

**Application Reference Number: (12/1/9/2-V79)**

<b>ALL RISE</b>	<b>FIRST APPELLANT</b>
<b>THE CENTRE FOR APPLIED LEGAL STUDIES</b>	<b>SECOND APPELLANT</b>
<b>THE HONOURABLE MEC</b>	<b>FIRST RESPONDENT</b>
<b>FOR ECONOMIC DEVELOPMENT, ENVIRONMENT AND</b>	
<b>TOURISM, LIMPOPO PROVINCE</b>	
<b>THE LIMPOPO ECONOMIC DEVELOPMENT AGENCY</b>	<b>SECOND RESPONDENT</b>

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**APPEAL IN TERMS OF SECTION 43 OF THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT, 1998 (NEMA): ENVIRONMENTAL AUTHORISATION IN TERMS OF REGULATION 24 OF THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT, 1998: ENVIRONMENTAL IMPACT ASSESSMENT REGULATIONS**

**TO THE MUSINA-MAKHADO ENERGY AND METALLURGY SPECIAL ECONOMIC ZONE DEVELOPMENT SOUTH SITE ENVIRONMENTAL IMPACT ASSESSMENT REPORT AND ENVIRONMENTAL MANAGEMENT PROGRAMME**

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## A. INTRODUCTION

1. This is an appeal against the environmental authorisation ("EA") granted by the Director: Environmental Impact Management of the Department for Economic Development, Environment and Tourism, Limpopo ("LEDET") on 23 February 2022 to the Limpopo Economic Development Agency ("LEDA") to undertake the list of activities specified on page 2 and 3 of the authorisation and as described in the Environmental Impact Assessment Report ("EAIR") dated 13 September 2021.
2. The authorisation was granted in terms of section 24 of the National Environmental Management Act, 1998 ("NEMA") and the Environmental Impact Assessment Regulations, 2014<sup>1</sup> ("EIA Regulations").
3. This appeal is brought in terms of the National Appeal Regulations, 2014.<sup>2</sup>
4. The appellants contend that the EIA process was fatally flawed and procedurally unfair. The appellants also contend that the EIAR was fatally flawed and cannot serve as a lawful basis for an environmental authorisation ("EA") decision.
5. The authorisation granted by LEDET is thus defective and falls to be set aside in this appeal.
6. A failure to do so will render any appeal decision similarly flawed and subject to being set aside on review in Court.
7. The first appellant made detailed legal and substantive submissions during the draft EIA process to the environmental assessment practitioner ("EAP") appointed by LEDA. These should be read with this appeal as if specifically incorporated herein (attached hereto marked Annexure "A2").
8. The Musina-Makhado Special Economic Zone ("MMSEZ") is made up of two sites and located in two municipalities namely, Musina and Makhado Local Municipalities within the Vhembe District of the Limpopo Province. This EIAR specifically relates to the EIA application for the authorisation to clear limited vegetation for the construction and installation of bulk services infrastructure and fencing of the Musina Makhado Special Economic Zone (MMSEZ) South Site.

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<sup>1</sup> GNR.982 of 4 December 2014: Environmental Impact Assessment Regulations, 2014.

<sup>2</sup> GNR.993 of 8 December 2014: National Appeal Regulations.

9. The impacts of the proposed MMSEZ South site have been assessed in terms of vegetation clearance, installation of bulk services and fencing of the site. While the scope of some specialist assessments was broadened to also include future planned industrial developments (such as the climate change, air quality and biodiversity offset) we submit that the process is fatally flawed in that it constitutes project splitting and fails to adequately address the need and desirability of the project as a whole.
10. This appeal is submitted on behalf of ALL RISE, Attorneys for Climate and Environmental Justice NPC and the Centre for Applied Legal Studies, University of Witwatersrand.

## B. DECISION

11. The EA is "mainly for clearance of indigenous vegetation, installation of bulk services infrastructure and fencing only. All other subsequent activities from individual plants/operations/process units must not commence prior obtaining EAs from the Department and/or organs of state".
12. Paragraph 2 f the EA provides that the EA is approval of Option 2 as outlined in the EIAR – by reducing the project footprint from 8022ha to 3862ha. However, this is incorrect as it is only Option 3 in the EIAR that reduces the project footprint, not Option 2. Option 2 is detailed on page 251 of the EIAR as follows:

*Layout 2 entail the development of the whole site (8013.91ha) for the development of the metallurgical hub. The plan is based on optimal land use of the site and does not consider sensitive ecological areas such as wetlands or extending ecological corridor links with adjacent properties. It does not take into consideration the recommendations that were made by the ecological specialists and the updated biodiversity251-offset report that require some sensitive areas to be avoided. Therefore, this layout option is not supported.*
13. The EA fails to comply with the prescribed content of an EA as set out in regulation 26 of the EIA regulations, including the commencement and completion date for non-operational aspects of the activities as well as the frequency of environmental auditing and submission of environmental audit reports.

### C. SUMMARY OF APPEAL GROUNDS

14. The appellants submit as a point *in limine* that the EIA process was fundamentally flawed, with the LEDET being the applicant, decision-maker, and appeal authority. This makes the EIA (including the public participation) process and this appeal process procedurally unfair.
15. The EA is also flawed in that it fails to comply with regulation 26 of the EIA regulations and authorises Option 2 (as opposed to, we assume, Option 3).
16. In the event that the appellants' point *in limine* is not upheld in the appeal decision, the appellants submit further grounds of appeal which are as follows:
  - 16.1. The EIA, appeal process and public participation process were procedurally unfair.
  - 16.2. Project splitting of the EIA process has resulted in a flawed assessment and ultimately a failure to adequately consider the cumulative impacts and the need and desirability of the project.
  - 16.3. The applicant and decision maker failed to consider the applicable developmental and spatial plans of South Africa.
  - 16.4. There has been a failure to adequately present the need and desirability of the project.

### D. GROUNDS OF APPEAL

#### D.1 Point in Limine: LEDET's dual role as applicant and decision maker

17. Under the leadership of the MEC: LEDET, the MMSEZ was designated as a Special Economic Zone (SEZ) in July 2016 and was gazetted in December 2017 in terms of the Special Economic Zones Act 16 of 2014.
18. The Musina-Makhado Special Economic Zone State-Owned Company (MMSEZ SOC) was entity was registered in March 2017. MMSEZ SOC is a wholly owned subsidiary of the Limpopo Economic Development Agency (LEDA), itself established in terms of the Limpopo Economic Development Agency Act 5 of 2016. LEDA is the implementing agency of LEDET.

19. The EIA application and Scoping Report (SR) were submitted to LEDET which was appointed as the Competent Authority by the then Department of Environment, Forestry and Fisheries. LEDET made decisions during the EIA process and ultimately issued the EA.
20. Section 3(1) of the Promotion of Administrative Justice Act, 2000 (PAJA) requires procedurally fair administrative action. Administrative action is reviewable where the administrator who took the decision is biased or reasonably suspected of bias, or when a decision was taken by an administrator who lacked the authority to do so.
21. There is a clear conflict of interest between MMSEZ SOC/LEDA, who is the applicant for the MMSEZ EA, and LEDET, who is the decision maker. This conflict violates the appellants' rights to procedurally fair administrative action both in the decision-making process and in this appeal process.
22. As a consequence, the EIA process upon which the EA under appeal is based is fatally flawed and fails to be set aside on review.
23. This flaw goes to the heart of the environmental authorisation process and cannot be remedied by this appeal process or an appeal decision that is not in the appellants' favour.

#### **D.2 EIA and Public Participation process procedurally unfair**

24. The public participation in an environmental authorisation process must not only meet the minimum commenting requirements set out in the EIA Regulations but must also meet the requirements of section 3 of PAJA, applicable provisions of the South African Constitution, and the NEMA Public Participation Guideline. I&APs must be afforded an opportunity to make meaningful representations, which also requires access to all relevant information.
25. On 15 September 2021 the first appellant sent a letter to the new EAP to inform it that although comments to the draft EIAR were submitted on 22 October 2020, no response was received. We also requested a copy of the Comments and Response report to ascertain whether the appellants' comments as well as those comments submitted by other I&APs were addressed in the latest version of the EIAR. A copy of the letter is attached as Annexure "A3".
26. This is a requirement required not only in terms of Appendix 3 of the EIA Regulations, but also in terms of Regulation 13(1)(f). According to Regulation 43 of the EIA Regulations, all I&APs are

entitled to comment on all reports or plans and Regulation 3(8) of the EIA regulations requires the commenting period to be at least 30 days. PAJA also requires a reasonable and fair administrative process, requiring proper notification to the public and a commenting process.

27. We informed the EAP that since numerous I&APs had been excluded from the EIA process and all relevant documents, including the EIA documents, have not been made available to the public, the public participation process was defective, and did not meet the NEMA and the EIA regulation requirements, or reasonable administrative decision making process requirements in terms of PAJA
28. We received no response to this letter.
29. When the comments and response report was made available on the EAP website, we noted that there were no responses to the comments – the response column is blank.
30. Section 1(h) of Appendix 3 of the EIA Regulations requires public comment to be incorporated into the assessment, or an explanation of why certain comments were not incorporated. The EAP proceeded under a shortened timeframe that the EAP acknowledged made it “impossible” for specialists to incorporate the prior round of comment that closed on 22 October 2020 into its reports, address all comments, or provide a summary of all comments received.
31. Section 2(4)(f) of NEMA requires effective public participation. For public participation to be effective all registered interested and affected parties must be provided with a reasonable opportunity to comment and must be allowed to comment on any issues which that party believes may be significant. An EIA must include, among other things, a summary of the issues raised by interested and affected parties, and an indication of the manner in which the issues were incorporated, or the reasons for not including them. These regulations are meant to ensure that the public participation process “provide[s] access to all information that reasonably has or may have the potential to influence any decision with regard to an application.” This was not complied with.
32. To further exacerbate the problematic public participation process, the LEDET appeal form states that emailed submissions will not be accepted in the appeal process but that “*Appeals should be hand delivered or posted to the office of the MEC for Limpopo Department of Economic Development, Environment and Tourism.*”

33. In terms of S 47D(1) (bB) of NEMA a notice or other document in terms of this Act or a specific environmental management Act may be issued to a person *by e-mailing a copy of the notice or other document to the person, if the person has an e-mail address.*
34. According to PAJA, in order for administrative action to be procedurally fair, the decision maker must provide:
  - 34.1. "adequate notice of the nature and purpose of the proposed administrative action;
  - 34.2. a reasonable opportunity to make representations;
  - 34.3. a clear statement of the administrative action;
  - 34.4. adequate notice of any right of review or internal appeal, where applicable; and
  - 34.5. adequate notice of the right to request reasons in terms of section 5."
35. Section 5 of PAJA also states that the decision-maker should provide adequate reasons for the decision; failing which, for the purpose of judicial review proceedings, the action will be deemed to have been taken without good reason.
36. In addition to the PAJA requirements above, Regulation 8(1) of the Appeal Regulations specifically indicates that "*A person may deliver documents in terms of these regulations by using one of the delivery methods referred to in Section 47D of the Act*" and NEMA section 47D(1)(bB) specifically allows for delivery of documents "*by emailing a copy of the notice or other documents to the person, if the person has an e-mail address*".
37. To exclude the submission of appeal electronically, is therefore in contravention of NEMA, PAJA and the National Appeal Regulations, 2014 (Appeal Regulations).
38. The public participation process was fatally flawed and the EA falls to be set aside.

### **D.3 Project Splitting the EIA process**

39. By issuing the EA, LEDET has validated a practice of “project splitting” in relation to environmental authorisation. In this case, the practice takes the form of artificially limiting the scope of the so-called impacted environment to clearance of indigenous vegetation, installation of bulk services infrastructure and fencing. The effect of this is that the environmental impact of the *entire* development is underestimated in the EIA and requires the application for separate EAs for activities which are more contentious, on an already cleared and prepared site – effectively a *fait accompli*.

40. According the EIAR, the construction of the bulk services and fencing will “**secure the site for future development opportunities**” (our emphasis) thereby assuming that once this part of the project is done, the rest of the development is a foregone conclusion.

41. To reiterate this point, the EIAR states that:

*“[t]his environmental authorisation application **focuses on applying for transformation of land through vegetation clearance and the installation of services** for future developments of the land”*. (Our emphasis). The future EAs that will be required for the MMSEZ are clearly pronounced as being potentially problematic in the EAIR, for example it states: *“It is understood that access to a dedicated water supply will need to be secured to allow for further development of the metallurgical hub of the MMSEZ South site”*

And:

*“[d]ue to the perceived impact of the coal fired plant on GHG emissions it is proposed that a separate EIA be undertaken for it due to the fact that establishment of power generating facilities exceeding 20MW is a listed activity that should be undergo the EIA process and authorised prior commencement. This will allow for further investigations into a phased plant, clean technology as well as the option to access electricity from possible other more renewable sources.”*

And:

“The proposed development can however not be seen in complete isolation as it will prepare the site for future industrial developments. However, as the developments will trigger listed activities in terms of the EIA Regulations of 2014, as amended, each developer will be required to undertake a stand-alone EIA.”

And:

“Mitigation potential is considered high for the proposed project relating to vegetation clearance, installation of bulk services and fencing. However, for future potential industrial developments mitigation may be difficult due to the scale and bulk of future project activities.”

42. Segmenting the various MMSEZ projects into different environmental impact assessment processes is highly problematic and results in piecemeal environmental authorisations for activities when, in fact, the final outcome may never be reached. This is called "project-splitting".

43. While this practice has not received judicial scrutiny in South Africa, it submitted that the test formulated by the California Court of Appeal in Laurel Heights Improvement Assn. v Regents of University of California<sup>3</sup> is instructive:

"An EIR must include an analysis of the environmental effects of future expansion or action if: (1) it is a reasonably foreseeable consequence of the initial project; and (2) the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects .....This standard is consistent with the principle that 'environmental considerations do not become submerged by chopping a large project into many little ones - each with a minimal potential impact on the environment - which cumulatively may have disastrous consequences.'<sup>4</sup> ... The standard also gives due deference to the fact that premature environmental analysis may be meaningless and financially wasteful".<sup>5</sup>

44. We submit that this project takes it one step further in that not only will the premature environmental analysis be meaningless and financially wasteful, but it will also result in large scale environmental destruction.

45. In the United States, regulations implementing the national law on environmental impact statements require that all connected actions must be assessed at the same time.<sup>6</sup> When determining, at an early stage, the scope of issues for analysis (a scoping report),<sup>7</sup> or when preparing a "full and fair" environmental impact statement,<sup>8</sup> agencies must examine "connected actions" that "are closely related and therefore should be discussed in the same impact statement."<sup>9</sup> Actions are closely related when they:

- (i) Automatically trigger other actions that may require environmental impact statements;
- (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously; or
- (iii) Are interdependent parts of a larger action and depend on the larger action for their justification.<sup>10</sup> This requirement is "directed at avoiding segmentation, wherein the

<sup>3</sup> (1998) 47 Cal. 3d 376, 253 Cal. Rptr. 426.

<sup>4</sup> Citing with approval Bozung v. Local Agency Formation Com. (1975) 13 Cal. 3d 263 at 283-284.

<sup>5</sup> At 396.

<sup>6</sup> 40 C.F.R. §§ 1501.3, 1502.4

<sup>7</sup> 40 C.F.R. § 1501.9(e).

<sup>8</sup> 40 C.F.R. § 1502.4.

<sup>9</sup> 40 C.F.R. § 1501.9(e).

<sup>10</sup> 40 C.F.R. § 1501.9(e).

significance of the environmental impacts of an action as a whole would not be evident if the action were to be broken into component parts and the impact of those parts analyzed separately.”<sup>11</sup>

46. Similarly, EIA Regulations require that cumulative impacts must be assessed, and cumulative impact is defined as “the past, current and reasonably foreseeable future impact of an activity, considered together 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 diverse activities.”<sup>66</sup>

47. Thus, although the EA under appeal is “only” for the clearance of vegetation, fence building and bulk services infrastructure, the consequences are one of two things:

- a) indigenous vegetation will be removed (it is not clear how much nor how many of the 100 000 protected trees will be destroyed in the option 3 layout scenario), the land fenced and bulk services infrastructure established, only to have the rest of the EAs not authorised, energy not sourced<sup>12</sup> and water unavailable<sup>13</sup> (or a multitude of other scenarios) resulting in the whole project becoming a proverbial white elephant; or
- b) the piecemeal projects are authorised and the combined effect is catastrophic for all the reasons pointed out in the various comments and appeals submitted herein.

48. Project splitting of this nature is problematic and should not be condoned. It is should definitely not be condoned when water management, transport infrastructure, climate change and energy certainty are at stake.

49. Strategic planning and strategic environmental assessment (SEA) go a long way to avoid project splitting and this is discussed more fully below.

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<sup>11</sup> U.S. Department of Energy, “Recommendations for the Preparation of Environmental Assessments and Environmental Impact Statements Second Edition,” p. 8 (2004), <https://www.energy.gov/nepa/downloads/recommendations-preparation-environmental-assessments-and-environmental-impact>.

<sup>12</sup> “The energy specialist report will need to be updated once industry specific EIA applications are submitted to the CA.” Page 915 of EAIR.

<sup>13</sup> “Water availability currently is only available for the first couple of years in the MMSEZ South Site development.” Page 915 of the EIAR.

#### **D.4 Failure to consider the the various spatial and developmental planning mechanisms**

50. For the proposed MMSEZ to be considered appropriate, the applicant must have considered the developmental and spatial plans mentioned below and responded to the agreed upon growth path accordingly as reflected in the EIA Regulations. These plans are also thoroughly consulted upon, and can be considered both the state's and the surrounding communities collective vision for the future of the area. The failure to meaningfully consider the spatial and environmental plans, is not only unlawful but also leads to significant land-use conflicts and socially and ecologically incompatible regional development.<sup>14</sup>

#### **Context**

51. A significant and strategic element of modern South African planning frameworks is the adoption of the principle of 'integrated development planning' which affords local government wide-ranging local economic development related powers and functions in order to fulfil its constitutional mandate.<sup>15</sup> In order to operationalise this principle, a need arose for practical instruments to ensure developmental coordination. This paved the way for Integrated Development Plans (IDPs) and the inclusion of Spatial Development Frameworks (SDFs).<sup>16</sup>

52. All proposed development must consider the various spatial and developmental planning mechanisms that are designed for a designated local, district and provincial areas. These planning tools inform all developmental applications and are integral to integrated development. Local government, in particular, has the constitutional mandate to drive local economic development and the IDPs from the 5-year plan for the particular municipality, with the SDF accompanying the plan as the spatial representation of the IDPs planned priorities. Various environmental spatial planning tools are also then overlaid into these plans to provide detailed representations of the ecological attributes of particular region, these include, *inter alia*, Environmental Management Frameworks (EMFs), Bioregional Plans, Biosphere Reserves and municipal Environmental Management Plans (EMPs).

53. Local and district municipalities bear the responsibility to formulate and implement IDPs, apportioning them legal status, superseding all intersecting plans that concern development within local government. The IDPs thus carry significant weight within the local developmental

<sup>14</sup> S6 (2) (e) (iii) of PAJA outlines the failure to take into account relevant considerations. Moreover, the NEMA framework places a positive obligation on the state to plan reasonably, rationally and responsibly in the management and sustainable usage of ecological resources and associated infrastructure. In terms of NEMA definition of sustainable development in Section 2, 'planning' forms a central part of the understanding of the principle.

<sup>15</sup> S44 of the Constitution, refer to Schedule 4 and 5 for government competences.

<sup>16</sup> Harrison P 'Integrated Development Plans and Third Way Politics in Democracy and Delivery' in U Pillay, R Tomlinson & J du Toit *Democracy and Delivery* (2006) 195. Glazewski (note 126 above) 13.

planning metric, as they reflect the vision for 'development of the municipality, with special emphasis on the most critical development and internal transformation needs'.<sup>17</sup> Importantly, the MSA has self-imposed environmental obligations, committing to provide services in an environmentally sustainable manner. The Court in *Le Sueur and Another v Ethekwini Municipality* confirmed that an explicit municipal duty exists to ensure that environmentally-sensitive land is protected and conserved.<sup>18</sup>

54. However, on a local level the most important integration must occur between the municipal IDPs and SDFs, as these instruments are integral to fulfilling the local integrated planning function. The spatial analysis section of the IDP provides the existing spatial pattern, growth points and population concentrations that have emerged in the municipal area; while spatial detail, challenges and opportunities is contained in the SDF. The spatial future of an area is based on the collective decisions regarding land-use, characteristics and developmental drivers of the area.

#### ***Musina-Makhado Special Economic Zone Locality***

55. In order to meaningfully assess the suitability of any receiving environment in relation to a particular proposed development, it is critical to understand characteristics, vulnerabilities, potential and locality within the broader region. An assessment of this nature requires appreciating the integration of environmental management, spatial planning laws and plans in the area. Areas, such as the site identified for the MMSEZ, is a prime candidate for land-use conflicts due to its inherent sensitivities and perceived developmental potential. Moreover, the myriad of plans and frameworks in place over the region is a testament to its strategic importance and the ecological value.
56. The Vhembe Bioregional Plan, in particular, provides an immense amount of valuable data to screen EIAs and provide insight into the mapped sensitivities of the area. The broad purpose of a bioregional plan is to act as the primary biodiversity platform 'informing land-use planning, environmental assessment and authorisations, and natural resource management, by a range of sectors whose policies and decisions impact on biodiversity'.<sup>19</sup> The Vhembe Bioregional Plan is the first plan of its kind for the district, covering the entire region, which includes the Musina and Makhado municipalities. The bioregional plan is based on a systematic biodiversity planning,

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<sup>17</sup> S26(c) of the MSA.

<sup>18</sup> The responsibility of environmentally-conscious planning and protection is therefore a core obligation of local government, even though the 'environment' is not an explicit functional competency, municipal planning must recognise the s24 right to environmental health and wellbeing, see s23(1)(c) of the MSA.

<sup>19</sup> Limpopo Department of Economic Development, Environment and Tourism 'Vhembe District Bioregional Plan' (December 2017) vii.

mapping the priority areas and attributing specific land and resource-use guidelines to the area.<sup>20</sup> We have, however, noted with concern that the Vhembe Bioregional Plan has not been specifically considered as part of this application.

57. Equally, the Vhembe Biosphere Reserve provides an excellent birds-eye view of the characteristics of the area through the zonation analysis. The MMSEZ South site is of particular interest as it is located in the Vhembe Biosphere reserve. While it does not form part of the core or buffer areas of the biosphere reserve, the proposed site is located within the transition zone that should support the development of sustainable activities. The development of a metallurgical mega-project complex of this nature cannot be considered to be in any way sustainable. This would have significant impacts on the buffers and core of the Vhembe Biosphere Reserve.
58. The Vhembe Bioregional Plan, the Vhembe Biosphere Reserve Status Quo Assessment and the Limpopo Conservation Plan all see the majority of the MMSEZ South site falling within a designated Ecological Support Area Category 1 (ESA 1). The most critical area of biodiversity conservation is located in the southern portion of the MMSEZ South site and is categorized as Critical Biodiversity Area 2 (CBA 2). The rest of the proposed MMSEZ South site is on Ecological Support Area 2 (ESA 2), an area that retains potentially significant importance from an ecological perspective, such as maintaining landscape connectivity.
59. These areas are central to ecosystem stability and connectivity within the Vhembe region. Sustainability, natural resource and ecological protection is reflected as a core principle within not only the above environmental planning tools, but central to the provincial, district and local developmental plans aimed at addressing the challenges faced by the region. The scale and industrial intensity of the MMSEZ guarantees the destruction of these sensitive areas and any compatible land-use activities being supported in the future. The cumulative impact of the MMSEZ and the surrounding planned mines, and industrial projects supporting the MMSEZ, will alter the landscape for centuries to come, pushing this pristine region over the environmental tipping point.

#### **Water Access and Quality**

60. The environmental and developmental challenges of the area are common between the planning frameworks and include: ageing infrastructure; serious water supply and quality concerns,<sup>21</sup>

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<sup>20</sup> Published by the Minister or MEC in terms of s 40 (2) of the NEM: BA of the Vhembe region. Ibid 4.

<sup>21</sup> The quality of service delivery is worryingly poor, in particular the quantity and quality of water service. Vhembe District Municipality Blue Drop performance was poor in 2014, most notably for the considerable decline in performance compared to

droughts; the recurrence of heavy flooding; pollution; destabilisation of wetlands and service delivery challenges.<sup>22</sup> Water is clearly a central concern to this dry and arid region, as both ground and surface water is in short supply. The few available catchment areas are under increasing pressure from domestic and industrial activities such as agriculture and mining. Inappropriate and incompatible land-uses in water source areas, poorly maintained infrastructure and inadequate monitoring are aggravating the imbalance between the supply and demand for water.<sup>23</sup> The Limpopo River and its tributaries are critical to the livelihoods of the local economy, yet many of these rivers are heavily polluted.<sup>24</sup>

61. The region, additionally, 'has water demand management challenges and a great need exists for the implementation of water demand and conservation management projects'.<sup>25</sup> It is not just the region's water sources that are under pressure, as the biodiversity and cultural resources<sup>26</sup> are also under constant threat.<sup>27</sup> This is primarily due to in large scale carbon incompatible land-use development activities and resource consumption which protrude into sensitive ecosystems negatively affecting the stability of the systems, impacting many endangered species. The MMSEZ is certainly classified as this type of project which jeopardises the water security of therefore regions ability to sustain the ecological reserve.

#### ***Biodiversity as a strategic resource***

62. The Limpopo Development Plan (LDP), together with the district and local IDPs all specify that environmental management is a central concern and strategic objective. The environmental approach adopted by the IDP seems to be influenced by sustainable development and the management of ecosystem services. Sustainable development is presented as a core principle of the operation of the province and municipalities, refer, in multiple instances, to the balance that needs to be found between ecological stability and development.<sup>28</sup> The planning framework also directly links the reliance of communities on the stability and continual existence of the natural

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2012. This deterioration in drinking water quality management was associated with the lack of key drinking water quality management documentation.

<sup>22</sup> Limpopo Environmental Outlook Report at 13.

<sup>23</sup> Vhembe IDP at 122.

<sup>24</sup> DWS Blue Drop Certification Programme which in Vhembe District Municipality was disappointingly poor in 2014, most notably for the considerable decline in performance compared to 2012.

<sup>25</sup> The vast number of problems identified seems to be institutional in nature. Amongst others, staff members of Vhembe DM are still on the DWA payroll, resulting in a spirit of poor accountability and lack of direction. Compounded by the lack of an organisational structure, the municipality seems to find itself in a space of worker dissatisfaction and confused roles and employers.

<sup>26</sup> These uncontrolled developments are negatively affecting tourism development due to deterioration of unprotected heritage sites entire district and lack of coordination of from local municipalities. See reference.

<sup>27</sup> The regional planning framework collectively recognises how rich and bio-diverse the province is, admitting that the systems are under severe pressure and require conservation and formal protection.

<sup>28</sup> In accordance with s 83(3)(d) of the MSA, 'a district municipality must seek to achieve the integrated, sustainable, and equitable social and economic development of its area as a whole by promoting the equitable distribution of resources between the local municipalities in its area to ensure appropriate levels of municipal services within the area'.

resources and functionality of ecosystem services.<sup>29</sup> The biodiversity of the region is considered a strategic resource, as it provides rural communities with natural products which sustain their livelihoods, such as shelter, food, fuel and medicinal plants.<sup>30</sup>

63. The SDFs of both Musina and Vhembe reference the National Biodiversity Strategy and Action Plan (NBSAP) in detail, which requires local government 'to develop a plan of action for the conservation and sustainable use of the country's biological diversity'.<sup>31</sup> The implications include ensuring that sensitive areas are mapped, and their on-going protection ensured. The provincial and district SDFs follow this directive and outline the environmental sensitivity classes identified for specific development sites on the maps. For each sensitivity classification there are specific explanatory notes giving an indication of development nodes and areas outside nodes.<sup>32</sup> Within each node of sensitivity the preferred types of ecologically-compatible development are provided, as stipulated in NEM: BA and NEM: PAA.<sup>33</sup> For example, low sensitivity areas should be considered as preferred development areas inside development nodes compared to area of moderate and high sensitivity. The distinction made between sensitivity within developmental nodes and that of outside, sets thresholds for sensitivity, from high, to moderate, to low. This assists with the correct placement of proposed developments from a strategic perspective, these classifications are common amongst the SDFs.
64. The status of CBAs seems to permeate the local development planning documents, as the SDFs identify this classification as central to decision-making from a planning perspective. Areas such as river corridors and wetlands are prioritised for protection from urban, agricultural and industrial activities. The pressures on biodiversity are laid out clearly in Vhembe Bioregional Plan, these include, agricultural expansion and human settlement expansion. The biggest threat to regional biodiversity within the Vhembe District Municipality is identified as new mining and industrial developments. Incompatible land-uses threaten to encroach on CBAs and ESAs alike, with multiple new applications for mining rights expected as a result of the MMSEZ successfully

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<sup>29</sup> The recognition of how valuable ecosystem services extend to the identification of the RAMSAR wetlands and the appreciation of the specific function that wetlands have in the dry and arid area.

<sup>30</sup> Vhembe IDP at 116.

<sup>31</sup> Vhembe SDF at 14.

<sup>32</sup> 'The LSDF rationalises and promotes the optimal use of land and protection of natural resources by considering high and moderate potential agricultural areas, high and moderate environmental sensitivity areas and mining and mineral deposit areas, as well as other relevant factors.' See *Ibid*.

<sup>33</sup> 'The spatial planning categories include: Core 1a, which are formally protected conservation areas; Core 1b, which are CBAs outside of formally protected conservation areas; Core 2-River, which refer to corridors and wetlands. Buffer zones are also referred to as part of the decision-making criteria. The SDFs bring two new classifications, namely, urban settlement and urban edge-outer.' See Vhembe SDF at 14.

gaining the EA from the proposed project, steep biological decline is expected in the medium term.<sup>34</sup>

### ***Vulnerability to Climate Change and the Need of a Low-Carbon Economy***

65. Ecosystem-based adaptation and resilience are mentioned as a core principle in the LDP. The province and municipalities recognise that 'growing public awareness of the consequences of climate change and unconstrained consumption of the natural resources has led to a refocusing of political priorities towards the protection and rehabilitation of the region's natural assets'.<sup>35</sup> The LDP and the district IDP reinforce the NDPs stance on the transition to an environmentally sustainable low carbon future, which requires the 'decoupling of economic growth from natural resource degradation and depletion'.<sup>36</sup> With the completed MMSEZ expected to contribute more than 10% of the country's carbon commitment, it cannot be said that the project falls within the vision of transitioning the region away from an extractive and carbon-intense future.
66. The IDPs commit to the decoupling of resource use and increasing investment in green sectors, so as not to expose future generations to significant environmental risks or ecological scarcities. The plans recognise the wealth of natural resources in the region, identifying resource over-exploitation and land degradation as central threats.<sup>37</sup> Taking the phased approach and the alignment with the NDP's sub-outcomes and actions into account, these plans seemingly only pay lip-service to the environmental concerns as the accelerated developmental drive is not aligned to these environmental objectives. All plans, except the LDP, are silent on the inherent conflict that exists between mining,<sup>38</sup> heavy industry, agriculture<sup>39</sup> and nature-based conservation related activities proposed in the area.
67. The LDP does recognise that this focus on mining development could present a serious long-term risk due to the cyclical nature of the mining sector. The promotion of the diversification of the economy and multi-skilling of the workforce in an effort to mitigate these risks associated with commodity price dips and mine closures must be kept at the forefront of developmental decision-making. However, this is not likely to impact the prevalence of extractive operations, given the focus on the sector and the need to invest, given the unemployment and poverty related concerns.

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<sup>34</sup> Vhembe Bioregional Plan at 12

<sup>35</sup> NDP at 216.

<sup>36</sup> The NDP has identified outcomes such as that ecosystems must be sustained and natural resources are used efficiently through enhanced governance systems, capacity and sustainable human communities.

<sup>37</sup> Small Enterprise and Human Development, 2008.

<sup>38</sup> 'Existing mining and its waste dumps are already responsible for terrestrial, hydrological and atmospheric pollution in the region. Poorly managed coal mines can leak methane into the atmosphere, and coal waste dumps contain materials that can burn on their own (self-combustion) and produce poisonous particles and gases.' See Vhembe IDP at 114.

<sup>39</sup> Agriculture's impact on the environment, includes increased methane, air and soil pollution and water usage.

68. In response to these concerns, the LDP calls for all heavily industrialised areas to have strategic environmental frameworks, and every district and local municipality to have an EMP. The LDP stresses the need for the provincial environmental authorities, in this case LEDET, to foster an 'Environmental Accumulative Study' approach, which takes a holistic and cumulative approach to impact. It identifies that the three mega-conservation areas<sup>40</sup> and the three centres of endemism<sup>41</sup> that exist in Limpopo should have specific development plans, yet there is no further direction is provided as to how these plans should be developed and within which legislation or framework. The Soutpansberg being one of the mega-conservation areas". These plans are now completely unattainable with a mega industrial complex being planned in very close proximity to the Soutpansberg. Additionally, to our knowledge no 'Accumulative Study' has been undertaken in order to understand the cumulative impact of the existing and proposed projects for the region.

#### ***Land-Use Conflicts and Spatial Representation***

69. The region has a vision to conserve the scenic and pristine settings contained in the sacred sites and important bio-diverse, catchments and landscapes of the Soutpansberg, Mapungubwe and Kruger National Parks. The SDFs take a holistic and ecosystem-centred perspective, stating that impacts resulting in 'natural environmental processes and ecosystems functioning should be a priority. The Musina SDF in particular mentions that endangered and vulnerable ecosystems are of utmost importance, with conservation, heritage and sense of place being the central principles of decision-making. The SDFs encourage local government to focus on the proximity of invasive development to vulnerable areas, minimising developmental footprints and providing alternatives that ensure the preservation of indigenous ecosystems and species.

70. Areas with extractive and industrial potential is highlighted in the SDF, however it is stated that due to the locality of the coal field between areas with agricultural activities and areas of biodiversity protection, great care should be taken in ensuring sustainability of the latter uses/activities. Development of extractive and industrial activities should not prejudice any of the other land uses earmarked for this area, nor should it encroach on agricultural land and environmental protection areas.

71. The Vhembe SDF was prepared using the Ecological Socio-Economic Relationship (ESER) Framework. This framework is based on the principle that the relationship between economic efficiency, social justice and human wellbeing, and ecological integrity is not one of equal and overlapping spheres where losses in one area can be set off by enhancements in another. It

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<sup>40</sup> Waterberg, Soutpansberg and Drakensberg.

<sup>41</sup> Soutpansberg, Wolkberg and Sekhukhune.

directly connects these principles to the spatial component. This ESER Framework recognises, firstly, that economic efficiency is wholly dependent on the quality of human resources and their capability to add to the economy. Secondly, economic activities and social development are wholly dependent on the availability of ecosystem services, yet they cannot demand more from these services than they are able to deliver on a long-term sustainable basis. The two clearly stated important regional planning considerations are highly valued mineral resources and areas of critical biodiversity. This poses difficulties in terms of conflicting developmental planning and imperatives. There is pressure on water resources and biodiversity, with agriculture and mining listed as the chief threats to environmental stability, with focus on pollution of soils and watercourses from fertilisers and mining related air emissions.<sup>42</sup>

72. The zoning of spaces for mega-conservation projects has been listed as a challenge. The proposed solution is to engage with contending land-users, such as agriculture, mining and settlement development agencies, to agree on how these areas can be zoned for protection and management.<sup>43</sup> Public-private institutional models are proposed for the development of these mega-conservation projects. This is an enormous project, with multiple interests, both personal and financial.
73. A broad capital-intensive environmental assessment and mass re-zoning proposal such as this requires multi-stakeholder input and agreement. 'In order to contribute towards achieving these targets, the province would need to improve decision-making and governance, and harness research and information management capacity to identify, develop and maintain datasets to generate policy-relevant statistics, indicators and indices.'<sup>44</sup> Furthermore, the LDP plans to increase land under conservation to 35 000 hectares from 25 000 hectares.
74. One of the central SDF visions is to 'optimise the rich and balanced mix of the regions agriculture, tourism, heritage, natural and mineral resources, and ecosystem services within their scenic settings.'<sup>45</sup> The SDF promotes the principle of spatial sustainability, efficiency and resilience in municipal planning; as well as activities that are compatible with the characteristics of the area and mindful of its sensitivities. This aligns with the SPLUMA principles and is applied to the specific needs of the district.

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<sup>42</sup> The solution to this issue, as presented in the SDF, is the establishment of eco-industrial parks within the already disturbed areas. See Musina Local Municipality 'Draft Spatial Development Framework' (2014/2015) 159.

<sup>43</sup> LDP at 98.

<sup>44</sup> Ibid 97.

<sup>45</sup> Ibid.

75. What is clear is that the proposed development is in conflict with the desired state of the region and specific site is not compatible in terms of land use. After an assessment of the site specific overlay of the area, it's clear there are sensitivities present on the site that exceed the need for a large industrial complex. The MMSEZ is in conflict with local and regional developmental plans, and how the growth path outlined in the plans does not cater for the impacts being proposed in the MMSEZ EIA.
76. The stimulation of industrial and mining developments in the area due to the MMSEZ would lead to more incompatible and uncontrolled development in this culturally rich and sensitive area. Process wise, it fails to use the tool of Strategic Environmental Assessment. An inclusive consultation process involving the relevant government departments and spheres, organised labour including and affiliated unions, communities, civil society organisations and other stakeholders with the purpose of deciding on a shared low-carbon and egalitarian development plan for the area should instead commence. A Strategic Environmental Assessment under the auspices of the DEAFF should be undertaken before any mega-projects can be proposed.

#### **D.5 Inadequate Assessment of the Need and Desirability**

77. Regulation 18 of the EIA Regulations requires that, when considering an application the competent authority must have regard to section 24O and 24(4) of the Act, the need for and desirability of the undertaking of the proposed activity, the requirements of these Regulations, any protocol or minimum information requirements relevant to the application as identified and gazetted by the Minister in a government notice or any relevant guideline published in terms of section 24J of the Act.
78. Section 24O of NEMA mandates that any guidelines, departmental policies, and environmental management instruments that have been adopted in the prescribed manner by the Minister and any other information in the possession of the competent authority that are relevant to the application; and any information and maps compiled in terms of section 24(3), including any prescribed environmental management frameworks, to the extent that such information, maps and frameworks are relevant to the application **must** be taken into account when considering applications.

79. According the DFFE's own guidelines, "need and desirability" is determined by "considering the broader community's needs and interests as reflected in a credible IDP, SDF and EMF for the area, and as determined by the EIA."<sup>46</sup>

80. The EIA Regulations appendices specify that the scoping report and environmental impact report (S&EIR)<sup>47</sup> must provide a motivation for the need and desirability of the proposed project and that I&APs must be afforded an opportunity to make representation in terms of their views in terms of the need and desirability considerations.

81. The consideration of "need and desirability" in EIA decision-making therefore requires the consideration of the strategic context of the development proposal along with the broader societal needs and the public interest. The government decision-makers, together with the environmental assessment practitioners and planners, are therefore accountable to the public and must serve their social, economic and ecological needs equitably.

82. The initial EIA process was premised on the development of the Musina Makhado Special Economic Zone in an area comprising 8 000 hectares of "pristine bush" (including 177 ha of Limpopo Ridge Bushveld, 4 422.2 ha of Musina Mopane Bushveld and 145 ha of Riparian vegetation) with numerous industrial projects being part of the site, including a 3300MW coal fired power station; and coke, carbon steel, pig iron, ferrochromium, ferromanganese, silicon-manganese and calcium carbide plants.

83. Compared to the initial process, it now states that currently the best available energy sources are regarded as a *combination between renewable energy (for future administration buildings) and a scaled down independent coal fired power plant* (for future industries for 24/7 power supply) but that a separate EIA be undertaken for it due to the fact that establishment of power generating facilities exceeding 20MW is a listed activity that should be undergo the EIA process and authorised prior commencement.<sup>48</sup> (Our emphasis).

84. However, elsewhere the EIAR confirms that the applicant has investigated sources of electricity in the Energy Analysis information report (Appendix S) and that the proposal for a clean *coal-fired power station should be the last resort* in the planning and development of supply of energy to the MMSEZ South Site. It should only be considered if standards set out by the Air Quality and

<sup>46</sup> [https://www.dffe.gov.za/sites/default/files/legislations/needanddesirabilityguideline2017\\_0.pdf](https://www.dffe.gov.za/sites/default/files/legislations/needanddesirabilityguideline2017_0.pdf), page 4

<sup>47</sup> Regulations appendix1 (3) (f), appendix2 (2) (f), appendix3 3(f) of Government Notice No. R. 982 of 04 December 2014 refers.

<sup>48</sup> Page x of the EIAR

Climate Change specialists can be mitigated and maintained, and the EAP agrees with these findings. These include, as indicated by the Climate Change Specialist, carbon capturing and filters and certain limits for the power and manufacturing and smelter plants to be developed within the MMSEZ South Site. The energy specialist report will need to be updated once industry specific EIA applications are submitted to the decision maker.<sup>49</sup>

85. The EAIR confirms that the proposed development will prepare the site for future industrial developments and as the developments will trigger listed activities in terms of the EIA Regulations of 2014, as amended, each developer will be required to undertake a stand-alone EIA.
86. The EIAR recommends *inter alia* that the following studies will need to be updated once EA is sought for the various future industrial developments on the site:<sup>50</sup>
  - 86.1. Energy: A comprehensive specialist assessment of available energy sources for the further development of the MMSEZ South site.
  - 86.2. Air Quality: Acid Rain impact once the MMSEZ South site is in operation on food security and agricultural sector.
  - 86.3. Waste: An assessment for the need and construction of a future industrial waste dump.
  - 86.4. Water: Feedback on the feasibility study on water from Zimbabwe from DWS and feedback on the water feasibility study on the offtake dam in the Sand River.
87. The EA records on page 9 with reference to the Specialist Climate Change Impact Assessment Report that EAs “for the individual plants should only be granted if the emission intensities can be achieved....” and “any approval of the project should be conditional upon an overall water risk analysis of the region being conducted with specific reference to the proposed SEZ project”.
88. Energy, air, waste, food security, climate risk and water - these are all strategic issues that are fundamental to establishing the need and desirability of the project. To push these vital considerations out along an unclear timeframe is an unacceptable start to a project of this magnitude. The decision maker itself records with reference to Need and Desirability<sup>51</sup> that “the proposed development might look like will not be possible [sic] due to power shortages in the

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<sup>49</sup> Page 915

<sup>50</sup> Page 918

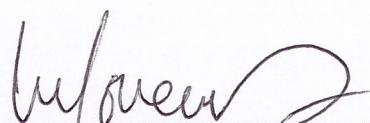
<sup>51</sup> Page 13 of the EA

country". The splitting of the project to grant an EA for the clearance of vast swathes of vegetation etc. cannot be condoned when the need and desirability goes far beyond this for a project that is potentially completely unfeasible.

89. To add to the concern around the lack of assessment of need and desirability, on 2<sup>nd</sup> March 2022<sup>52</sup> the MMSEZ CEO Lelhogonolo Masoga said plans to build a coal-fired power plant to provide electricity for the hub's proposed steel, coking and pig iron plants "had been ditched." Msoga said: "Environmentalists said no. World leaders said no – [saying instead] let's reduce our carbon footprint and stop producing energy through coal...we have abandoned that part of the project. We are now focusing on solar."
90. Based on the above, it is submitted that it is impossible for the need and desirability aspect of the project to have been adequately assessed and the issues at stake are too serious to ignore. The appeal should be upheld on this basis alone.

#### **E. CONCLUSION**

91. The MMSEZ EIA suffers from fundamental and fatal flaws at the levels of conception, procedure and is likely unlawful. Conceptually it commits the area to environmental destruction and a high carbon growth path which runs counter to the need to arrest the climate emergency while ensuring a just transition to an energy and economic development trajectory that places communities and workers at the centre of decision-making and benefits.
92. In light of this and the above submissions, the EA should not have been authorised and the appeal should be upheld.




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#### **APPELLANTS' ATTORNEYS**

ALL RISE, Attorneys for Climate and Environmental Justice, NPC  
 2<sup>nd</sup> Floor Offices, 29<sup>o</sup> South  
 7 Umsinsi Junction, Dube City, Dube Trade Port, La  
 Mercy, KZN  
 Ms. Kirsten Youens

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<sup>52</sup> <https://www.news24.com/fin24/companies/coal-feets-limpopo-industrial-park-backed-by-china-ditches-plans-to-build-power-station-20220302>

[kyouens@allrise.org.za](mailto:kyouens@allrise.org.za)

**TO:** THE MEC FOR ECONOMIC DEVELOPMENT, ENVIRONMENT AND TOURISM  
PO Box 55464  
Polokwane  
0699  
Attention: Ms. Khorommbi  
By e-mail: KhorommbiA@ledet.gov.za; MongweV@ledet.gov.za

**COPY TO:** DIRECTOR: ENVIRONMENTAL IMPACT MANAGEMENT  
DEPARTMENT ECONOMIC DEVELOPMENT, ENVIRONMENT AND TOURISM  
Attention: Mr. Lehlogonolo Masoga  
Per Email: [L.Masoga@mmsez.co.za](mailto:L.Masoga@mmsez.co.za)

**COPY TO:** ENVIROXCELLENCE SERVICES  
4b Paul Kruger Street,  
Polokwane, 0699  
Attention: Ishmael Semenya  
By e-mail: [projects@enviroxcellence.co.za](mailto:projects@enviroxcellence.co.za)

**COPY TO:** THE LIMPOPO ECONOMIC DEVELOPMENT AGENCY  
Enterprise Development House; Main Road; Lebowakgomo  
Attention: Richard Zitha  
By e-mail: [Richard.Zitha@lieda.co.za](mailto:Richard.Zitha@lieda.co.za)