MPRDA amendment to MSR's mining right(s) is unlawful in these circumstances.

68. MSR is seeking to significantly expand its mining operations at the Tormin Mine. In order to do that, MSR was granted an amendment of its mining right(s) to include an expanded mining area, on the one hand, and a fresh/new IEA, on the other hand. It was not granted an amendment to its existing environmental authorisation and EMPr in respect of its existing mining right(s) i.e. before amendment. The MSR should have applied for a new mining right in terms of the MPRDA.

69. The CER submits that it is not the purpose or within the scope of section 102 of the MPRDA to enable a mining company to mine large new areas that were not part of its original mining right application, nor to expand significantly the mining area delineated in its mining rights.

70. Using section 102 of the MPRDA, which does not specify any transparent

procedures for amendment, to mine significant new areas outside of an authorised mining area, is a circumvention of the application process for prospecting and mining rights, and the environmental impact assessment (EIA) process under NEMA and the EIA Regulations for prospecting and mining.

70.1. Section 102(1) of the MPRDA provides that:

*“a reconnaissance permission, prospecting right, mining right, mining permit, retention permit, technical corporation permit (sic), reconnaissance permit, exploration right, production right may not be amended or varied (including by extension of the area covered by it or by the additional (sic) of minerals or a shares or seams, mineralised bodies or strata, which are not at the time the subject thereof) without the written consent of the Minister.”*

70.2. Section 72 of the Mineral and Petroleum Resources Development Amendment Act, 2008 (the Amendment Act), seeks to amend section 102 the MPRDA.

70.3. In the Amendment Act of 2008, Parliament intends to expressly exclude any substantive amendment of a mining right to be effected in terms of section 102(1) of the MPRDA, by introducing section 102(2) in the Amendment Act. That new section 102(2) limits the application of section 102(1) as follows:

*“The amendment or variations referred to subsection (1), shall not be made if the effect of such amendment or variation is to*

–

(a) Extend an area or portion of an area, or

(b) *Add a share or shares of the mineralised body, unless the omission of such area or share was a result of an administrative error.*” (Own emphasis)

- 70.4. Section 102(2) has not been brought into operation. The Amendment Act was assented to on 19 April 2009 and it was indicated, in section 94(1), that its provisions “*shall come into operation on a date fixed by the President by proclamation in the Gazette.*”
- 70.5. On 23 May 2013, President Zuma issued Proclamation 14 of 2013, in terms of section 94 of the Amendment Act, and declared that it would commence on 7 June 2013. This proclamation would have brought into effect section 102(2). However, on 6 June 2013, a day before the commencement date, the President amended Proclamation 14 of 2013 to prevent section 102(2) (as well as other amendments, but not section 102(1)) from coming into operation.
- 70.6. The decision by the President to prevent certain amendments from coming into operation may have been motivated by the fact that another amendment to section 102 was being contemplated in further amendments to the MPRDA. These further amendments are contained in Bill 15-2013 (the Bill), which was introduced into Parliament in June 2013. However the President referred the Bill back to Parliament because he had concerns about the constitutionality of certain

provisions of the Bill, which concerns did not relate to section 102(2).

71. Despite the failure to bring section 102(2) of the MPRDA into effect, section 102(1) should – on a proper interpretation, taking into account the section 24 environmental right and the NEMA principles – be interpreted in a manner that limits variations and amendments of the legislative instruments listed in section 102(1) to non-substantive amendments or to substantive amendments that fall within the allowable scope of substantively amending an environmental authorization under the NEMA (i.e. as opposed to granting an entirely fresh IEA).
  
72. The requirement to submit an amended Mining Works Programme and Social and Labour Plan under the section 102 amendment process does not mean that there is no prejudice and no circumvention of the MPRDA by relying on section 102 of the MPRA to significantly extend mining operations (as contended by MRS in its response to the CER's appeal against the grant of the IEA). The criteria that apply under the MPRDA for a new mining right are largely circumvented, including the requirement in section 23(2)(d) that the mining will not result in unacceptable pollution, ecological degradation or damage to the environment.
  
73. MSR has relied on section 102 of the MPRDA to significantly extend the area of its mining right while applying for a new IEA. There are at least two reasons why this approach potentially undermines the One Environment System and is unlawful:
  - 73.1. Firstly, it obviates the need for the Mining Minister to consider whether the proposed mining will result in unacceptable pollution or ecological degradation, as the proponent is not applying for a new mining right.

73.2. Secondly, it facilitates the practice of “salami-slicing” in relation to environmental authorizations. Salami-slicing refers to the practice of project splitting in relation to environmental authorizations, which is recognized as a weakness or threat to the system of EIA. Project proponents resort to project splitting either to ensure that split projects fall below EIA screening thresholds or obviate the need for an EIA at all, or to obtain EIA approval for the less questionable parts of a project and later apply for extensions for the parts of a project that would have been more environmentally contentious, thus making the development of the rest of the project a *fait accompli*.

74. MSR’s application in terms of section 102 of the MPRDA to amend its mining right to significantly expand mining operations is therefore not permitted in law.

**II. Lack of transparency and failure to conduct a public participation process in terms of the MPRDA and PAJA (second ground of appeal)**

75. To the best of the CER’s knowledge, there has been no public participation process in respect of MSR’s application for amendment in terms of section 102. The CER has never seen MSR’s section 102 amendment application nor the Mining Minister or delegated authority’s consent thereunder, despite its request to the DMR for public participation in relation to the application.

76. In its 13 July 2017 letter to the DMR (**Annexure 15**), the CER reiterated its objection to MSR’s application in its entirety on the grounds that the application is an unlawful circumvention of the applications process, but nonetheless called for

public participation insofar as the DMR may persist in its consideration of MSR's section 102 amendment application. In that letter, the CER pointed out that:

76.1. The approval of a section 102 amendment application is "administrative action" as envisaged by section 1 of PAJA. It is a decision taken by an organ of state when exercising a public power in terms of legislation which adversely affects the rights of any person and has a direct, external legal effect;

76.2. In accordance with section 3 of PAJA, administrative action affecting any person must be procedurally fair. Section 4 of PAJA provides that administrative action affecting the public must also be procedurally fair; and

76.3. Decisions taken in terms of section 102 of the MPRDA that will adversely affect any person or the public cannot be made without prior public participation, as a minimum requirement for procedural fairness.

77. The CER also emphasized that it is not possible to conduct public participation unless the section 102 application is made available to the public for that purpose. We specifically requested that the DMR confirm that it will require MSR to conduct a public participation process in relation to its amendment application and that it will immediately make or require MSR to make a copy of that application publicly available for that purpose.

78. In response to this, the DMR stated in its letter of 21 July 2017 (**Annexure 16**) that:

- 78.1. *“MSR is required to submit or to meet with requirements of mining right in terms of MPRDA when doing Section 102” and;*
- 78.2. *MSR has applied for an Environmental Authorisation and therefore “has an obligation to comply with the 2014 EIA Regulations as amended and conduct public participation as stipulated on Chapter 6 of the 2014 EIA Regulations as amended. The EAP administering the process must ensure that the process gives interested and/or affected parties the opportunity to participate in the process, and must furthermore respond to and/or address all issues raised during the process.”*
79. The DMR’s response appears to indicate that the DMR deemed the public participation process under the environmental impact assessment process in terms of NEMA to be sufficient for purposes of MSR’s section 102 amendment application.
80. However, that stance is clearly wrong. Two separate decisions are being made in terms of different pieces of legislation: the section 102 amendment under the MPRDA and the IEA under NEMA.
81. The section 102 amendment decision under the MPRDA is clearly administrative action. In terms of section 6(1) of the MPRDA, subject to PAJA, any administrative process conducted or decision taken in terms of the MPRDA must be conducted or taken, as the case may be, within a reasonable time and in accordance with the principles of lawfulness, reasonableness and procedural fairness.
82. An application for a new mining right in terms of sections 22 and 23 of the MPRDA

require public participation in terms of the MPRDA. Public participation is then also undertaken as required for purposes of an environmental authorisation under NEMA.

83. In its response letter of 21 July 2017 (**Annexure 16**), the DMR conceded that MSR *“is required to submit or to meet with requirements of mining right in terms of MPRDA when doing Section 102. For example amended Mining Work Programme, Social and Labour Plan with financial provision to cater all aspects of Social and Labour Plan will be provided.”*

84. According to MSR in its responding statement in the CER’s appeal against the granting of the IEA in terms of NEMA, MSR submitted an amended Mining Work Programme and Social and Labour Plan (SLP) in respect of the proposed extension of the mine. Clearly, those draft documents should have been made available for public participation before they were approved.

85. The CER submitted a request in terms of the Promotion of Access to Information Act 2 of 2000, to the DMR on 29 January 2020 for a copy of *“MSR’s most recently approved SLP”* in relation to its Tormin Mine (attached as **Annexure 18**). The CER was granted access to those records by the DMR in March 2020. However, despite numerous follow-ups with the DMR (Western Cape Regional Office), we have still not been provided with a copy of those records.

**III. Failure to apply the section 23(1)(d) factor and to take into account the environmental sensitivity of the site (third ground of appeal):**

86. In terms of section 23(1)(d) and 23(4) of the MPRDA a mining right can only be

granted if “the mining will not result in unacceptable pollution, ecological degradation or damage to the environment and an environmental authorisation is issued.”

87. There is no evidence that the Mining Minister/DMR applied this factor when granting the section 102 amendment of the mining right – even though the DMR’s 21 July 2017 letter appeared to create the impression that MSR would be required to comply with the same requirements for the grant of a new mining right in its section 102 amendment application. In any event, even if section 23(1)(d) is not applicable, the environmental sensitivity of the site is a relevant consideration for purposes of this section 102 amendment application.

88. The majority of the properties subject to MSR’s section 102 amendment application fall within environmentally sensitive areas as described below.

**i. Critical Biodiversity Area**

89. The area under application, which is located in the Matzikama Local Municipality, falls within a Critical Biodiversity Area (CBA) and close to an aquatic Ecological Support Area (ESA). This is shown on the map and associated table from the Western Cape Biodiversity Spatial Plan (WCBSP) Handbook<sup>13</sup> attached as **Annexure 19**. (The areas covered by the proposed extension are the red and blue outlined areas marked as “Site 1” and “Site 2” on the map. Site 1 is the Northern Beaches and Site 2 is the Inland Strand area.)

---

<sup>13</sup> Pool-Stanvliet R, Duffell-Canham A, Pence G, and Smart R. 2017. Western Cape Biodiversity Spatial Plan Handbook. Stellenbosch: CapeNature. Available at: [https://www.capenature.co.za/wp-content/uploads/2017/12/DEADP\\_CN\\_WCBSP\\_Handbook\\_2017.compressed-ilovepdf-compressed.pdf](https://www.capenature.co.za/wp-content/uploads/2017/12/DEADP_CN_WCBSP_Handbook_2017.compressed-ilovepdf-compressed.pdf).

90. CBAs are defined in the WCBSP Handbook as “*areas in a natural condition that are required to meet biodiversity targets, for species, ecosystems or ecological processes and infrastructure.*”<sup>14</sup> These biodiversity targets relate directly to South Africa’s international conservation obligations in terms of the Convention on Biological Diversity, and include all areas needed to meet species and ecosystem targets, highly threatened ecosystems, critical corridors to maintain landscape connectivity and all areas needed to meet ecological infrastructure targets.
91. As is shown on the map (**Annexure 19**), much of the extension area falls within a CBA Type 1 (namely, an area in a natural condition). According to the Handbook, the desired management objective for a CBA Type 1 is to “*Maintain in a natural or near natural state, with no further loss of habitat. Degraded areas should be rehabilitated and “only low-impact, biodiversity-sensitive land uses are appropriate.*”<sup>15</sup>
92. These areas have been designated as CBAs mostly in order to promote coastal resource protection and to maintain ecological processes (including ecological corridor function) associated with the coastal strip, especially the ability of fauna restricted to this area to disperse along the coast. The proposed prospecting activities, which presuppose further mining in the area, therefore pose a potential threat to the functioning of the affected CBAs, both in terms of a direct impact on species diversity (biodiversity pattern) as well as on broad-scale ecological processes.

---

<sup>14</sup> As above, p 55.

<sup>15</sup> As above, p 55.

93. The site lies near to an aquatic Ecological Support Area Type 1, defined as an area that is *“still likely to be functional”*.<sup>16</sup> According to the Handbook, these are *“Areas that are not essential for meeting biodiversity targets, but that play an important role in supporting the functioning of PAs or CBAs, and are often vital for delivering ecosystem services.”*<sup>17</sup> The desired management objectives for these areas are to *“maintain in a functional, near natural state. Some habitat loss is acceptable, provided the underlying biodiversity objectives and ecological functioning are not compromised.”*<sup>18</sup>

**ii. Important ecological corridor: Namaqualand Strandveld**

94. The dominant vegetation type on site is Namaqualand Strandveld, which has little formal protection and is steadily declining. An analysis done in 2016 by CapeNature shows that the remaining extent of Namaqualand Strandveld has decreased by more than 20% since 2011. This stretch of coastline and inland area has been identified as an important ecological corridor, the importance of which has been elevated due to notable loss and degradation of habitat between the Olifants and Sout Rivers.

95. The role of CBAs to meet South Africa’s international obligations in terms of the Convention on Biological Diversity does not appear to have been considered or addressed in the decision to grant the amendment application or the IEA. CBAs are areas which have been scientifically and systematically designated since they are essential if the country is to meet its biodiversity targets, often involving vegetation types and ecosystems that occur nowhere else in the world. CBAs are the most efficient configuration in space, with the least negative impact on land

---

<sup>16</sup> As above, p 52.

<sup>17</sup> As above, p 55.

<sup>18</sup> As above, p 55.

uses, and any negative impacts on these areas are seen to be unacceptable since they are likely to result in long-term (if not permanent) loss of biodiversity. The loss of any material area of critical biodiversity would generally be seen as constituting 'irreplaceable loss' and its significance as being 'very high' or 'high'.

### iii. Globally recognised terrestrial biodiversity hotspot

96. Importantly, the area is also one of three globally recognised biodiversity hotspots, being located in the Succulent Karoo. A map indicating this area is attached as **Annexure 20**.<sup>19</sup> There are 34 globally recognised hotspots and the areas subject to the IEA granted by the DMR, falls into one of these hotspots.

### iv. Biodiversity Priority Area

97. In 2013, the *Mining and Biodiversity Guideline: Mainstreaming Biodiversity into the Mining Sector* was published by the DEA, the DMR, the Chamber of Mines, the South African Mining and Biodiversity Forum and the South African Biodiversity Institute (SANBI).<sup>20</sup> The proposed extension areas fall within an area which has been identified in the Mining and Biodiversity Guideline as a Category B area, having the "Highest biodiversity importance" and being at the "Highest Risk for mining."<sup>21</sup> Category B areas are viewed as necessary to ensure the protection of "biodiversity, environmental sustainability, and human well-being".<sup>22</sup> Maps indicating this classification in relation to the Northern Beach and Inland Strand

---

<sup>19</sup> This map was taken from the 'Climate Change Adaptation Plans for South African Biomes' report, published by the DEA in 2015, and is available at: [https://www.environment.gov.za/sites/default/files/reports/climatechangeadaptation\\_plansforsouthafricanbiomes\\_report.pdf](https://www.environment.gov.za/sites/default/files/reports/climatechangeadaptation_plansforsouthafricanbiomes_report.pdf).

<sup>20</sup> Department of Environmental Affairs, Department of Mineral Resources, Chamber of Mines, South African Mining and Biodiversity Forum, and South African National Biodiversity Institute. 2013. Mining and Biodiversity Guideline: Mainstreaming biodiversity into the mining sector.

<sup>21</sup> As above, p 29, Table 1.

<sup>22</sup> As above.

areas, as well as the relevant parts of the Mining and Biodiversity Guideline is attached as **Annexure 21** and **Annexure 22** respectively.

98. The decision by the DMRE to grant an amendment of a mining right in respect of areas with the highest biodiversity importance is therefore flawed, as essential information relation to the areas does not appear to have been taken into account.

## **CONCLUSION**

99. In the circumstances, the decision of the Mining Minister or delegated authority to grant MSR an amendment of the mining right(s) in terms of section 102 of the MPRDA should be set aside in its entirety.
100. The CER requests a copy of the decision taken in terms of section 102 of the MPRDA and reserves its rights to supplement and/or vary this appeal if it gets a copy of the section 102 decision and/or further information.
101. The CER is also requesting the Mining Minister, in terms of section 96(2) of the MPRDA, to suspend the decision of the Mining Minister or delegated authority to grant MSR an amendment of the mining right(s) in terms of section 102 of the MPRDA, pending the outcome of this appeal.

**SIGNED at CAPE TOWN on this 21<sup>st</sup> day of SEPTEMBER 2020.**



---

**CENTRE FOR ENVIRONMENTAL  
RIGHTS**

The Appellant  
Second Floor, Springfield  
Studios  
1 Scott  
Road  
Observ  
atory  
Cape  
Town  
7925

Tel: 021 447 1647

Fax: 086 730 9098

Email: [zomar@cer.org.za](mailto:zomar@cer.org.za) / [lgovindsamy@cer.org.za](mailto:lgovindsamy@cer.org.za)

**Ref: ZO/LG**

**TO: HONOURABLE MINISTER GWEDE MANTASHE  
MINISTER OF MINERAL RESOURCES AND  
ENERGY**

Block 2C, 4<sup>th</sup>  
Floor  
Trevenna  
Campus  
Corner of Francis Baard and Meintjies  
Streets Sunnyside  
Pretoria

Email: [pieter.alberts@dmr.gov.za](mailto:pieter.alberts@dmr.gov.za)

**Attention: Mr Pieter Alberts**

Legal services  
Department of Mineral  
Resources By courier and by  
email

**AND TO: DIRECTOR-GENERAL, DEPARTMENT OF MINERAL RESOURCES**

Block 2C, 4<sup>th</sup> Floor  
Trevenna Campus  
Corner of Francis Baard and Meintjies Streets Sunnyside  
Pretoria

Email: [thabo.mokoena@dmre.gov.za](mailto:thabo.mokoena@dmre.gov.za)

**Attention: Mr Thabo Mokoena**

By courier and by email

**AND TO: MINERAL SANDS RESOURCES (PTY) LTD**

1<sup>st</sup> Floor, Block A

The Forum

North Bank Lane

Century City

Cape Town

Email: [sibonelo@mineralcommodities.com](mailto:sibonelo@mineralcommodities.com); [martin.kauth@mineralcommodities.com](mailto:martin.kauth@mineralcommodities.com)

**Attention: Mr Sibonelo Mkhize and Mr Martin Kauth**

By courier and by email

**AND TO: TORMIN MINERAL SANDS (PTY) LTD**

1<sup>st</sup> Floor, Block A

The Forum

North Bank Lane

Century City

Cape Town

Email: [sibonelo@mineralcommodities.com](mailto:sibonelo@mineralcommodities.com); [martin.kauth@mineralcommodities.com](mailto:martin.kauth@mineralcommodities.com)

**Attention: Mr Sibonelo Mkhize and Mr Martin Kauth**

By courier and by email