APPLICATION FOR SUSPENSION IN TERMS OF SECTION 96(2) OF THE MINERAL AND PETROLEUM RESOURCES DEVELOPMENT ACT, 2002 ("MPRDA")

CENTRE FOR ENVIRONMENTAL RIGHTS	**APPLICANT**
IN RE:	
MINISTER OF MINERAL RESOURCES AND ENERGY	**DECISON-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**

APPLICANT'S RESPONSE TO THE RIGHT HOLDERS' REPLY IN THE ABOVE APPLICATION

I, the undersigned –

ZAHRA OMAR

do hereby make oath and say that –

1. I am a practising attorney of the High Court of South Africa and am employed as such by the Applicant, the Centre for Environmental Rights ("*the CER*"). I am duly authorised to depose to this affidavit on behalf of the CER.

2. The facts and circumstances set out in this affidavit fall within my personal knowledge and belief, except where the context indicates otherwise, and are true and correct.

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Introduction

3. The CER became aware on 14 September 2020 that the Minister of Minerals and Energy ("*the Mining Minister*") or a delegee in the Department of Minerals and Energy ("*the DMRE*"), had taken a decision in terms of section 102(1) of the MPRDA for purposes of the extension of the Tormin mine ("*the section 102 decision*").

4. Because of the CER's concern that the decision may have been taken in and during June 2020 already, on 21 September 2020, the CER urgently lodged an internal appeal in terms of section 96(1) of the MPRDA against the section 102 decision ("*the internal appeal*") and simultaneously lodged this application for a suspension of the section 102 decision, pending the outcome of the internal appeal ("*the suspension application*").

5. Approximately a week later, on 29 September 2020, the CER sent a letter to the Mining Minister and the DMRE motivating for the suspension application to be dealt with on an urgent basis. A copy of the letter is annexed marked "**ZO 1**".

6. On 14 October 2020 the Rights Holders' attorneys of record submitted an affidavit deposed to by the Rights Holders' attorney which is described as a "reply" to the suspension application. In effect, it is an affidavit which sets out the Rights Holders' answer and grounds of opposition to the suspension application. In order not to cause confusion, in this affidavit I nevertheless refer to that affidavit as "*the Reply*".

7. Thereafter, on 16 October 2020, the CER sent a further urgent letter to the Mining Minister and the DMRE, amongst other aspects, noting that the Reply raised procedural and substantive grounds of opposition, including new matters, and

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submitting that the CER should be entitled to deliver a response to the Reply and would do so by 28 October 2020. A copy of the letter is annexed marked "**ZO 2**".

8. On 30 October 2020, the CER lodged a rectified Notice of Appeal and thereafter sent a further letter to the Mining Minister and DMRE, copying the Rights Holders' attorneys of record, notifying them that the CER has rectified any procedural defects that there may have been in the internal appeal, and that the CER will deliver its response in the suspension application by 6 November 2020. A copy of the letter is annexed marked "**ZO 3**". To date the CER has not received a response to that letter.

9. As detailed below, on 30 October 2020, the CER lodged a rectified Notice of Appeal and accompanying affidavit in the internal appeal and, out of an abundance of caution, I placed the original submissions that the CER made in the suspension application on oath (even though this is not a requirement stipulated in the MPRDA nor the MPRDA Regulations) and also delivered that to the Mining Minister, the DMRE and the Rights Holders. In this affidavit I shall refer to those submissions and that affidavit as "*the founding submissions*".

10. On the same day, 30 October 2020, the Rights Holders delivered what is referred to as a reply to the internal appeal which is to some extent relevant in this suspension application ("*the internal appeal Reply*"). The internal appeal Reply refers to the written section 102 decision and the Rights Holders' application in terms of section 102 of the MPRDA. Those two documents, are however, not annexed thereto. The DMRE has not yet filed a record of decision in the internal appeal. Despite requests to the Rights Holders, the Mining Minister and the DMRE, those documents have, to date, not been furnished to the CER.

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11. In this affidavit, the CER responds on a thematic basis to the grounds of opposition in the Reply. Any argument or averment in the Reply which is not specifically dealt with in this affidavit must be taken as denied. In light of the issues raised in the Reply and the internal appeal Reply, and in order to place relevant information before the Mining Minister, the CER appointed independent experts to assess aspects of the environmental impacts in respect of the section 102 mining extension and the risks to the environment if the section 102 decision is not suspended. This response is accompanied by the supporting expert affidavits of Susan Brownlie, Nick Helme, Dr Peter Carrick and Prof Merle Sowman, as well as the confirmatory affidavit of Robert dos Santos. These affidavits are annexed marked "**ZO 4** – "**ZO 8**".

DEFECTIVE APPEAL IN TERMS OF SECTION 96(1) MPRDA *(para 6 of the Reply)*

12. The Rights Holders' contend that the CER failed to comply with procedural requirements contained in Regulation 74 of the Amendment MPRDA Regulations[1] and that there is therefore no basis for the Mining Minister or the Director General to suspend the section 102 decision as there is no valid appeal before them.

13. In the CER's letter dated 16 October 2020 referred to above ("**ZO 2**"), the CER submitted that there was sufficient substantial compliance with the amended Regulation 74 such that there is a valid appeal but that the CER would nevertheless, for the sake of caution, take steps to remedy the alleged procedural defects and, to the extent necessary, seek condonation.

14. In this regard, on 30 October 2020, the CER lodged a rectified Notice of Appeal and accompanying affidavit ("*the rectified internal appeal*") and (as mentioned above)

[1] GN420, GG43172 of 27 March 2020.

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placed the original submissions that the CER made in the suspension application on oath (even though this is not a requirement stipulated in the MPRDA nor the Regulations). The CER also submitted a conditional application for condonation in terms of Regulation 74(4) of the Amendment MPRDA Regulations.

15. The Rights Holders' contentions under this ground of opposition are therefore dealt with in the rectified internal appeal and in the conditional application for condonation.

FAILURE TO COMPLY WITH REGULATION 74 IN RESPECT OF THIS APPLICATION ***(para 7 of the Reply)***

16. The Rights Holders' contend that, in addition to failing to comply with the peremptory requirements of Regulation 74 in relation to the internal appeal, the CER also failed to comply with Regulation 74 in respect of the suspension application, which (so they contend) is "linked" to the internal appeal, and that the suspension application therefore falls to be dismissed.

17. As submitted by the CER in the rectified internal appeal (para 13), there are no regulations in the Amendment MPRDA Regulations pertaining to the submission of suspension applications in terms of section 96(2) of the MPRDA.

18. Accordingly, the suspension application as lodged on 21 September 2020 was not defective. In any event, out of an abundance of caution, on 30 October 2020, the CER re-lodged the suspension application in accordance with the requirements of Regulation 74 of the Amendment MPRDA Regulations pertaining to the internal appeal.

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INCORRECT FORUM ***(para 8 of the Reply)***

19. The Rights Holders' main contention under this ground of opposition is that the motivations submitted in the suspension application all relate to environmental issues, which were already considered and assessed in the environmental authorisation process under NEMA, and are therefore not part of the section 102 application process in terms of the MPRDA.

20. The Rights Holders have misread paragraph 4 of the founding submissions. The CER submitted that, to the extent necessary, the contents of the internal appeal - i.e. under the MPRDA - and not the CER's NEMA appeal should be incorporated into the suspension application. One of the annexures to the internal appeal is the decision of the Environment Minister in the NEMA appeal.

21. The internal appeal does not only contain grounds which, as the Rights Holders put it, "*relate to environmental issues*". Notably, one of the grounds of appeal is the lack of transparency and failure to conduct a public participation process in respect of the section 102 decision (i.e. under the MPRDA) (as opposed to the environmental authorisation process under NEMA).

22. The Rights Holders effectively contend that under the One Environmental System, the "environmental issues" are dealt with under NEMA and not the MPRDA, the environmental authorisation granted in this instance was a prerequisite to the granting of the section 102 amendment and the environmental issues are then not revisited or re-assessed in the section 102 application under the MPRDA.

23. This is disputed by the CER. If a new mining right is granted, the "environmental issues" are not only dealt with under NEMA. In terms of section 23(1)(d) of the

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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* (i.e. under NEMA) *is issued* (our emphasis). The MPRDA decision maker therefore cannot simply rely on the fact that an environmental authorisation was issued under NEMA. Regard must also be had to whether the mining will not result in unacceptable pollution, ecological degradation or damage to the environment and a mining right can only be granted if the mining will not do so.

24. The CER's third ground of appeal in the internal appeal is that there was a failure to apply the section 23(1)(d) MPRDA factor when the section 102 decision was taken and that, 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 the Rights Holders' section 102 amendment application.

25. The decision maker in respect of the suspension application is the Minister, not the DMRE. There is therefore no force in the Rights Holders' contentions in paras 8.12 and 8.13 of the Reply including that it is inappropriate to ask the very department that granted the environmental authorisation (the DMRE) to revisit its own decision and that the DMRE is *functus officio*.

FAILURE TO EXHAUST ALTERNATIVE REMEDIES *(para 9 of the Reply)*

26. The Rights Holders' contend under this ground of opposition that: -

26.1. the CER has failed to exhaust alternative remedies in that it could have brought urgent interim interdict proceedings in the High Court review application against the decision of the Minister of Environment to dismiss the CER's appeal of the granting of an Integrated Environmental Authorisation (IEA), and that the CER

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should have applied for interim relief suspending the IEA as part of that High Court review application; and

26.2. had the High Court granted interim relief it would have *de facto* suspended the amended mining rights because one of the statutory pre-requisites for mining would no longer be in place.

27. In order to obtain an interim interdict, one of the requirements is that the applicant does not have any other satisfactory remedy. In this case, given that the CER had lodged the internal appeal, it was arguably obliged to first exhaust the remedy of a suspension application before approaching the court for an interdict to stop the mining activities.

28. In terms of section 32(2) of NEMA, a court may decide not to award costs against a person, or group of persons which fails to secure the relief in respect of any breach or threatened breach of any provision including a principle of NEMA or any other statutory provision concerned with the protection of the environment or the use of natural resources if the court is of the opinion that the person or group of persons acted reasonably out of a concern for the public interest or in the interest of protecting the environment and had made due efforts to use other means reasonably available for obtaining the relief sought. (our emphasis)

29. The objects of the MPRDA include, amongst others:-

29.1. Promoting equitable access to the nation's mineral and petroleum resources to all the people of South Africa;

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29.2. Giving effect to the principle of the State's custodianship of the nation's mineral resources;

29.3. Promoting employment and advancing the social and economic welfare of all South Africans;

29.4. Giving effect to section 24 of the Constitution by ensuring that the nation's mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development; and

29.5. Ensuring that holders of mining and production rights contribute towards the socio-economic development of the areas in which they are operating.

30. The CER was quite entitled – and possibly even obliged – to first avail itself of the section 96(2) statutory internal remedy before approaching the High Court for any interdictory relief.

SECTION 96(1) APPEAL *(para 10 of the Reply)*

31. This section of the Reply deals with certain of grounds of appeal in the internal appeal which are relevant to this suspension application.

32. The CER addresses the Rights Holders' "high level" submissions briefly under the sub-headings below, and reserves its rights to expand on those responses when the CER submits its amended notice of appeal after receiving the record of decision and/or when it submits its replying affidavit in the internal appeal.

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Critical Biodiversity Areas

33. The Rights Holders' allege that the CER's submission in the suspension application that "the areas" which are subject to the section 102 mining extension lie within a critical biodiversity area, is incorrect. They also criticise the CER for not having provided expert reports in the suspension application.

34. As dealt with further below, the Rights Holders' Environmental Impact Assessment Report (*"EIAR"*) and Terrestrial Ecology Specialist Study (Appendix 11F of the EIAR) (*"the Terrestrial Study"*) undertaken as part of the environmental impact assessment process under NEMA for purposes of its section 102 application failed to properly apply the legal framework in respect of Critical Biodiversity Areas (CBAs) and to take into account the environmental impacts associated with the proposed mining in the CBAs.

35. The Rights Holders' argue in the suspension application that *"...only a portion of the amended mining rights granted under Section 102 fall within what the Applicant has indicated are CBAs."* (own emphasis) (para 10.1.1.3 of the Reply)

36. This is misleading. The Rights Holders' own EIAR states that *"The majority of the area under application falls within Critical Biodiversity Areas (CBAs). These areas have been designated as CBAs to promote coastal resource protection and to maintain ecological processes associated with the coastal strip, especially the ability of fauna to move along the coast."*[2] (own emphasis)

[2] SRK Consulting: 507228: Tormin Mine Extension EIA – EIA Report Executive Summary, p vi.

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37. Similarly, the Terrestrial Ecology Specialist Study (Appendix 11F of the EIAR) states that *"The vast majority of the affected area under application falls within CBAs. These areas have been designated CBAs mostly in order to promote coastal resource protection and to maintain ecological processes associated with the coastal strip, especially the ability of fauna restricted to this area to disperse along the coast. The development poses 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 (biodiversity process)."*[3] (own emphasis).

38. It is therefore clear from the above that it is not just a *"portion"* of the section 102 mining extension area which falls within CBAs, but a *vast majority* of the extension area. Figures 5-19 and 5-20 in the Terrestrial Ecology Specialist Study is further evidence of this.

39. Most of the section 102 mining expansion area falls within CBAs, as identified in the Western Cape Biodiversity Spatial Plan, 2017 (*"the Western Cape Biodiversity Spatial Plan"*).

The legal framework in respect of CBAs

40. The National Environmental Management: Biodiversity Act, 10 of 2004 (*"the Biodiversity Act"*) provides for integrated and co-ordinated biodiversity planning to give effect to South Africa's international biodiversity obligations and the section 24 environmental right. It is a specific environmental management act in terms of NEMA.

[3] Simon Todd Consulting: Terrestrial Ecology EIA Report - Tormin, June 2017, p 31. The Terrestrial Study is annexed to the Rights Holders' Reply in the internal appeal marked "RA 6".

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41. The Biodiversity Act's objectives include, within the framework of NEMA, to provide for the management and conservation of biodiversity within the Republic and of the components of such biological diversity (section 2(a)(i)) and to give effect to ratified international agreements relating to biodiversity which are binding on the Republic (section 2(b)).

42. South Africa has been a party to the Convention on Biodiversity since 31 January 1996. In terms of section 3 of the Biodiversity Act, it gives effect to ratified international agreements affecting biodiversity to which South Africa is a party and which bind the Republic.

43. In terms of section 7 of the Biodiversity Act, its application must be guided by the NEMA principles set out in section 2 of NEMA. In terms of section 4(a) of NEMA sustainable development requires consideration of all relevant factors, amongst others:-

43.1. that the disturbance of ecosystems and loss of biological diversity are avoided, or, where, they cannot be altogether avoided, are minimised and remedied;

43.2. that the development, use and exploitation of non-renewable resources and ecosystems of which they are a part do not exceed the level beyond which their integrity is jeopardised;

43.3. that a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions.

44. The Biodiversity Act establishes the South African National Biodiversity Institute ("*SANBI*"), which is obliged to monitor and regularly report on the status of South

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Africa's biodiversity (section 11(1)(a)(i)). It also requires the Environment Minister to prepare and regularly update a National Biodiversity Framework (section 38) and it makes provision for a number of sub-regional and local planning instruments, including bioregional plans and biodiversity management plans (sections 40 – 45).

45. In 2016, the Western Cape Department of Environmental Affairs and Development Planning finalized the province's latest Provincial Biodiversity Strategy and Action Plan 2015 – 2025 in line with the international and national policy and legislative context. The Provincial Biodiversity Strategy and Action Plan notes the global importance of biodiversity in the Western Cape, in large part characterized by the Cape Floristic Region which has been recognized as a biodiversity hotspot (p. 15).

46. The Western Cape Biodiversity Spatial Plan was developed by CapeNature in collaboration with the Western Cape Department of Environmental Affairs. It comprises the Biodiversity Spatial Plan Map (BSP Map) and the WCBSP Handbook.

47. It draws on best available science, provides a singular, province-wide biodiversity assessment, and gives explicit consideration to ecological infrastructure and climate resilience (p. vi, WCBSP Handbook). The main purpose of the Western Cape Biodiversity Spatial Plan is to consolidate and make accessible the most recent and best quality spatial biodiversity information to inform land use and development planning, environmental assessments and authorizations and natural resource management. It achieves this by (a) providing a map of terrestrial and freshwater areas that are important for conserving biodiversity pattern and ecological processes, i.e. by identifying CBAs and ESAs; and (b) presenting guidelines on types of land uses that are compatible with maintaining CBAs and ESAs.

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48. CBAs are defined as "*Terrestrial (e.g. threatened vegetation type remnants) and/or aquatic features (e.g. vleis, rivers and estuaries) and the buffer areas along aquatic CBA features, whose safeguarding is critically required in order to meet biodiversity pattern and process thresholds. They are identified through a systematic biodiversity planning approach and represent the most land-efficient option to meeting all thresholds*". ESA's are a "*supporting zone or area required to prevent the degradation or CBAs*"...

49. The province-wide network of CBAs and ESAs set out in the Western Cape Biodiversity Spatial Plan is intended to achieve the following (p. 4, WCBSP Handbook):

- *achieve national and provincial biodiversity targets on the least amount of land possible;*
- *have the least conflict with other forms of land use;*
- *favour areas that are important for freshwater ecosystems and water security; and*
- *promote adaptation to climate change and connectivity across the landscape.*

50. CBAs, in particular, are areas in a natural condition that are required to meet biodiversity targets for species, ecosystems, or ecological processes and infrastructure and include *"all areas required to meet biodiversity pattern (e.g. species, ecosystems) targets; Critically Endangered (CR) ecosystems (terrestrial, wetland and river types); all areas required to meet ecological infrastructure targets, which are aimed at ensuring the continued existence and functioning of ecosystems and delivery of essential ecosystem services; and critical corridors to maintain landscape connectivity*" (p. 52, WCBSP Handbook).

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51. The WCSBP Handbook emphasizes that *"CBAs are areas of high biodiversity and ecological value and need to be kept in a natural or near-natural state, with no further loss of habitat or species. Degraded areas should be rehabilitated to natural or near-natural condition. Only low-impact, biodiversity sensitive land uses are appropriate"* (p. 52, WCBSP Handbook).

52. In the Western Cape Biodiversity Spatial Plan the area is identified as CBA I: Terrestrial and Forest, meaning a CBA that is likely to be in a natural condition. The general land-use guidelines for CBA I are as follows (pp. 71 – 2):

- *Biodiversity loss and land use change in CBAs should not be permitted. Unauthorized land use change or degradation by neglect or ignorance must be monitored as a matter of priority.*

- *Where appropriate and in accordance with the Protected Area Expansion Strategy (and where capacity exists), these areas should be incorporated into the formal Protected Area system through biodiversity stewardship agreements (contract Nature Reserves or Protected Environments).*

- *Ideally, conservation management activities should be the primary land use in all irreplaceable areas, OR they should at least be managed in ways that have no negative impact on species, ecosystems or ecosystem services.*

- *Extensive (low-intensity) livestock or game ranching, if well-managed, may be compatible with the desired management objectives for these areas. These land uses are acceptable if they take into account the specific biodiversity features (e.g. rare species or vegetation remnants) and vulnerabilities (e.g.*

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infestation by invasive alien plants) at each site, if they comply with recommended stocking rates and if any associated infrastructure (required to support the ranching activities) is kept to low levels.

- *Conservation efforts should focus on conserving Species of Conservation Concern and populations of keystone species and species responsible for pollination and seed dispersal.*

53. The Western Cape Biodiversity Spatial Plan outlines five steps that should be followed when using the BSP map to determine the biodiversity context of a particular land use, and to identify potential "red flags" that should inform the revision of project plans and alternatives (p. 96). Importantly, for assessing the impact of a development on biodiversity (Step 3), the plan notes that when a significant impact in CBAs or ESAs is unavoidable: Any irreversible loss of habitat would be highly undesirable; these biodiversity features [irreversible loss of habitat] should be treated as "red flags" or even disqualifiers ("Fatal Flaws"); it is necessary to proceed with extreme caution, and with likely delays and higher costs; a SACNASP registered biodiversity specialist must be appointed early in the process to conduct surveys in the appropriate season; and restoration and maintenance of ecological processes will be necessary (p. 98).

The EIAR in respect of the impact of the mining on biodiversity

51. For purposes of the environmental impact assessment for the Rights Holders' section 102 IEA, SRK Consulting appointed an expert, Simon Todd of 3Foxes Biodiversity Solutions, to undertake the Terrestrial Study.

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52. The EIAR relies on the Terrestrial Study in respect of impacts on biodiversity and CBAs. The EIAR itself barely deals with the significance of most of the area falling within CBAs. It is only dealt with briefly in the section dealing with vegetation sensitivity (para 6.8.3. pp. 99 – 101). Importantly, there is no regard whatsoever to the legal and policy framework in respect of CBAs set out above. Instead, the status of CBAs is downplayed and the incorrect legal position is given as follows: "*Although CBAs confer no rights and have no official conservation status in law, they provide an indication of ecological status (biodiversity)*".

53. The Terrestrial Study itself also does not refer to the legal and policy framework in respect of CBAs. The section of the Terrestrial Study headed "**Critical Biodiversity Areas**" (pp.31 – 33) barely explains what a CBA is. It is acknowledged that "*The vast majority of the affected area under application falls within CBAs*". There are five references in total to the Western Cape Biodiversity Spatial Plan, all in the context of referencing sources of maps / data.

54. The Terrestrial Study found that the development poses a potential threat to the functioning of the affected CBAs, both in terms of a direct impact on species diversity as well as on broad scale ecological processes (p.31). Figure 5-21 (p.34) shows that the ecological sensitivity of the inland mining area and expanded mine footprint is high. Furthermore, "*the areas immediately inland of the beaches is considered High Sensitivity on account of their vulnerability to disturbance as well as their role as an ecological corridor along the coast, with a variety of species restricted to habitat.*" (p.34).

55. The Terrestrial Study finds that the major impact associated with the inland mining would be the loss of the currently intact Strandveld vegetation of approximately 150 hectares which would result in the loss of individuals of plant species of conservation

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concern (SCC) within the footprint, as well as loss of faunal habitat and disruption of landscape connectivity (p.36).

56. Importantly, the following further findings were made in this regard: "*The long-term impact of the inland mining would hinge largely on which vegetation cover within the affected area can be restored to natural levels. This in turn will be dependent largely on topsoil management and the ability of the mine to backfill the mining void to a natural level and soil-stored seed, with follow up active restoration where required. Provided that the cover of the affected area can be restored to near-natural levels, then the long-term impact of the inland mining on ecological processes would be relatively low. However, the degree to which this ideal will be achieved is unknown and cannot be assumed*" and "*the diversity of the affected area will never be fully restored and regardless of the mitigation and rehabilitation applied, some residual impact will remain in this regard*" (p.37).

57. In effect, the finding was that these impacts on priority areas for biodiversity are not reversible. Contrary to the requirements of the NEMA EIA regulations, the Terrestrial Study did not assess either the degree to which impacts could be reversed or the degree to which the impact may cause loss of irreplaceable resources. The loss in this case could constitute "*loss of irreplaceable resources*" since most of the area falls within CBAs.

58. Based on this finding, and applying the framework in respect of CBAs above, in the view of the CER and its experts, this irreversible loss of biodiversity should have been raised as a fatal flaw (i.e. a disqualifier). At the very least, it should have been raised as a red flag (i.e. proceed with extreme caution).

59. This severe shortcoming is exacerbated by the fact that it is by no means clear that the Terrestrial Study was in fact able to accurately assess the full extent of the impact. As set out above, the major impact that was assessed was to vegetation. However, (for unexplained reasons) the site could apparently not be sampled in the spring season when the majority of the plant species are active. Furthermore, due to the prevailing drought that characterised the study period the majority of the annuals, forbs and geophytes were dormant during the study period and could not be adequately sampled.

60. In the light of all of the above, the reliance in the Terrestrial Study on rehabilitation to mitigate the effect of the negative impacts is misplaced. Firstly, rehabilitation is different to restoration. The latter aims to restore vegetation to its original state. Rehabilitation acknowledges that vegetation will be permanently altered, but seeks to return a self-sustaining native plant community that it as close to the original as possible.

61. Secondly, in respect of rehabilitation, it was expressly acknowledged in the terrestrial study that rehabilitation of arid environments is "usually difficult" and is especially so in a mining context on the West Coast for a variety of reasons including the use of seawater to process material, highly unfavourable subsoil chemistry and the harsh, windy conditions on the West Coast (p.37). The impacted vegetation, Namaqualand Strandveld, is difficult and extremely slow to rehabilitate, and it is unlikely that the site will return to its pre-mining biodiversity or be restored (i.e. the overall diversity if the CBAs will be reduced).

62. Thirdly, despite the acknowledgement in the terrestrial study that the degree to which the cover of the affected area can be restored to *near-natural is unknown and cannot be assumed, a "generalized and high level"* rehabilitation plan was provided as an

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appendix to the Terrestrial Study, which would "*still need to be translated into a detailed action and implementation strategy based on the final details of the mining plan on the site.*"

Expert evidence in respect of biodiversity - Susan Brownlie

63. Susie Brownlie is an environmental consultant and environmental assessment practitioner and is recognized internationally for her work on biodiversity in impact assessment.

64. Brownlie assisted the CER with the preparation of the appeal in respect of the IEA and deposed to an expert affidavit for purposes of the IEA review.

65. In respect of the impact on terrestrial vegetation in the CBAs, Brownlie notes, with reference to a journal article, that strip mining for diamonds and heavy minerals is considered the greatest threat to the biodiversity of the Namaqualand region as it is the greatest source of degradation as it involves the total removal of topsoil and vegetation from large stretches of land and that this is of particular concern in an environment, such as Namaqualand, where revegetation is considerably restricted by harsh conditions, such as an arid and windy climate, as well as saline and nutrient-poor soils.

66. Brownlie further notes that Namaqualand Strandveld has little formal protection and has steadily declined over the years. An analysis done by CapeNature in 2016 shows that the remaining extent of this vegetation type has decreased by more than 20% over the last decade. This loss is likely to have increased since that analysis in 2016. According to Dr Philip Desmet, a botanical specialist, there is a diversity of habitats

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within Strandveld that are sensitive, and that should be mapped with appropriate buffers and protected as 'no go' areas for mining.

67. A further aspect dealt with by Brownlie in her affidavit is concerns in respect of a sufficient buffer zone between the mining activity and the coastal dunes which crucial to ensure that coastal dunes do not collapse or become eroded, which would amplify damage to the CBA. The Integrated Environmental Authorisation, citing the Environmental Management Programme (EMPr), stipulates that a buffer zone of 10m "*...must be demarcated from the edge of the cliff and the actual mining area*" as a 'no go area'.

68. Brownlie deals with the reliance on the proposed rehabilitation of affected vegetation in mitigation of negative impacts and gives reasons why it is, in her view, inadequate. She concludes that given the difficulty and uncertainty regarding the success of rehabilitation of this terrestrial vegetation, and the shortcomings of the approach to rehabilitation, the impacts of mining should be considered to have a long-term, irreversible impact on this CBA. Brownlie then deals with reliance on Search and Rescue of Species of Conservation Concern and explains why it is inadequate, including drawing on the evidence of Nick Helme, the specialist botanist whose affidavit and report also accompany this affidavit.

69. Overall, Brownlie concludes that should mining be allowed to continue in the section 102 expansion area, there is a real risk of long-term, potentially permanent, damage to – and fragmentation of - a national and provincial CBA.

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Specialist Botanical Expert – Nick Helme

70. The CER appointed Nick Helme of Nick Helme Botanical Surveys to review the EIAR, the Terrestrial Study and the IEA for purposes of the suspension application. Helme has undertaken over 1900 botanical assessments, with at least 70 botanical assessments having been undertaken in the Sandveld region in the last 12 years.

71. For the reasons given in his report, Helme was of the view that the Terrestrial Study may have understated the true botanical sensitivity of the proposed mining and facility areas.

72. Helme points out that Mr Todd (the author of the Terrestrial Study) concedes that the seasonality of the three site visits was a significant constraint in terms of his ability to assess the presence of seasonally evident species, notably bulbs and annuals (which are dormant and often invisible out of season). This meant that none of the three site visits was undertaken in the optimum spring flowering season (early August – early September) in this semi-arid and strongly winter rainfall area, and thus Todd was unable to identify or record a substantial portion of the flora present in the study area, as these life forms typically make up between 20 and 40% of the total plant diversity in these habitats. It is for this reason that CapeNature strongly recommends that site visits be undertaken during the optimum flowering season, especially for large projects such as this one.

73. Helme further notes that, in his report, Todd in fact only names two plant Species of Conservation Concern that he actually observed – both being bulbs that have perennial leaves or surface visible bulbs (*Boophone haemanthoides* and *Babiana thunbergii* (now *B. hirsuta*).

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74. However, based on surveys and assessments undertaken by Helme (in the spring flowering season) in nearby and adjacent properties, in similar habitat, Helme is of the view that it is indeed very likely that the beach mining areas support at least 4 plant SCC (*Oncosiphon schlechteri, Helichrysum dunense, Drosanthemum marinum* and *Manulea cinerea*). Todd lists all these species in Appendix 1, and notes that these 40 listed species are "known from the vicinity", but does not indicate which are known from the actual development footprints or from the greater property (which may in due course be subject to further mining applications). Many are in fact known from the adjacent Namakwa Sands property.

75. Furthermore, the 75 hectares inland mining area and the 64 hectares facility footprint are in Helme's view very likely to support between 5 and 10 plant Species of Conservation Concern (viz. *Eriospermum arenosum, Leucoptera nodosa, Wahlenbergia asparagoides, Lapeirousia simulans, Muraltia obovata, Helichrysum tricostatum, Babiana teretifolia, Babiana brachystachys* and *Ferraria foliosa*).

76. Importantly, in addition, Todd fails to mention that there are three undescribed plant species known from this habitat in this region (*Nemesia* sp. nov. *Gethyllis* sp. nov. and *Arctotis* sp. nov. *rubrosabulosa* MS), and the first two are rare and undoubtedly threatened, whilst the latter is more widespread and perhaps does not qualify as threatened. The presence of three undescribed species is indicative both of the richness of, and of how poorly known, the flora in the region actually is.

77. Helme therefore concludes that there could thus easily be as many as 12 or 13 plant SCC in the inland development footprints, and as a spring survey of the site was not undertaken and as the presence of these likely Species of Conservation Concern

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could thus not be disproven, this must be regarded as a failing of both the Terrestrial Study, the EIAR and the IEA. The presence of Species of Conservation Concern is a key informant of sensitivity assessment. The precautionary principle, which EIAs are required to follow, implies that one must assume that sites are ecologically sensitive and may contain Species of Conservation Concern, until proven otherwise.

Expert evidence in respect of rehabilitation – Dr Peter Carrick

78. The CER also appointed Dr Peter Carrick, an ecological scientist specialising in the ecological restoration, functioning and management of semi-arid landscapes to review the terrestrial study. His work and research have been focused on the west coast, Namaqualand and Succulent Karoo region since 1997.

79. Dr Carrick points out that the Terrestrial Study emphasises the restoration of ecological function but does not outline how this is achieved or what aspects should be monitored in order to gauge progress. In that regard he elaborates that the rehabilitation goals set out in the terrestrial study are neither context nor site specific. The only rehabilitation targets concern vegetation cover, and it is unclear what informed the setting of these targets. Reference sites are needed for each vegetation sub-type impacted, and these should be analysed to set explicit targets. Targets for vegetation composition may then include abundance and/or cover metrics, site-scale diversity and area-scale diversity (these should concern species in reference systems rather than simply the number of species). Numerous targets for vegetation structure and/or function can be developed. These targets should be relevant to the context and the key environmental processes and functions that need to be restored.

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80. The Terrestrial Study annexes a high-level rehabilitation plan. Dr Carrick outlines a number of specific shortcomings in the rehabilitation and revegetation plan, briefly summarised below: -

53.1. In respect of topsoil management, Todd directs that either that 500 mm or 300 mm of topsoil is removed and used for rehabilitation. The use of up to 500 mm of surface soil for rehabilitation is very good practice in these ecosystems. However, the failure to recognize this depth of surface soils as two components will result in crucial dilution of the true topsoil, the burial of most of the seedbank and a significant failure of rehabilitation. The key components of topsoil are concentrated in the top 50 mm of topsoil. The upper 50 mm of topsoil should not be mixed with any other soil layers. Good practice implemented by the Namaqua Diamond Company, in exactly the same area as the proposed mine expansion, involved the stripping of the upper 50 mm of topsoil (together with surface plant material), and the remaining 500 mm of subsoil separately. These layers are then stored separately and replaced in reverse order during rehabilitation.

53.2. Provision for topsoil storage is also crucial as topsoil is the primary driver of successful rehabilitation. The major threat to topsoil stores/dumps in the west coast environment is wind erosion. Steps to limit the degradation or loss of topsoil are not adequately set out for this mining operation. Best practice involves storing topsoil in piles no greater than 1 m high and for not longer than one month. Todd recommends piles no greater than 1 m high and for not longer than six months, and the EIAR and EMPr recommends stockpiles no greater than 4 m high and for not longer than six months. Following the latter guidelines will result in the loss of the majority of ecological value of the topsoil.

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53.3. Due to cost implications it is most unusual for topsoil to be trucked offsite to a dedicated storage area as indicated by Todd. Wherever topsoil is stored, its management should be guided by the environmental dynamics of the region and not guidelines borrowed from other global operations.

53.4. Netting is crucial for any successful rehabilitation along the west coast to limit wind erosion and should be implemented immediately following the replacement of the final topsoil layer. Todd has highlighted much of the necessary wind erosion management, however the distance between nets of 5-10 m prescribed by Todd is incorrect and may result in significant rehabilitation failure. The use of shade-netting to limit wind erosion was pioneered by the Namakwa Sands mining operation at Brand-se-Baai, has proved effective, and is well established, e.g. Halbich 2003. If such nets are placed further than 6 m apart soil erosion will result in most cases before plants can establish.

53.5. The emphasis given by Todd to the use of indigenous seed from the immediate area and understanding of functional groups of plants to inform the seeds used for reseeding is good management practice, however, the recommendation that reseeding be done using "*an agricultural methods (i.e. tractor and planter or spreader and roller)*", is wholly unfeasible. It is simply not possible to collect sufficient quantities of seed for such methods. Reseeding methods need to be implemented in order to best manage the scarcity of seeds. It is also unclear why Todd recommends the use of only 3-4 species for reseeding. In most cases this is inadequate for the restoration of even the key functional groups, and around 20 species are usually used to achieve this target.

53.6. As a means of restoring populations of plants that are rare of have specific habitat requirements, search and rescue is often unsuccessful. No reliance for the

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restoration of biodiversity should be placed on this practice. Furthermore, suitable management guidelines for such operations are lacking from Todd.

53.7. Due to cost implications it is most unusual for overburden to be trucked offsite to a dedicated storage area as indicated by Todd, when mining commences at new mining sites. If this practice is not followed and overburden is stored/dumped adjacent to the mine cutting (as is the usual the practice), it will result in an additional degraded area after return of the overburden to a mining void and an increased footprint of mining impact (not accounted for by Todd). If this process is followed and overburden is located in the infrastructure / plant expansion area, protocols and provisions should be provided for its management (i.e. Is the area large enough? How is erosion and soil and slope movement to be managed?), and are not.

53.8. No details are provided of the nature of the new roads, including the 15 m wide haul road. If these roads are to be compacted or treated in any way, e.g. clay, calcrete, hardpan or saltwater used for stabilisation and dust suppression, specific rehabilitation will be required. No provision or guidelines are provided for specific mining impacts and too few for the specific environmental dynamics of this region.

Lack of Independent Expert Evidence ***(paras 10.1.2 – 10.1.2.8 of the Reply)***

81. The Rights Holders' contention under this ground of opposition is that the CER has failed to present a single independent expert report – either in its internal appeal or suspension application – which contradicts the Rights Holders' own independent expert reports procured for the purposes of applying for the IEA (para 10.1.2 of the Reply).

82. The CER submits that this is incorrect. In the internal appeal and suspension application, the CER relied on its appeal in terms of NEMA submitted to the DMRE against the granting of the IEA for the section 102 amendment application ("the IEA appeal"). The CER's submissions in its IEA appeal were prepared with the assistance of Susan Brownlie, an independent environmental consultant and environmental assessment practitioner recognised internationally for her work on biodiversity in impact assessment.

83. As set out above, the internal appeal and suspension application were initially lodged on an urgent basis. Given the elapse of time, the CER thereafter appointed experts to assist with the suspension application.

84. As regards the Rights Holders' contention that the arguments presented by the CER are theoretical, policy based and high level, and therefore add little value to contradicting the findings of the experts in the IEA process (para 10.1.2.5 of the Reply), the CER submits that this is incorrect. The CER's arguments are not theoretical, policy or policy-based. They are legal arguments about the interpretation of the relevant environmental and administrative laws and what should be construed as a relevant fact, given the scientific evidence before the administrative decision-maker. The CER has now also relied upon further independent experts.

<u>The Cumulative Impact Argument is Flawed</u> ***(paras 10.1.3 – 10.1.3.5 of the Reply)***

85. The CER strongly denies the allegation that raising cumulative impacts brings into question the bona fides of the application. The CER's rights in this regard are expressly reserved.

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86. The accompanying expert affidavit of Professor Merle Sowman deals, *inter-alia*, with the failure to assess cumulative impacts (paras 38 – 54 of the affidavit).

PREJUDICE TO THE MINE *(para 11 of the Reply)*

87. The Rights Holders' main contention under this ground of opposition is that should this suspension application be granted and the section 102 decision be suspended, the Rights Holders will suffer financial and operational prejudice. Furthermore, there will not only be financial implications for the Rights Holders, but also social and socio-economic implications that will affect lives and livelihoods of employees and communities, and broader economic prejudice.

88. As regards the Rights Holders' arguments in 11.4 and 11.5 of the Reply, the CER makes the following submissions:

88.1 According to the Rights Holders', *"following receipt of the Rights Holders' rights in June 2020, the Rights Holders have expanded their workforce, mining fleet and commenced operations to mine the expanded footprint of the expanded mining right. A suspension would render those activities obsolete."* (para 11.5 of the Reply).

88.2 In July 2019, the CER, among other interested and affected parties, appealed the DMRE's granting of an IEA to the Rights Holders in respect of the section 102 amendment application. That appeal was dismissed by the Minister of Environment in March 2020.

88.3 Despite the CER having placed on record with the DMRE and the Rights Holders' environmental consultants (SRK Consulting) that there was a legal obligation for the section 102 decision to be procedurally fair and that it believed that the application of section 102 in these circumstances is unlawful, neither the Rights Holders nor the DMRE notified the CER when the Mining Minister / DMRE took the section 102 decision.

88.4 The section 102 decision was apparently made in June 2020 (para 11.5 of the Reply).

88.5 The CER only became aware of the section 102 decision in September 2020 while it was preparing for judicial review proceedings in respect of the IEA appeal decision. As mentioned above, the CER was at no point notified of the section 102 decision by the DMRE (paras 23 – 28 of the rectified internal appeal). To the best of the CER's knowledge, there has also been no public participation process and consultation in respect of the section 102 amendment application (i.e. as opposed to - and over above - the public participation that was conducted in the IEA process under NEMA), despite the CER calling for such public participation process in its correspondence to the DMR (paras 57 – 67 of the rectified internal appeal).

88.6 In those circumstances, any prejudice which the Rights Holders may suffer as a result of the suspension application is as a result of their own making. They took the risk of not notifying the CER that the section 102 decision had been taken. Had they done so, the CER would have lodged an internal appeal and a suspension application then, before the Rights Holders started implementing the section 102 decision, including incurring expenditure.

88.7 As regards the Right Holders' argument in para 11.5.3 that *"Mining Charter and Social & Labour Plan commitments made with the assumptions of adequate supporting cashflow would be discontinued, including the sponsorship of learners at various institutions"*, the CER cannot comment on this submission as it has not had sight of the Rights Holders' Social and Labour Plan (*"SLP"*) submitted in respect of the section 102 amendment application (paras 66 and 67 of the rectified internal appeal) despite requesting a copy of that SLP from the DMRE and from the Rights Holders. Further, a report by Oxfam South Africa in 2018 titled *"David vs Goliath: The Case of the Social and Labour Plan Outcomes of Mineral Sands Resources Limited (MSR) Ltd, Tormin Mine and the Community of Lutzville"*[4] , shows that the Rights Holders' previous Annual SLP Compliance Reports (for 2015 and 2016) have failed to provide sufficient evidence to be able to satisfy that the SLP (for 2014 – 2019) is being implemented, both in terms of data that is simply missing, and in terms of the contradictory, and unreliable nature of much of the data that is actually included.[5] Further, the report notes that the projects in the Rights Holders' SLP have not been aligned to the Matzikama Local Municipality's Integrated Development Plan (IDP). SLPs should be drawn up in consultation with municipalities so that they align with IDPs which are supposed to reflect community priorities.[6] The fact that there is no sufficient evidence of the implementation of the Rights Holders' SLP (2014 – 2019) for its existing Tormin Mine operations indicates that there is no guarantee of the Rights Holders' meeting their SLP commitments for their amended mining right.

[4] Available online at: https://neilovery.files.wordpress.com/2018/07/oxfam-mining-final-lowres.pdf.

[5] At page 51.

[6] At page 55.

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Risk to the environment and balance of convenience

89. The CER submits that the risk that mining in the section 102 expansion area poses to the environment should be balanced against any prejudice that the Rights Holders may suffer.

90. For all the reasons given in the founding submissions, this affidavit and the accompanying expert reports, and given the fundamental flaws in the Terrestrial Study and EIAR, the CER submits that there exists a reasonable apprehension that unless the suspension application is granted irreparable harm will occur to the sensitive landscape and biodiversity impacted upon by the mining and related operations to be conducted in the section 102 expansion area. In this instance, given the "gaps" in the terrestrial study and in respect of rehabilitation, the application of the precautionary principle lends further weight to the risk of irreparable harm.

91. The mining activities pose a risk of causing irreparable harm to this sensitive area, almost of which falls within CBAs. Once this area – including the ten beaches on our West Coast - has been damaged or destroyed, they are lost.

92. Against these interests must be weighed the commercial interests of the Rights Holders.

93. As mentioned above, one would also expect a responsible operator to have contingency plans in place in the event of further legal challenges, given the fact that the CER (and others) have consistently challenged this expansion since January 2017. It is also worth repeating that, despite these consistent objections, the Rights Holders not only made no attempt to notify CER (or other registered interested and affected parties) of the DMRE's decision to approve the application under section 102

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and its intention to commence mining – but even now still refuses to disclose the section 102 application and the section 102 decision.

94. If the mining operations that are underway continue in the interim, it may be impossible to turn back the clock on some of the environmental impacts.

95. In matters involving the protection of the environment from harm, the law places special duties on the relevant authorities, including the courts, to take appropriate action to anticipate and prevent negative impacts on the environment and on people's environmental rights.

96. This is duty is expressly contained in section 2(4)(viii) of NEMA. I respectfully submit that it is appropriate for the Honourable Mining Minister to be guided by this consideration in weighing the broader public interest inherently involved in this case, against the interests of the Rights Holders.

CONCLUSION

97. In the circumstances of all of the above, the CER submits that the suspension application should be granted.

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ZAHRA OMAR

I CERTIFY THAT:

1. The Deponent acknowledged to me that:
   1.1. She knows and understands the contents of this declaration;
   1.2. She has no objection to taking the prescribed oath;
   1.3. She considers the prescribed oath to be binding on his conscience.
2. The Deponent thereafter uttered the words, "I swear that the contents of this declaration are true, so help me God."
3. The Deponent signed this declaration in my presence at **PRETORIA** on this **6th** day of **NOVEMBER** 2020.

COMMISSIONER OF OATHS

Full names: Lenny Mashebane

Address: 119 Duxbury Road Hillcrest

Capacity: Sergeant