

The Honourable Minister Gwede Mantashe  
Minister of Mineral Resources and Energy

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Your reference

Our Reference

Date

I Sampson/kam  
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13 November 2020

Dear Honourable Minister Mantashe

**APPLICATION IN TERMS OF SECTION 96(2) OF THE MPRDA FOR THE SUSPENSION OF THE DECISION TAKEN IN TERMS OF SECTION 102(1) TO GRANT A MINE EXTENSION AT THE TORMIN MINE IN RESPECT OF PROPERTIES IN THE MAGISTERIAL DISTRICT OF VAN RHYNSDORP, PENDING THE OUTCOME OF THE APPEAL IN TERMS OF SECTION 96(1) OF THE MPRDA (MINING RIGHTS WC 30/5/1/2/2/10107MR AND WC 30/5/1/2/2/10108MR**

1. We refer to the document entitled "Applicant's Response to the Right Holders' Reply in the Above Application" which was provided to our client on 6 November 2020 in relation to the Section 96(2) suspension application.
2. Our client objects to the filing of this document on the following bases:

**Johannesburg: Partners:** J Esterhuizen, T H Kamdar, L M Kotzé, N D Ntombela, I R Sampson, F van Rooyen, D Venter, J L Woker. **Senior Associates:** L Cleland, G Mathebula, N L V Vilakazi.  
**Associates:** T Esterhuizen, S C Khan, R N Mampane.

**Cape Town: Partner:** P H Kumlehn. **Associate:** M Z Ncube.

**Durban: Partners:** R B Armstrong, M D Asherson, M J Bagwandeen, N Besesar, W P Coetzee, P C Cowan, S Davidson, E de Wet, A F Donnelly, A B Edwards, C Eve Friis, C J Field, J L Finnigan, E C Holmes, A W Lockem, M G Maeso, S A H Mkhize, M S Msomi, B D Nelson, M E Nkosi, K V Oosthuizen, V M Oosthuizen, A D Parsons, I R Sampson, J C Smith, Q van der Merwe, J M von Klemperer, D J Warmback, N P Woodroffe (Managing Partner). **Senior Associates:** P J Evelyn, D Joubert De Villiers. **Associates:** F A Christian, K A Hemero, N Kassier, W J Rajbansi, K Singh, S Singh, C M Wilson, A G Zwane.

**Richards Bay: Partners:** A J Heydorn, B C Morkel, B J van Rooyen. **Associate:** A P Kannigan.

**Pietermaritzburg: Partners:** B M Le Roux, J T Manuel, S G Shoji.

**Consultants: Durban:** S M S Dwyer, O M Oosthuizen, K Reddy, H N Theunissen. **Johannesburg:** J L Kotze.

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- 2.1. First, the Regulations do not provide a right of reply in relation to a Section 96(2) suspension application. Regulation 74 of MPRDA Regulations governs “Appeals”, whereas what is before you in this suspension application is not an appeal. Indeed, this point is taken explicitly by CER from paragraph 16 of its Response. If CER is correct in this allegation, then there is no right of reply provided in the empowering regulations, and the document filed on 6 November 2020 does not fall to be considered. (CER cannot have it both ways - either it is governed by Regulation 74, in which case its original suspension application was *pro non scripto* for failing to comply with the mandatory requirements of that regulation; or Regulation 74 does not apply, in which case there is no right of reply for CER).
  - 2.2. Moreover and in any event, the document now filed is an entire reworking of CER’s case. As CER itself records at paragraph 83 of its latest affidavit, its original suspension application was lodged without any support by experts and was unsubstantiated. Now, CER seeks to bolster its case in reply by presenting commentary by a plethora of experts. These experts ought to have been commissioned at the outset of the suspension application (and appeal) so that the Rights Holders had an opportunity to respond to the allegations.
  - 2.3. The Supreme Court of Appeal has repeatedly stressed that a party is not permitted to make out its case for the first time in reply - particularly where (as in this case) the new arguments are a classic case of trying to ‘relieve the pinch of the shoe’, and where the facts put up in reply ought to have been raised in founding. To do so “severely prejudices the party who has to meet a case based on those submissions.” See in this regard *Hano Trading CC v J R 209 Investments (Pty) Ltd* (650/11) [2012] ZASCA 127; 2013 (1) SA 161 (SCA); [2013] 1 All SA 142 (SCA) (21 September 2012) at paragraph 10.
  - 2.4. In addition to prejudicing the Rights Holder, to admit CER’s new expert evidence, made for the first time in Reply, would violate the requirements of procedural fairness and *audi alteram partem* and vitiate the decision.
  3. In the premises, we submit that the “Applicant’s Response to the Right Holders’ Reply in the Above Application” is not properly before you and falls to be ignored.
  4. In the alternative, we submit that the following portions of the Response fall to be struck out as an improper attempt to make out a new case in reply:
    - 4.1. Para 63 - 69 of the Response together with the entire affidavit of Susan Brownlie;
    - 4.2. Para 70 - 77 of the Response together with the entire affidavit of Nick Helme;
    - 4.3. Para 78 - 53.8 (the second one) together with the entire affidavit of Peter Carrick. (The numbering of the Response is not consistent).

5. However, should you intend to admit / consider the Response together with recently-obtained supporting expert evidence, we request that we be given notice of your intention to do so as well as an adequate opportunity of 10 working days to reply thereto.

Yours sincerely

Ian Sampson

**SHEPSTONE & WYLIE**

*(This document has been sent electronically and is therefore not signed)*