

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

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

AFFIDAVIT

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.

3. Where I make contentions of a legal nature, I do so on the advice of the CER's legal representatives.
4. The Centre for Environmental Rights (CER) ("the Applicant") hereby formally lodges an application for the suspension of the decision of the Minister of Mineral Resources and Energy ("the Minister") to grant extended mining rights (WC30/5/1/2/2/10107MR and WC 30/5/1/2/2/10108MR) to Mineral Sands Resources (Pty) Ltd ("MSR") and Tormin Mineral Sands (Pty) Ltd ("Tormin Mineral Sands").
5. This application is sought pending the outcome of the appeal against the decision of the Mining Minister to approve an application made by MSR and Tormin Mineral Sands to amend its existing mining rights in terms of section 102(1) of the MPRDA. This application is annexed to the Applicant's appeal in terms of section 96(1) of the MPRDA.
6. An appeal in terms of section 96(2) does not suspend the decision being appealed against. Section 96(2) of the MPRDA vests the power in the appeal authority to suspend such a decision pending the outcome of the appeal.
7. To the extent necessary, the contents of the appeal (together with the annexures) are expressly incorporated into this application for the suspension of MSR's mining right. In particular, we refer to the decision of the Environment Minister to dismiss the Applicant's appeal against the IEA for the mine extension as well as the documents and reports which served before her for purposes of deciding the appeal.
8. The areas subject to MSR's proposed expansion lie within Critical Biodiversity Areas (CBAs). They are determined through spatial biodiversity planning to meet national

biodiversity targets in accordance with the country's commitments in terms of the international Convention on Biological Diversity. These areas collectively meet targets for ecosystem types, species and ecological processes that have not been met in the protected areas. That is, they are recognised priority areas for conserving South Africa's unique biodiversity, which should be maintained in a good ecological condition. The affected area also lies within a recognised ecological corridor of importance. Critical Biodiversity Areas should be maintained in a good condition.

9. Of paramount importance in assessing impacts on biodiversity is the need to consider direct, indirect and cumulative impacts of a proposed activity on biodiversity pattern (i.e. ecosystems, species, special habitats) and on ecological processes. Any loss of intact CBAs should be considered to have a high negative impact on a regional if not national level and to compromise the ability for the country's biodiversity targets to be met.
10. The Tormin mine relies on *rehabilitation* of affected vegetation in mitigation of negative impacts. Rehabilitation is different from restoration. 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 of the CBAs will be reduced).
11. Appendix 11F of the EIA Report, which served before the Environment Minister in her decision to dismiss the Applicant's appeal against the IEA for the mine extension, makes the point that the degree to which vegetation cover can be restored to near-natural levels is 'unknown and can't be assumed', and that 'the diversity of the affected area will never be fully restored'. That is, these impacts on priority areas for biodiversity are not reversible.

12. The Tormin mine also relies on the 'search and rescue' of species of conservation concern (SoCC) to mitigate impacts and reduce the significance of residual impacts. Importantly, the South African National Biodiversity Institute (SANBI) advocates 'strong avoidance of 'search and rescue' options for conserving SoCC' in its Guidelines for Environmental Impact Assessments¹.
13. Although a section of Appendix 11F covers cumulative impacts, the interpretation of 'cumulative' is restricted to the mine's existing operations and the proposed extension. All impacts – and in particular the cumulative impacts of mining on ecological processes within these Critical Biodiversity Areas and ecological corridor, are described as 'long term', taking into account mitigation. As noted in the terrestrial ecologist specialist study, disruption of ecological processes would be vulnerable to cumulative impact and were the mining footprint to expand further, there could be significant disruption of ecological processes.
14. The negative impacts on biodiversity of other existing or 'applied for' mining operations that affect the same biodiversity, have not been assessed. There is a range of different types of mining activities in the coastal region and offshore (e.g. diamond mining), which all affect terrestrial, coastal and marine biodiversity. The assessment of cumulative impacts is required in terms of the NEMA EIA Regulations of 2014 (GN R982 in Government Gazette No. 38282, 4 December 2014 as amended by GN 326 in Government Gazette No. 40772, 7 April 2017), as defined in s1 of these Regulations: 'the past, current and reasonably foreseeable future impact on an activity, considered with the impact of activities associated with that activity, that in itself may not be significant, but may become significant when added to the existing and reasonably foreseeable impacts eventuating from similar or

¹ Available at: <http://redlist.sanbi.org/eiaguidelines.php>.

diverse activities' (my emphasis). The cumulative impacts have, therefore, not been adequately addressed in the EIA.

15. Section 2(4)(a)(ii) of NEMA explicitly requires that disturbance of ecosystems and loss of biological diversity be avoided, or where it is not possible to altogether avoid, it should be minimised and remedied. While measures are proposed to minimise impacts, residual impact ratings on biodiversity remain of medium significance. That is, given the significance of these residual impacts, there is a further need for remedy beyond minimisation and rehabilitation. In terms of both the gazetted Draft National Biodiversity Offset Policy (31 March 2017)² and the Western Cape Guidelines on Biodiversity Offsets (March 2015)³, biodiversity offsets should be required. Appendix 11F of the EIA Report does not address the need for biodiversity offsets, other than recommending, 'ideally, in the long term', 'some kind of conservation agreement' on one land parcel 'partly' to offset the remaining impacts. The latter does not meet the core principles of biodiversity offsetting as set out in both the draft national policy and the provincial guidelines.

16. Section 2(4)(vii) of NEMA requires a risk-averse and cautious approach, taking into account the limits of current knowledge about the consequences of decisions and actions. The mining area contains numerous West Coast endemics and species of conservation concern, and various endemic or restricted-range subterranean animal species (mammals, reptiles and invertebrates) associated with coastal sands and dune systems. Importantly, the terrestrial ecologist specialist report noted limitations in information and knowledge about the species in the affected area, given that the

² Available at:

https://www.environment.gov.za/sites/default/files/legislations/nema107of1998_draftnationalbiodiversityoffsetpolicy_qn40733_0.pdf.

³ Available at:

<https://www.westerncape.gov.za/eadp/files/atoms/files/DeadP4Offsets%20Guideline%2025%20March%202015%20%27clean%27.pdf>.

survey was carried out during a drought and the sampling period excluded the spring season, implying that annuals, forbs and geophyte species in particular were not adequately sampled.

17. In summary, the impacts for biodiversity in this priority area are not reversible and the lack of proper assessment of the cumulative impacts of mining on the extended area of the mine, presents a significant harm to a critical biodiversity area.
18. There will be no irreparable harm to MSR if the mining right is suspended pending the outcome of the appeal. Any harm which it may suffer would be purely financial.
19. In contrast, if MSR commences mining in this environmentally sensitive area pending the outcome of the appeal, there will be irreparable harm and damage.

Conclusion

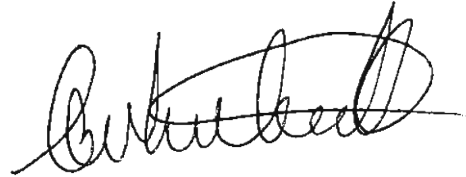
20. In the circumstances the decision to grant MSR the amendment of the mining rights in terms of section 102 of the MPRDA should be set aside in its entirety and suspended pending the outcome of the appeal.



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 **30th** day of **OCTOBER 2020**.



COMMISSIONER OF OATHS

Full names:

Address:

Capacity:

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