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27 April 2023

RE: PRESS RELEASE

APPEAL HEARING: ENVIRONMENTAL MANAGEMENT

NCUMCARA COMMUNITY FOREST AND OTHERS // RECONNAISSANCE AFRICA (PTY) LTD AND OTHERS:

26, April, 2023, Windhoek: Yesterday, the Minister of Environment, Forestry and Tourism reserved judgement after hearing arguments for and against the decision by the Environmental Commissioner (EC) to amend an Environmental Clearance Certificate (ECC) 0091 held by Reconnaissance Energy Namibia (Pty) Ltd (REN).

As affected and interested members of the public: the Ncumcara Community Forest Management Committee, Muduva Nyangana Communal Conservancy Management Committee, Katope Community Forest Management Committee and the Kavango East and West Regional Conservancy and Community Forest Association (the Appellants) lodged an appeal on 22 June 2022, in terms of section 50 of the Environmental Management Act, Act 7 of 2007 (EMA). After numerous correspondences and two separate postponements, the Minister finally heard the matter on the 24th of April 2023. The hearing, which was held in the ministerial boardroom on the 2nd floor of the Ministry of Environment, Forestry and Tourism before the Honourable Minister, Mr. Pohamba Shifeta, allowed one witness for the appellants and one witness for the respondent to present oral evidence in support of their claims. After approximately 9 hours of hearing testimony and legal submissions, the Minister stated that parties should expect his finding in May 2023.

The primary objection against the EC's decision to grant an amendment focused on the law that requires the listed activities proposed by REN to be authorized and approved by the Environmental Commissioner. The Applicants argued that this may only be done by way of further impact assessments for an additional Environmental Clearance Certificate, and not merely by making amendments to an existing one where cumulative impact is not considered.

Furthermore, the Appellants contend that the Environmental Commissioner acted *ultra vires* (beyond his powers) and failed to comply with the provisions of Section 39 of the EMA, in approving the amendments to REN's ECC 0091. Moreover, the EC should have gone through the entire process he went through for the initial application, when considering an amendment. Including community/public engagement and input. That means the amendment application cannot be used to circumvent the requirements of the EMA. While a notice was sent out to the public and stakeholders, only previously registered members were allowed to make comments. There was limited public participation, surely a discriminatory action and limitation of democratic right to participate.

In addition, the Appellants made submissions about the inadequacies of the environmental impact assessment, particularly on how it addressed and mitigated potential environmental impacts and their exclusion from participation in the decision-making processes. However, since exploration activities, that could cause these impacts, have already been carried out by REN, the issues related to environmental management are now considered a theoretical exercise because the damage is already done.

In opposition, REN argued that the Environmental Commissioner, when amending the ECC, acted under section 39 of the EMA and in line with his general powers conferred to him. The Respondents are of the view that the EC's decision may be wrong in law, but on the facts before the Minister, there is no basis for dismissal of the decision.

Background:

When the EC requires an application to be made for an amendment of an ECC under section 39 of the EMA, in considering such application for amendment, the EC should take into consideration the same aspects that it took into consideration of the initial application. While a notice of such request to amend was published, it only allowed previously registered interested parties to make comments despite the amendment seeking authority to conduct activities beyond that identified under the existing ECC under 0091 and despite it affecting more community members.

Despite submissions made, in particular around the lack of public consultation and the inadequacies of the environmental impact assessment undertaken in the first application, the EC failed to consider such and granted the amendment of the ECC 0091.

In addition to the appeal lodged by the community forests and conservancies on 22 June 2022, the appellants also attached for urgent attention the Minister (in terms of Section 50 (6)), to make a decision in which he stays the decision to amend the ECC which was being appealed. This would have stopped all activities by REN under that particular clearance certificate to provide the community the right to be heard and for the Minister to determine whether the decision was correct. Instead, the Minister failed to acknowledge such application. The appellants then approached the High Court to consider the decision to stay the decision. The High Court denied the application on the basis that the High Court did not have the jurisdiction to make such order and that the application should have requested instead for the High Court to compel the Minister to make such a decision to stay the amendment.

As a result, the request to stay the activities authorised under the appeal was unsuccessful, the appeal of the decision to grant an amendment after a full year of lodging is still pending, however, the activities to clear land and continue exploration activities under amended ECC continues - denying the communities the opportunity to exercise their rights to be heard timeously.

Voices of the community:

“While a notice was sent out to the public and stakeholders, only previously registered members were allowed to make comments. There was limited public participation, surely a discriminatory action and limitation of our democratic right to participate in things concerning our community”. – Max

Mr. Julian Comalie acted on instructions of the Legal Assistance Centre, Legal representative for the clients while Advocate Khama acted upon the instructions of Shakwya Nyambe Inc., lawyers for RECONNAISSANCE AFRICA (PTY) LTD. The finding will be delivered in May 2023.

**Issued by the Land, Environment and Development department of the LAC
Corinna van Wyk**

Trustees of the Legal Assistance Trust:

Clement Daniels (Chairperson) Norman Tjombe Taamba Iithete
Tangeni Amupadhi Toni Hancox (ex officio) Gladice Pickering