MINISTER

FORESTRY, FISHERIES AND THE ENVIRONMENT

REPUBLIC OF SOUTH AFRICA

Reference: LSA 216916

LSA 216917

APPEAL DECISION

APPEAL AGAINST THE ENVIRONMENTAL AUTHORISATIONS ISSUED TO SUNELEX ENERGY (PTY) LTD FOR THE PROPOSED MATJHABENG 400MW SOLAR PHOTOVOLTAIC (PV) POWER PLANT WITH 80 MW (320 MWH) BATTERY ENERGY STORAGE SYSTEMS PROJECT: PHASE 1 AND PHASE 2 POWERLINES AND FOR THE DEVELOPMENT OF 400MW MATJHABENG SOLAR PHOTOVOLTAIC POWER PLANT WITH 80MW (320 MWH) BATTERY ENERGY STORAGE SYSTEMS PROJECT: PHASE 1 AND PHASE 2 IN ODENDAALSRUS, WITHIN THE MATJHABENG LOCAL MUNICIPALITY AND LEJWELEPUTSWA DISTRICT MUNICIPALITY, IN THE FREE STATE PROVINCE

Harmony Gold Mining Ltd Harmony (Freegold) (Pty) Ltd Avgold Limited	Appellants
SunElex Energy (Pty) Ltd	Applicant
Chief Directorate: Integrated Environmental Authorisations Department of Forestry, Fisheries and the Environment	Competent Authority

Appeal: This is a consolidated appeal submitted by White and Case LLP South Africa, on behalf of Harmony Gold (Pty) Ltd (1st appellant), Harmony (Freegold) (Pty) Ltd (2nd appellant) and Avgold Ltd (3rdappellant) (collectively: the appellants), against the decisions of the Chief Director: Integrated Environmental Authorisations (CD: IEA) of the Department of Forestry, Fisheries and the Environment (the Department), taken on 18 March 2022, to grant the following environmental authorisations (EAs) to SunElex (Pty) Ltd (the applicant) for listed activities pertaining to (i) the proposed development of the Matjhabeng Solar Photovoltaic Facility with Battery Energy Storage Systems Project: Phase 1 and Phase 2 Power Lines and (ii) the proposed development of Matjhabeng 400MW Solar Photovoltaic Power Plant with 80MW (320 Mwh) Battery Energy Storage Systems Project: Phase 1 and Phase 2 in Odendaalsrus, within the Matjhabeng Local Municipality and Lejweleputswa District Municipality, in the Free State Province (the EAs).

1. BACKGROUND AND APPEAL

1.1 On 12 August 2021, the applicant submitted separate EA applications to the CD: IEA for listed activities pertaining to the proposed development of Matjhabeng Solar Photovoltaic Facility with Battery Energy Storage Systems Project: Phase 1 and Phase 2 Power Lines, and the development of Matjhabeng 400MW Solar Photovoltaic Power Plant with 80MW (320 Mwh) Battery Energy Storage Systems Project: Phase 1 and Phase 2 in Odendaalsrus at the above-mentioned location. These applications were lodged and processed in terms of the Environmental Impact Assessment Regulations, 2014, as amended (2014 EIA Regulations), published under the National Environmental Management Act, 1998 (Act No. 107 of 1998), as amended (NEMA).

1.2 The applicant commissioned an independent environmental assessment practitioner (EAP), namely Nemai Consulting (Pty) Ltd, to conduct the full Scoping and Environmental Impact Reporting (S&EIR) process and a Basic Assessment (BA) process (BA) for the abovementioned applications as follows:

1.2.1 In respect of the development of Matjhabeng 400MW Solar Photovoltaic Power Plant with 80MW Battery Energy Storage Systems Project: Phase 1 and Phase 2, the applicant conducted a S&EIA process:

1.2.1.1 On 12 August 2021 the CD: IEA commented on the draft Scoping Report.

1.2.1.2 On 03 September 2021, the final Scoping Report was accepted by the CD: IEA.

1.2.1.3 On 09 November 2021, the CD: IEA commented on the draft EIAr.

1.2.1.4 On 26 November 2021 the CD: IEA received the final EIAr.

1.2.2 In relation to the Matjhabeng Solar Photovoltaic with Battery Energy Storage Systems Project: Phase 1 and Phase 2 Power Lines, the applicant conducted a BA process:

1.2.2.1 On 02 September 2021, the CD: IEA commented on the draft BAR.

1.2.2.2 On 11 November 2021, the CD: IEA received the final BAR.

1.3 On 18 March 2022, the CD: IEA approved the EA applications and proceeded to issue the EAs to the applicant.

1.4 On 20 April 2022, the Directorate: Appeals and Legal Review (Appeals Directorate) within the Department received a consolidated appeal from White and Case LLP South Africa, on behalf of the appellants, challenging each of the abovementioned EAs. The consolidated appeal was lodged in terms of section 43(1) of NEMA, read with the National Appeal Regulations, 2014 (2014 Appeal Regulations).

1.5 On 13 May 2022, applicant filed a responding statement on the appeal.

1.6 On 30 May 2022, comments on the appeal were thereafter received from the CD: IEA.

1.7 On 13 July 2022, the appellant submitted an answering statement on the applicant's responding statement.

1.8 The appeal is premised on the following grounds:

1.8.1 The applicant and appellants have conflicting interests in the Matjhabeng Properties;

1.8.2 The final EIAr and BAR that had been submitted in support of the respective EA applications failed to comply with mandatory requirements of NEMA; and

1.8.3 The CD: IEA's decisions were influenced by an error in law, and it is therefore unreasonable.

2. GROUNDS OF APPEAL

Conflicting interests in the Marjhabeng Properties

2.1. The appellant submits that:

2.1.1 Harmony Freegold (Freegold) holds a mining right (reference number FS30/5/1/2/2/84MR), to mine gold over various properties, which include the following:

(i) the Farm Kalkuil 153; portion 2 of the Farm Kalkuil 153, Farm Hesters-Rust, Portion 0 of the Farm Hesters Rust 224, on which Phase 1 of the proposed solar PV facilities will be constructed; and

(ii) Portion 2 of the Farm Kalkuil 153; Portion 0 of the Farm Rietpan 17; Portion 4 of the Farm Rietpan 17; Portion 0 of the Farm Lotgeval 96 and Portion 0 of the Farm Euclid 144, over which a portion of the powerline from the Phase 1 solar PV facility will be constructed.

(collectively: the Phase 1 Site);

2.1.2 Avgold Ltd (Avgold) holds a mining right (reference number FS30/5/1/2/2/226MR), to mine gold over various properties, which include the following:

(i) the Farm Dolly 404, Portion 0 of the farm Hesters-Rust 224; Farm Ophir 405, Portion 0 of the Farm Hesters-Rust 224; Farm Paleis-Heuvl 323, Portion 3 of the Farm Paleis-Heuvel 323 and the farm Kalkkuil 153, portion 2 of the Farm Kalkuil, on which Phase 2 of the proposed solar PV facilities will be constructed; and

(ii) Portion 2 of the Farm Kalkuil 153; Portion 0 of the Farm Paleis-Heuvel 323; Portion 0 of the Farm Dolly 404 and Portion 0 of the Farm Marthina's Gift 299, over which a portion of the powerline from the Phase 2 solar PV facility will be constructed

(collectively: the Phase 2 Site);

2.1.3 They (the appellants) do not have an "*in principal*" objection to the proposed project. Their objection relates to the fact that the appellants and applicant seek to have competing and conflicting uses of the Matjhabeng Properties, which the parties have, to date, not resolved. In this regard, the appellants submit that:

2.1.3.1 The CD: IEA failed to take relevant factors into account when granting the EAs, im particular that the appellants hold a mining right and surface right permits over the Matjhabeng Properties and that:

i. The proposed project falls within the appellants' mining right areas.
ii. The applicant has not obtained approval in terms of section 53 of the Mineral and Petroleum Development Act, 2002 (Act No. 28 of 2002) (MPRDA) to continue with the proposed project on the Matjhabeng Properties. The approval obtained from the Department of Mineral Resources and Energy (DMRE) only permits the applicant to undertake feasibility investigations on the Matjhabeng Properties.
iii. The surface of the Matjhabeng Properties on which the applicant plans to construct the proposed project includes various mining related infrastructure. These include, but are not limited to, waste rock dumps, slimes dams, settlements, pipelines, roads and buildings.

2.1.3.2 Much of the infrastructure will need to be decommissioned, removed and rehabilitated to construct the proposed project in accordance with the approved layout.

2.1.4 The appellants have informed the applicant that they will only demolish the infrastructure and rehabilitate the Matjhabeng Properties at the end of the mine's life in accordance with its approved Environmental Management Plan (EMPr), and that such rehabilitation will thus not occur before the implementation of the proposed project.

2.1.5 The Tripartite Agreement between *Harmony Gold Mining Company, MLM and the applicant* was submitted as part of the comment and response report. Although the Tripartite Agreement is still in draft, it demonstrates the key considerations that need to be finalised and agreed upon by the parties before the proposed project can commence.

2.1.6 Paragraph 11.2.3 of the draft EIAr read as follows:

"11.2.3 Rehabilitation Requirements

The previous mining company (i.e. Harmony Gold Mining Company Ltd) is responsible for all the surface disturbances on the mining areas which includes, all historical mining and prospecting activities. There is a Tripartite and Rehabilitation Agreement between Harmony Gold Mining Company Ltd, MLM and the Applicant. Some of the key rehabilitation activities for the mining company to undertake, based on the aforementioned agreement, include the following:

- *Dump structures must not be left on the surface, this includes topsoil stockpiles, overburden stockpiles, waste rock piles, tailing dumps and slime dams;*
- *All excavations must be backfilled to the natural surface level;*
- *Removal of the old buildings and foundations on the site;*
- *Removal of pollutants in the soil and groundwater, if applicable;*
- *Removal of alien species, such as the Black Wattle occurring on site;*
- *Removal of slimes dam;*
- *Removal of vent shaft on site;*
- *Removal of mine settlements; and*
- *Removal of old shaft on the north west of the site."*

2.1.7 Paragraph 11.2.3 was amended such that the final EIAr reads as follows:

"11.2.3 Rehabilitation Requirements

Although there is an existing mining right by Harmony's subsidiary, Freegold, on part of the site, a consent letter was received from the mining company. To manage the interface between the Project and the Freegold mining operations and rehabilitation obligations, Freegold, the Applicant and the MLM are in the process of negotiating a detailed Land Use and Rehabilitation Agreement. The aforementioned Agreement refers to Harmony's rehabilitation obligations under the EMP relating to the Freegold mining right. The applicant accepts that the Harmony mine rehabilitation obligations must be fulfilled at the end of the life of the mine, but that certain aspects thereof could occur earlier. The Agreement provides for consultation with the Applicant with regards earlier rehabilitation to enable coordination of activities on the properties." [emphasis added].

2.1.8 The amendments to paragraph 11.2.3 of the EIAr are misleading in that:

2.1.8.1 the appellants never consented to the proposed project, as set out in paragraph 3.4.4.3 of the comments and response report, which states that:

"*The "consent" granted by Harmony is evident from the letters sent by Harmony Gold Mining Company dated 5 June 2015 and 9 September 2020, which is attached as Appendix G to the EIA Report. These letters state that Harmony: "has no objection against the proceeding of environmental and feasibility studies on the Farm Kalkuil 153". This cannot be construed as a consent to the proposed project.*"

2.1.8.2 While the applicant acknowledges in paragraph 11.2.3 of the final EIAr that the mine rehabilitation obligations will be completed at the end of life of the mine, the qualification that some of these measures may take place earlier suggests that the applicant and the appellants are negotiating for the earlier remediation of the Matjhabeng Properties.

2.1.8.3 As set out above and in the comments, the appellants have no intention of rehabilitating the Matjhabeng Properties before the end of life of the mine.

2.1.9 Notwithstanding the above, the CD: IEA granted the EAs, and therefore clearly failed to take material factors into account when approving the EA applications.

Failure to Revise the Layout Plan

2.1.10 The CD: IEA approved the layout plan for the proposed project, as set out in Annexure A of the final EIAr and final BAR, without considering that the approved layout plan for the construction of the proposed project is on areas of the Matjhabeng Properties, which the appellants currently utilise for, *inter alia*, slimes dams, tailings, stockpiles, waste rock dumps and buildings.

2.1.11 As indicated above, the appellants do not plan to rehabilitate the Matjhabeng Properties prior to the end of the life of mine. As a result, the infrastructure will remain on the Matjhabeng Properties whilst that the proposed project will need to be constructed around the infrastructure. The layout plan in the final EIAr and final BAR was not amended to cater for this scenario.

2.1.12 In the conclusions and recommendations to final EIAr, the EAP added an additional comment that "*a buffer of at least 50m needs to be maintained around all of the Harmony Group's mining infrastructure.*" The layout plan in the final EIAr and final BAR was not amended to cater for this buffer zone.

2.1.13 Paragraph 3.8 of the comments and response report, on page 53 of the EIAr, records the following:

- "*The Feature Map for the Phase 1 Site is contained at page 81 of the EIAr. It notes that certain solar panels will be situated on partly demolished mine infrastructure, stockpiles and old mine workings, slimes dams, ventilations shafts and other infrastructure. The rehabilitation of these areas will occur in accordance with the appellants' rehabilitation and closure plans and will not be completed prior to*

construction of the proposed project. As a result, as a minimum, the following PV panel sites will need to be excluded from Figure 31: 1.2, 1.3, 1.4, 1.5, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13 1.16, 1.17, 1.20, 1.26, 1.27, 1.28, 1.29, 1.54, 1.55, 1.56, 1.79 and 1.85. The exact co-ordinates of each of the panels will need to be plotted and the appellants will need to assess the site to confirm if any further panels would need to be excluded.

- *The Feature Map for the Phase 2 Site is contained on page 83 of the EIAr. It notes that certain solar panels will be situated on or in close proximity to existing borrow pits, graves, old mine infrastructure, a sewage treatment plant, mine stockpiles, dams, wetlands, streams, informal landfills, residential areas, mine stockpiles and a railway line. Based on the presence of this infrastructure, the following PV panel sites will, as a minimum, need to be excluded from the Figure 33: 2.40, 2.41, 2.42, 2.43, 2.44, 2.45, 2.52, 2.60, 2.64, 2.67, 2.68, 2.69, 2.70, 2.72, 2.79, 2.80, 2.81, 2.90, 2.91, 2.99, 2.100, 2.101, 2.106, 2.109, 2.110 and 2.111. The exact co- ordinates of each of the panels will need to be plotted and the Harmony Group will need to assess the site to confirm if any further panels would need to be excluded."*

2.1.14 The Feature Maps and layout plan in the final EIAr and final BAR were not updated to exclude the above panels or to show the 50m buffer zones. The appellants have also not received the revised Feature Maps mentioned in the Comments and Responses Report. As a result, neither the CD: IEA, nor the appellants nor any other interested and affected parties (IAPs) can assess the environmental and other impacts of the proposed project.

Failure to conclude the Land Use and Rehabilitation Agreement

2.1.15 In the comments and response report, the appellants noted that the Land Use and Rehabilitation Agreement between applicant, Municipality and the appellants had not been concluded on the basis that there are "*certain material concerns that have not yet been agreed to between the parties.*" The Comments and Responses Report sets out the following:

- The parties have not yet agreed to the proposed layout of the proposed project. The parties appear to disagree as to whether the Harmony Group will undertake remediation prior to the implementation of the proposed project;

- The parties have not yet agreed to Sunelex's right to access Site 1 using the Harmony Group's Road from the Harmony Tshepong Mine Access Intersection off the R30 road;

- The parties still need to have a technical meeting to assess the impacts of mining operations on the proposed project and vice versa, which may result in further changes to the proposed Tripartite Agreement;

2.1.16 The purpose of the Tripartite Agreement is, on the applicant's own version, '*to ensure optimal interface and minimal interference*' between the parties. This agreement is therefore critical to mutual co-operation of the parties in using the Matjhabeng Properties.

2.1.17 There is a failure to appreciate the eviction process required to evict the unlawful occupiers situated on the Matjhabeng Properties.

2.1.18 On this aspect, the applicant's proposed layout for the proposed project includes construction on the site where there are buildings that are currently inhabited by the unlawful occupiers.

2.1.19 It is common cause that the appellants submitted an eviction application in accordance with the Prevention of Illegal Evictions Act, 1998 (Act 19 of 1998) (the PIE Act) to evict a community that is residing on a portion of the Matjhabeng Properties associated with the Phase 2 Site.

2.1.20 The final EIAr and final BAR do not consider, assess, and evaluate the following:

- The impact that will be had on the proposed project if the eviction application is not successful, and the unlawful occupiers are allowed to remain on the Matjhabeng Properties;

- The impact that will be had on the proposed project if the Municipality fails to act in a timely manner in preparing the report such that the unlawful occupiers are still present on the Matjhabeng Properties at the time that appellants' plans to commence with the proposed project;

- the mitigation measures that will need to be implemented to prevent harm to the unlawful occupiers and other persons present on the Matjhabeng Properties;

- the exclusion (or potential exclusion) of the areas of the Matjhabeng Properties on which the unlawful occupiers are situated ("the Unlawful Occupier Area") from the layout plan;

- the viability of the proposed project if the PV panels proposed from the Unlawful Occupier Area.

2.1.21 There is no evidence in the EAs or in the reasons attached to the EAs to suggest that the CD: IEA considered the impact of the proposed project on the unlawful occupiers and vice versa.

The viability of the proposed project

2.1.22 The CD: IEA granted the EAs without appreciating the impact that the revised layout may have on the viability of the proposed project.

2.1.23 A minimum of 48 panels contained in the Feature Maps on pages 81 and 83 of the final EIAr need to be excluded from the proposed project, because they overlap with the appellants' infrastructure or other existing infrastructure. New feature maps are in the process of being prepared but have not yet been disclosed to the Department or the appellants for review and comment.

2.1.24 In response to the appellants' concerns regarding the financial viability of the proposed Project, the applicant indicated that, "*the Project's financial viability has been assessed in terms of a financial model that was prepared by an agency of the United States*

Government. Further, the Project has been valued by Riscura. Both the financial model and the valuation model confirm the viability of the Project."

2.1.25 The financial model and the valuation model were not attached to the draft EIAr or the final EIAr and therefore it is not possible for the CD: IEA or the Harmony Group to confirm the veracity of these statements. However, it is assumed that the financial viability of the proposed project is contingent on the total megawatts of electricity generated which is contingent on a minimum number of solar panels.

Failure to take into consideration the findings of the Radiological Assessment

2.1.26 In the Report on the Radiological Status dated 17 November 2020 and prepared by SciRAD Consulting ("the Radiological Report"), the specialist concludes that:

- *"Sunelex should take cognisance of the fact that since these sites are classified as former mine land, these sites will not be released from the NNR [(National Nuclear Regulator)] regulatory control until these tailings have been removed or used in an approved manner. This basically means that the NNR will not allow the applicant to continue with their proposed development of the site. It is recommended that when the tailings material is removed, a follow-up survey is conducted to verify that the activity concentrations in the respective areas are indeed below 0.5 Bq/g.*'

2.1.27 Despite this statement, the CD: IEA granted the EAs without as a condition therein that a public safety assessment / land clearance assessment is to be conducted and NNR clearance is to be granted before the proposed project commences. The CD: IEA clearly did not take into consideration the findings of the Radiological Report, and therefore acted unlawful.

Failure to take into consideration the findings of the Water Resource Assessment

2.1.28 In the Water Resource Assessment for the proposed project, prepared by the Biodiversity Company (dated November 2020), the specialist concluded that:

- *"All anticipated risks are considered to have a moderate impact significant due to the expected loss of wetland areas. It has been recommended that the expected loss of wetland areas must be compensated for."*

2.1.29 Offsets as compensation for environments affected by the proposed development are recommended in circumstances where an impact to a valuable environment as a result of a proposed development cannot be mitigated. The specialist's conclusion highlights the value of the environment that will be affected by proposed project.

Failure to take into consideration the findings of the Avifaunal Assessment Report

2.1.30 In the Avifaunal Assessment Report prepared in respect of the proposed project prepared by the Biodiversity Company (dated November 2020), the specialist concludes that:

- *"The Phase 2 PV area has a significantly higher avifaunal importance and sensitivity as well as supporting artificial hotspots of collision prone species. Consequently, residual impact significant ratings for habitat loss / degradation and collision / electrocution risk are assessed as Moderately High. It is important to note that the Phase 2 PV area has been divided into a western and eastern transformer block areas in an attempt to avoid the wetland habitat that bisects them. It is therefore important to note that although the Moderately-High impact rating applies only to the eastern block as the western block supports comparatively depauperate birdlife and should be considered to be of Low overall impact on avifauna.' The report continues to state that 'the entire Phase 2 development is situated in an area of high avifaunal importance and sensitivity and has the potential to adversely affect the birdlife at a regional to national scale. However, the likelihood (and consequently the significance) of the main potential impact, namely collisions with PV infrastructure due to the "lake effect" is uncertain...However, in lieu of more robust scientific evidence, the precautionary principles is applied here and the risk of significant collision is deemed plausible. It would be prudent to not underestimate the potential significance of collision events on the local birdlife especially considering the exceptionally high congregations of waterfowl in the area and the nationally*

important congregations of flamingo at Allanridge and surrounding pans. In addition, to the various mitigation measures stipulated in this report, it is recommended that the project follow its phased approach....[D]evelopment should start on the southern end of the Phase 1 area and proceed north. Bird mortalities in and around this area should be monitored. Monitoring should occur prior to construction and continue through operation for at least a year but preferably two. The decision to develop the northern Phase 2 PV area should only then be considered based on the findings of the mortality monitoring studies and this report. Thereafter, if the monitoring studies suggest low insignificant mortality rates Phase 2 should then be initiated within a small portion of the western transformer block. Here bird mortalities should be monitored in much the same way and the decision to develop the eastern block informed by this data...'

2.1.31 Notwithstanding the conclusions in the Avifaunal Assessment Report, the CD: IEA granted the EAs in respect of both Phase 1 and Phase 2 proposed project.

3. RESPONSES BY THE APPLICANT

3.1. In response to the appeal, the applicants state that:

3.1.1. None of the issues raised by the appellants warrant the setting aside of the EAs or the amendment of the EAs. The appeal states that "*...Harmony Group's objections are based predominantly on the fact that the Harmony Group and SunElex seek to have competing and conflicting uses of the Matjhabeng Properties which the parties have, to date, not resolved...*'

3.1.2. In the case of *Muckleneuk/Lukasrand Property Owners and Residents Association v The MEC Department of Agriculture Conservation and Environment, Gauteng Provincial Government and others [2007] 4 All SA 1265 (T)* (the "MLPORA case"), a full bench of the Gauteng High Court stated that it is not necessary for all I&APs to agree with a proposed project that has been lawfully and duly subjected to assessment, public participation and decision-making. The High Court held, at paragraph 53 of its judgment, that:

"Another aspect of importance in determining whether the decision is reviewable or not is the fact that although the applicants feel very strongly that their views must prevail, they are only a small number of all the interested and affected parties. It follows that once the decision-maker is satisfied that the project is desirable an alignment must be chosen. If from a planning point of view a responsible alignment is chosen the decision-maker cannot be faulted. The fact that there will of necessity be parties who are deeply unhappy does not make the decision unlawful.'[1]

3.1.3. Considering the nature of the Tripartite Agreement and the rights that the appellants hold in the surface rights of the Matjhabeng Properties, it is an exaggeration to state that *"it is not possible for the proposed project to be constructed and operated on the Matjhabeng Properties as it will be in direct conflict with the appellants' current operations and activities on the Matjhabeng Properties."* The appellant's surface rights to the Matjhabeng Properties take the form of surface rights permits, which allow them to use the surface of designated portions of the land for the purposes specified in the permits. Those rights are independent of and not conditional upon the execution of the Tripartite Agreement.

3.1.4. The applicant accepts that the appellant has mine rehabilitation obligations in terms of their EMPr that must be completed at the end of the life of mine. The applicant has not required that they (appellants) or any other member of the appellants accelerate the performance of their obligations. However, should the appellants wish to undertake some of those obligations, the parties agree that the applicant will be notified.

3.1.5. Both the Solar PV and Powerlines EAs state that all the information that had been presented to the CD: IEA and the appellants' comments were considered by the CD: IEA. It is thus disingenuous for the appellants to state that the correct factors were not taken into account by the CD: IEA as they (the appellants) are not in a position to assume that the competent authority did not fulfil its statutory mandate correctly. The EAP submitted all

[1] *Muckleneuk/Lukasrand Property Owners and Residents Association v The MEC Department of Agriculture Conservation and Environment, Gauteng Provincial Government and others [2007] 4 All SA 1265 (T) at paragraph [53]*

of the information necessary for the competent authority to make an informed decision, and the competent authority correctly considered such information.

3.1.6. The presence of mining infrastructure is acknowledged, discussed and assessed in various sections of the EIAr and the authorised layout excluded certain mining activities. The applicant commits to further revising the layout to avoid the appellant's mining infrastructure and to cater for a 50m buffer of such infrastructure as recommended in Section 16.3 of the EIAr. Approval for the revised layout will therefore be sought through an EMPr amendment process.

3.1.7. The applicant confirms that the project remains practically and economically viable even with the refinements to the layout to avoid the appellants' mining infrastructure. The applicant's detailed financial modelling information is confidential, and the appellants is not entitled to access to it. Such information is not required to be disclosed in the EIA process. The applicant does not have a duty to prove the financial viability of the project to the appellant.

3.1.8. In 2016, Dr. D de Villiers conducted a radiological survey of four tailings and waste rock areas found on the sites near Odendaalsrus. The surveys were intended to determine the radiological status of these areas, but not to release the site from regulatory control. The tailings areas contained material with uranium -238 activity concentrations, which exceeds the regulatory limit of 0.5 Bq/g; whilst the waste rock was below this threshold. This meant that the tailings material is to be regarded as radioactive. The 2020 survey concluded that the radioactive materials were not removed and are still present on the site. The best solution would be that the radioactive material be removed from these areas by the landowner/responsible party (i.e. Municipality/appellants) before the applicant utilises the site for their operations. If this option is currently not viable, then it is recommended the applicant should do the following:

3.1.8.1 Explicitly exclude these tailings areas from their lease and operations agreement with the Landowner/Responsible Party;

3.1.8.2 Set up a buffer zone of at least 50 metres around these contaminated areas to protect both workers and equipment from possible contamination/radiation exposure; and

3.1.8.3 Monitor these buffer zones during rainy seasons to ensure that tailings runoff does not enter the operational areas. Take note that a formal application to release the site from NNR regulatory control may be needed in the event that the applicant considers the purchase of the sites under consideration."

3.1.9 They (the applicant) commit to implementing these recommendations that had been received from the Radiation Protection Specialist.

3.1.10 There is no requirement for consent in terms of section 53 of the MPRDA to be provided before an EA can be issued. This is only a requirement in terms of the REIPPP. The appellants' argument in this regard is thus not a valid ground of appeal, as this consent may be obtained after an EA has been obtained.

3.1.11 As per the recommendations received from the Radiation Protection Specialist, the layout will exclude tailings areas where the regulatory limit is exceeded. In addition, the layout will include a buffer zone of at least 50m around these contaminated areas to protect both workers and equipment from possible contamination/radiation exposure. The applicant will be undertaking a detailed risk assessment based on the type of Battery Energy Storage System (BESS) technology selected during the final design of the Solar PV Plant. The outcomes of this risk assessment need to form part of the operational phase for the proposed project in the EMPr.

3.1.12 The feature maps referred to as Figure 31 and Figure 33 of the EIAr, were extracted from the geotechnical report compiled Byeffares & Green in 2016 and were included in the EIAr to provide an indication of the various developments and associated infrastructure that were found to be present at the Phase 1 and Phase 2 PV Sites. Existing mining infrastructure, amongst others, is also pointed out in these maps. The Feature Maps are not layout maps and do not show the footprints of the proposed project. The Best Practicable Environmental Option (BPEO) for the layouts for Phase 1 and Phase 2 is

provided in Figure 108 and Figure 109 of the EIAr, respectively. The layouts already excluded certain mining activities and will be refined further during the EMPr amendment process. The potential impact of the eviction process on project implementation and scheduling will be covered in the amendment of the EMPr.

3.1.13 Areas of avifaunal sensitivity for both Phase 1 and Phase 2 Sites were based on a combination of selected wetland delineation data, as deemed important for avifauna, as well as abundance data on congregations of collision prone species. The wetlands / watercourses deemed important for avifauna were assigned a "very high" importance rating. In response, the transformer blocks and ancillary infrastructure were reconfigured in Layout Alternative B to avoid areas of "very high" sensitivity.

3.1.14 Section 16.3 of the EIAr for the PV Sites included the recommendations from the Avifaunal Specialist, which are reflected in sub-paragraph (t)(ii) of the appeal. The requirements by the Avifaunal Specialist do not relate to the EA for the Powerlines (14/12/16/3/3/1/2410).

3.1.15 The manner in which water and sanitation services for the proposed project will be fulfilled are discussed in Section 9.10 of the EIAr. In this regard, water will be supplied by the Matjhabeng Local Municipality, with water connections to the Phase 1 and Phase 2 Sites, and sewage from the buildings and toilets across the site will be discharged into various septic tank systems.

3.1.16 Access to the Phase 1 and Phase 2 PV Sites was assessed in the EIAr. Section 9.10.5 of the EIAr explains that both the Phase 1 and Phase 2 sites are accessible from the north and south by the R30 arterial.

3.1.17 Dr A. Gouws, the same specialist who compiled the Agricultural Impact Assessment Report that was included in the EIAr, provided feedback as follows: "*There is only 69 ha of high potential land. The other 308 is medium potential land.*" As stated in the report, the loss is not permanent as it is only for the duration of the project. Cultivating any of the soil, will require authorisation from the Minister of Agriculture, Land Reform and Rural Development because the land is presently virgin land.

3.1.18 The grazing land that is used informally and without permission will become unavailable. There are other vacant land around Odendaalsrus that is grazing land. The specialist further notes that: "*With the desperate situation of Eskom and the impact that is has on the economy, I believe that all potential measures should be pursued to generate electricity. My recommendation from an agricultural perspective is that the regulating authorities allow the Project to be implemented.*"

3.1.19 The Phase 1 Cultural Heritage Impact Assessment Report states that "*...from a heritage point of view, it is recommended that the proposed development be allowed to continue on acceptance of the proposed mitigation measures and the conditions proposed...*". The aforementioned report states that it is acknowledged that the identified Txolwene compound at the Phase 2 Site is older than 60 years, and that it is rare and therefore formally protected by the National Heritage Resources Act, 1999 (Act No. 25 of 1999). It further states that "*...impact on or destruction of these structures for the purposes of the Matjhabeng PV Solar site are therefore subject to permit requirements which must be obtained from SAHRA/PHRA prior to any work being carried out...*". Furthermore, Section 16.3 of the EIAr includes the recommendation that the necessary permits will need to be obtained if inter alia structures older than 60 years are to be demolished at the Phase 2 Site. The presence of these structures thus does not present a fatal flaw to the development of the site and is adequately addressed by a specific condition in each of the EAs.

4. COMMENTS BY THE CD: IEA

4.1. In their comments to the grounds of appeal, the CD: IEA submits the following:

4.1.1. The Land Use & Rehabilitation Agreement and draft Tripartite Agreement was taken into account.

4.1.2. The site layout plans that had been attached as Appendix A of the BAR dated November 2021 were approved, and were to be updated after discussion with the appellants, whereafter a copy thereof would be made available to the appellants based on the conclusion of the on-going discussions.

4.1.3. Phase 1 and Phase 2 PV Sites were revised to cater for the environmental sensitivity, with associated changes to the powerlines and substations. The key changes made to the layouts entailed the reconfiguration of the transformer blocks and ancillary infrastructure to avoid areas of "very high" sensitivity, as well as avoiding the realignment of the A48 / S86. This new layout is referred to as Layout Alternative B. The occupiers mentioned are illegal occupants on these properties. They are occupying housing structures that the appellants used to house its staff. When the appellants recognised that such housing was no longer suitable it started relocated its staff with the view to demolish those structures. This would have enabled the applicant to use the relevant portions of the properties for the proposed project.

4.1.4. The reports clearly indicate that there was a follow up survey undertaken in 2020, as set out on pages 77 of the draft EIAr for the Solar PV plant. Further, the appellant committed to provide to the applicant a copy of the most recent Radiological Survey. The applicant is still awaiting receipt of this document. The statement about alternative land options from the Matjhabeng Local Municipality and private owners indicates ignorance of the reasons why the relevant properties were selected by the applicant and the Municipality for the proposed project.

4.1.5. The applicant accepts that the appellants' rehabilitation obligations must be fulfilled at the end of the life of the mine, but that certain aspects thereof could occur earlier.

4.1.6. Page 10 of the report states that the proposed project is located close to the town of Odendaalsrus where municipal services are available. The sites are easily accessible from the north and south by the R30 arterial road traversing both sites and from the east and west via the R34 arterial road. An operational railway line runs to the immediate west of the Project's Phase 1 Site and traverses the Phase 2 Site.

4.1.7. It is not anticipated that the proposed project will contradict or be in conflict with the municipal Integrated Development Plan (IDPs) and Spatial Development Frameworks (SDFs). The specialist studies further investigated the location based on sensitive environmental features and receptors.

4.1.8. The findings of the specialists are of particular importance in terms of understanding the impacts of the proposed project and managing these during the project life-cycle, as these studies focused on the significant environmental issues identified during the execution of the EIA processes.

4.1.9. The scheduling and the implementation of rehabilitation activities in accordance with the Land Use and Rehabilitation Agreement between the Municipality, the appellants and the applicant, must be resolved between the parties involved. However, the applicant complied with the requirements of the 2014 EIA Regulations.

4.1.10. A detailed risk assessment was to be undertaken based on the type of BESS technology selected and the final design of the Solar PV Plant. The outcomes of this risk assessment required to be incorporated into the Operational EMPr.

4.1.11. Suitable measures were to be implemented to prevent erosion, manage site drainage and rehabilitate cleared areas during the project life-cycle. The potentially significant environmental impacts were investigated through the relevant specialist studies. Key findings from the EIAr, apart from the sensitive environmental features and aspects which may also influence the conditions of the EA include the following:

- The Water Resources Impact Assessment found that the loss of wetland areas (particularly at the Phase 1 Site) cannot be effectively mitigated, and in accordance with the mitigation hierarchy some form of compensation would be required. Compensation could include the rehabilitation of unaffected systems in the local area.
- It is crucial that the activities contained in the Land Use and Rehabilitation Agreement between Municipality, the applicant and the appellants be implemented, including the rehabilitation of areas affected by mining activities. The scheduling of these activities are crucial for the implementation of the proposed project.

4.1.12. According to the Radiological Survey, radioactive tailings present on the PV Sites must be removed, which links to the rehabilitation activities that are to be undertaken by the Harmony Gold (1st appellant). A follow-up survey must be undertaken once the tailings material has been removed to verify that the activity concentrations in the respective areas are below 0.5 Bq/g. In addition, the proposed development of the PV Sites will need to adhere to all requirements of the NNR.

4.1.13. A buffer of at least 50m needs to be maintained around all of the Harmony Group's mining infrastructure.

4.1.14. From a bird perspective, the Avifaunal Specialist recommended that the development of Phase 2 proceed in phases, where the decision to develop this site should be informed by at least one year of bird monitoring on the Phase 1 Site. If the bird monitoring carcass search data from the Phase 1 Site do not suggest that collisions are a significant impact, then the western block can be developed first, followed by the eastern block. With repeated monitoring and analysis of mortalities, a decision can be made with regards to the development of the northern block.

4.1.15. The necessary permits will need to be obtained if the graves are to be relocated and the structures older than 60 years are to be demolished at the Phase 2 Site.

4.1.16. The recommendations from the Traffic Impact Assessment in terms of gaining access to the Phase 2 Site's eastern and northern blocks, need to be complied with.

4.1.17. The Layout Alternative A was revised to avoid areas with very high sensitivity ratings, based on the findings of the specialist studies. The evolved layout, which was termed Layout Alternative B, was determined to be the BPEO, together with the Phase 1 BESS Option 1.

5. EVALUATION (REASONS FOR THE DECISION)

5.1. In evaluating the grounds of appeal, I considered the purpose of the 2014 EIA Regulations, which reads as follows:

"The purpose of these Regulations is to regulate the procedure and criteria as contemplated in Chapter 5 of the Act relating to the preparation, evaluation, submission, processing and consideration of, and decision on, applications for environmental authorisations for the commencement of activities, subjected to environmental impact assessment, in order to avoid or mitigate detrimental impacts on the environment, and to optimise positive environmental impacts, and for matters pertaining thereto."

5.2. The 2014 EIA Regulations define *EIA* to mean *"a systematic process of identifying, assessing and reporting environmental impacts associated with an activity and includes basic assessment and S&EIR."* Considering the purpose of the 2014 EIA Regulations and the definition of an EIA process, the Tripartite agreement and the Land Use Rehabilitation Agreement between the applicant, appellants and the Municipality fall outside of the scope of the EIA process.

5.3. The application process for the EAs in issue were conducted through two separate and unique processes. The applicant followed a BA process for listed activities pertaining to the Matjhabeng Solar PV with Battery Energy Storage Systems Project: Phase 1 and Phase 2 Powerlines, and then conducted the S&EIR process for the development of the Matjhabeng Solar PV with Battery Energy Storage Systems Project: Phase 1 and Phase 2 facility.

5.4. I considered the BAR and the EIAr that had been prepared in respect of the proposed projects. I also considered section 24O and 24(4) NEMA, with specific reference to the need for and desirability of the proposed activity and the guideline published in terms of section 24J of NEMA.

5.5. The information before me indicates that the following specialist studies were conducted as part of the S&EIR process.

5.5.1 Water Resource Assessment

5.5.1.1 According to the findings of the Water Resource Assessment Study, a total of 29 wetland areas and 9 individual natural wetland hydrogeomorphic (HGM) units were identified and delineated within the project areas for Phase 1 and Phase 2 respectively. One non-HGM type is associated with Phase 1, namely a dam. A waterlogged area was also delineated for Phase 2. This area has not been characterised as a natural wetland and is regarded as artificial. Furthermore, the overall wetland health for Phase 1 determined that most of the systems within the project area are classified as class C (Moderately Modified) followed by class E (Seriously Modified), and class D (Largely Modified) systems. Most wetland area is covered by class D systems followed by class C, then class E systems. The overall wetland health for Phase 2 determined that most of the wetland systems are classified as Largely Modified, which is consistent with the most wetland area considered class D. The wetland areas for both phases are predominantly in a Largely Modified status. Furthermore, a 30m buffer area was determined to be suitable for the project components, this will only be applicable to the wetland areas that will not be lost because of the project.

5.5.2 Avifaunal Assessment

5.5.2.1 According to the findings of the Avifaunal Specialist, most of the Phase 1 and 2 project areas have been disturbed (to varying degrees) by past and current anthropogenic land use practices relating to crop cultivation, urban sprawl, water discharge, mining, infrastructure, and livestock grazing. As such, two battery alternatives were provided in Phase 1. The first battery option is found on the southwestern side of the project area and the second option is adjacent to the existing mining operation. Option 2 is the preferred option because it will not require the construction of an additional road and it will thus not lead to the destruction of more habitat. Phase 2 has two options for the realignment of the roads.

5.5.2.2 Furthermore, the impact assessment revealed that, with mitigation, all impacts associated with the Phase 1 project are considered to have a Low residual impact significance, due to the low bird abundances in this area, particularly with regards to collision prone waterfowl. The Phase 2 PV area has a significantly higher avifaunal importance and sensitivity as well as supporting significant hotspots of collision prone species. Consequently, residual impact significance ratings for habitat loss / degradation and collision / electrocution risk were assessed as Moderately High. I have considered that the Phase 2 PV area has been divided into a western and eastern transformer block areas to avoid the wetland habitat that bisects them. It is therefore important to note that although the Moderately-High impact rating applies only to the eastern block, as the western block supports a comparatively depauperate birdlife and should be considered of Low overall impact to avifauna.

5.5.3 I also considered the representations and comments received from the appellants, and the EAP's response to these representations and comments that were included in the Appendix C8: Comments and Response Report.

5.6 With regard to the BA process, I took note of the following:

5.6.1 The proposed project will be developed to serve the Municipality's energy requirements. The proposed Phase 1 and Phase 2 Power Lines and Substations are linked to the Solar PV Park. Hence, the need and desirability of the powerlines are directly link to the overall project.

5.6.2 The following project alternatives were assessed:

5.6.2.1 Layout Alternatives:

The original project layout referred to as Layout Alternative A, was assessed by the specialists. This layout included the following options to the proposed Phase 1 and Phase 2 Powerlines and Substations:

- Two options were considered for both the Phase 1 and Phase 2 Substation positions, with associated powerline routes; and
- For Phase 2, two options were identified for the powerline route to connect to the Geduld Substation. Based on the findings of the specialist studies, in particular the Water Resources Impact Assessment, Terrestrial Ecology Assessment, Avifaunal Assessment and Traffic Impact Assessment, the layouts for the Phase 1 and Phase 2 PV Sites were revised to cater for the environmental sensitivity, with associated changes to the power lines and substations. The key changes made to the layouts entailed the reconfiguration of the transformer blocks and ancillary infrastructure to avoid areas of "very high" sensitivity, as well as avoiding the realignment of the A48 / S86. Furthermore, the Phase 1 Substation Option 2 was identified as the preferred alternative in the Terrestrial Ecology Assessment and Avifaunal Assessment, as this option negates the need for an additional road that would have been required to access the Substation Option 1 Site. I do however note that the impacts associated with the additional road can be suitably managed by the mitigation measures provided.

5.6.3 The information before me indicates that the following specialist studies were conducted as part of the BA process:

5.6.3.1 **Water Resource Assessment**

According to the findings of the Specialist study, there are currently several site alternatives for the substation for both phases of the project, each occupying a very small footprint area of 6300m^2. No substations will be positioned in a wetland or an associated buffer area. Overall, all anticipated risks are considered to have a Low impact significance provided that the mitigation measures are effectively implemented. Under this assumption, it is the opinion of the specialist that the proposed development should not warrant any more than a General Authorisation in terms of water use licensing.

5.6.3.2 **Avifaunal Assessment**

According to the avifaunal specialist, the overall species richness, abundance and overall diversity were found to be considerably higher along the Phase 2 powerline route as compared to the Phase 1 route. This is attributed to the higher habitat diversity along the longer Phase 2 powerline, which also hosts wetlands, Wetlands are distinctly lacking from the Phase 1 route. Of the three broad avifaunal habitat types identified within the project area (Wetlands, Grasslands and Transformed), the highest diversity (abundance and species richness) is mostly found in the wetland habitats, particularly along the Phase 2 route. Further statistical analysis of the data revealed that that the avifaunal assemblages occupying natural habitats are largely distinct from those that occupy the transformed habitats. This finding was most pronounced along the less impacted Phase 2 route. In Phase 1, two substation options were provided, the first being south of the second. The preferred option is substation option 2 as this option mitigates the need for an additional road in the project area. An additional set of alternatives were provided, these were the two powerline options to Geduld substation. Again option 2 is the preferred option as it follows an already disturbed route. Within the Phase 1 route the sensitivity assessment identifies one area of very high sensitivity at the northern end of the powerline route and then areas of moderate-low sensitivity at the elbow and again in a patch of habitat nearer the existing substation to the south. Within the Phase 2 route the majority of sensitive habitat occurs in the northern two thirds. Very high areas are associated with the pans and wetlands in this area particularly further north.

5.7 On my assessment of the information before me, I am satisfied that the recommendations and mitigation measures are informed by the studies that have been recorded in the final BAR dated November 2021.

5.8 In light of the foregoing, I am satisfied that the Water Resources Impact Assessment and Avifaunal Assessment in both projects were adequately assessed and duly considered by the CD: IEA prior to approving the EA applications.

5.9 I am further satisfied that the layouts for the Phase 1 and Phase 2 PV Sites were adequately assessed and revised to cater for the environmental sensitivity, with associated changes to the power lines and substations as alluded to in section 14.3 and provided for in Figure 106 and Figure 107 of the EIAr.

5.10 Regarding the appellants' mining permit and the associated EMPr over the property, although I am mindful of the appellants mining right on the property, I cannot find that the development of the solar facility is in direct conflict with the mining operations.

5.11 I also considered that the EIAr and the approved layout plan excluded certain mining activities and that the maps were being updated after discussion with the appellants, whereafter a copy thereof would be made available to the appellants based on the conclusion of the on-going discussions. Moreover, the revised Maps will provide for buffers and the applicant commits to further revise the layout to avoid the appellants' mining infrastructure and to cater for a 50m buffer in the final layout plan.

5.12 It is evident that the amendments to the EMPr will be subject to a PPP before being submitted to the Competent Authority for approval.

5.13 On the aspect of the Radiological Survey Report, I considered the following:

5.13.1 The tailings areas contained material with uranium -238 activity concentrations exceeding the regulatory limit of 0.5 Bq/g, while the waste rock was below this threshold, indicating that the material is to be considered radio-active.

5.13.2 The specialist advised that the best solution would be for the landowner/responsible party to remove the radioactive material from these areas before the applicant utilises the site for their operations.

5.13.3 If this latter option is currently not viable, then the following interim solutions are recommended as follows:

- *"The applicant should explicitly exclude these tailings areas from their lease and operations agreement with the Landowner/Responsible Party*

- *Set up a buffer zone of at least 50 metres around these contaminated areas to protect both workers and equipment from possible contamination/radiation exposure; and*
- *Monitor these buffer zones during rainy seasons to ensure that tailings runoff does not enter the operational areas. Take note that a formal application to release the site from NNR regulatory control may be needed in the event that the applicant considers the purchase of the sites under consideration."*

5.14 It is critical that the radioactive material on site was caused directly from the mining activities conducted on the site and that these will peremptorily be dealt with in terms of the mine's closure plan of the appellants.

5.15 Whilst I am mindful that that the Constitution enshrines the right to adequate housing for everyone and that it is incumbent on the state to take reasonable and legislative measures within its available resources to achieve the progressive realisation of this right, the issue relating to the eviction of occupants from a building on the site does not fall within the purview of considerations in terms the NEMA and the EIA Regulations 2014. Nevertheless, I took particular heed of the fact that this aspect is being addressed via the the PIE Act[2] process and that the Matjhabeng Local Municipality, which is an organ of state, is involved in that process to adequately address this aspect. I am accordingly satisfied that the issues relating to the alleged illegal occupation of housing facilities located on the property and the eviction process which may impact on the proposed project is being appropriately addressed through the proper mechanisms.

5.16 In light of the above, the above ground of appeal by the appellant falls to be dismissed.

[2] Prevention of Illegal Evictions Act, 1998 (Act 19 of 1998)

6 FAILURE TO TAKE RELEVANT FACTORS INTO CONSIDERATION

The administrative action was procedurally unfair

6.1 In terms of NEMA and the 2014 EIA Regulations, the applicant must '*provide access to all information that it reasonably has or may have the potential to influence any decision with regard to an application...*' This principle was re-iterated in the case of *Earthlife Africa v Director-General Department of Environmental Affairs and Tourism and others 2005 (3) SA 156 (C)*, where Griesel J held at paragraph [77] that:

"*Fairness ordinarily requires that an interested party be given access to relevant material and information in order to make meaningful representations.*"[3]

6.2 The PPP for the proposed project was flawed and deficient because the appellants did not have access to crucial information and documents to enable it to make full and proper representations. The information and documents on this aspect include, among others, the following:

6.2.1 the revised Feature Maps for the Phase 1 and Phase 2 Sites setting out the position of the PV panels. On the applicant's own version as stated at page 53 of the Comments and Responses Report, these were not provided to the appellants;

6.2.2 the outcomes arising from a technical meeting between applicant and the appellants, proposed at page 45 of the Comments and Responses Report, to discuss and assess the impacts of the mining operations on the proposed Project and vice versa;

6.2.3 the proposed Project's financial viability assessment prepared by an agency of the United States Government and the proposed Project valuation prepared by Riscura and the revision of such reports following:

- the technical meetings between the appellants and the applicants have not been completed;

[3] *Earthlife Africa v Director-General Department of Environmental Affairs and Tourism and others 2005 (3) SA 156 (C)*, at paragraph [77]

- the adjustments to the layout plans in terms of which all the PV panels which overlap with the appellants infrastructure have been excluded; and
- the 50m buffer zones around the infrastructure are included in the layout plan.

6.3 The fact that this critical information was not prepared and subjected to public participation prior to the submission of the final EIAr and the final BAR renders the public participation flawed.

Failure to comply with the requirement to consider alternative sites

6.4 The procedures for the investigation, assessment and communication of the potential consequences or impacts of activities on the environment must include, an investigation of the potential consequences or impacts of the alternatives to the activity on the environment and assessment of the significance of those potential consequences or impacts, including the option of not implementing the activity.

6.5 The applicant failed to consider alternative sites for the proposed project during the S&EIR and BA processes, which is required in terms of the 2014 EIA Regulations.

6.6 Section 23 of NEMA states that the general objective of integrated environmental management is to identify, predict and evaluate the actual and potential impact on the environment, socio-economic conditions and cultural heritage, the risks and consequences and alternatives and options for mitigation of activities, with a view to minimising negative impacts, maximising benefits, and promoting compliance with the principles of environmental management set out in section 2 of the NEMA.

6.7 The competent authority must, when considering EA applications, consider all relevant factors including any feasible and reasonable alternatives.

6.8 At page 54 of the Scoping Report and page 71 of the final EIAr, the following is stated:

"no site alternatives are proposed for this Project, as the placement strongly depends on the flat and sparsely populated land, grid connection, water supply, good transport infrastructure and the availability of a large portion of municipal land."

6.9 The CD: IEA's decision to grant the EAs was so unreasonable that no reasonable administrator would, based on the final EIAr and the final BAR, have granted the EAs.

7. *RESPONSE BY THE APPLICANT*

7.1 The applicant submits as follows:

7.1.1 The EMPr amendment process will include public participation, as prescribed by the 2014 EIA Regulations.

7.1.2 The impacts to existing structures and infrastructure were assessed in section 13.23 of the EIAr, where it was stated that a detailed survey will be conducted to identify all physical features that are located within the final project footprint and that the optimisation of the layout during the design phase will seek to avoid existing structures and infrastructure, where possible.

7.1.3 Sites alternatives for the project, including an original list of offered sites, were initially considered during the feasibility assessment stage of the project. The site selection process and grid connection options went through an evaluation process under a Project Steering Committee, which included Eskom, the Municipality, and the applicant. Section 10 of the EIAr sets out the alternatives considered during the EIA process. A comparative analysis of the alternatives from environmental (including specialist input) and technical perspectives is provided in Section 14 of the EIAr. According to the 2014 EIA Regulations, "alternatives" in relation to a proposed activity, means different ways of meeting the general purpose and requirements of the activity. This may include alternatives to (i) the property on which or location where the activity is proposed to be undertaken; (ii) the type of activity to be undertaken; (iii) the design or layout of the activity; (iv) the technology to be

used in the activity or operational aspects of the activity. It also includes the option of not implementing the activity.

7.1.4 The alternatives that had been assessed in the EIAr, include layout options and the "no-go" option. Section 9.4 of the EIAr lists the factors that contributed to the suitability of the proposed Phase 1 and Phase 2 Sites, which include the following: a) Solar Radiation; b) Topography; c) Power and transmission considerations (grid connection); d) Overall extent of the sites; e) Suitable site access and road infrastructure; and f) Availability of land. No site alternatives were proposed for the proposed project in the EIAr, due to (i) favourable conditions listed in Section 9.4 of the EIAr, and (ii) it was determined that the potential impacts associated with the proposed project on the proposed sites can be avoided, managed or mitigated.

7.1.5 The applicant submits that Matjhabeng Properties are flat. In this regard section 11.6 of the EIAr records that the study area has an even flat slope ranging from 1440m above sea level (near Riebeeckstad) to 1290m to the north-west and south-west. The most prominent topographical features are the man-made mine dumps often dominating the skyline. Slopes across the study area are less than 1%.

7.1.6 As per the responses above, and in accordance with the provisions in the EAs, the applicant will undertake an EMPr amendment process to incorporate the changes proposed. The EMPr amendment process will include public participation, as prescribed by the 2014 EIA Regulations. The EMPr amendment process will provide further opportunities for technical engagements between the appellants and the applicant.

8. *COMMENTS BY THE CD: IEA*

8.1 Based on the findings of the specialist studies, in particular the Water Resources Impact Assessment, Terrestrial Ecology Assessment, Avifaunal Assessment and Traffic Impact Assessment, the layouts for the Phase 1 and Phase 2 PV Sites were revised to cater for the environmental sensitivity, with associated changes to the power lines and substations. The key changes made to the layouts entailed the reconfiguration of the transformer blocks and ancillary infrastructure to avoid areas of "very high" sensitivity, as well as avoiding the

realignment of the A48 / S86. This new layout is referred to as Layout Alternative B. Figure 84 and Figure 85 below show the layout alternatives for Phase 1 and Phase 2, respectively.

8.2 There were two alternatives that were ultimately assessed to identify the preferred options, namely Layout Alternatives A and B, as well as the Phase 1 Battery Energy Storage System Options 1 and 2.

8.3 Based on the recommendations of the specialists, technical considerations and the comparison of the impacts, the following alternatives were identified as the Best Practicable Environmental Option:

- Layout – Layout Alternative B; and
- Phase 1 Battery Energy Storage System – Option 1.

9. EVALUATION

9.1 *The administrative action was procedurally unfair*

9.1.1 I have noted the concerns raised by the appellant indicating that the PPP process was flawed and deficient with specific reference to specific information and documents including the Feature Maps for the Phase 1 and Phase 2 Sites setting out the position of the PV panels. In this regard I perused the layout maps in the draft EIAr (page 249-252), final EIAr (page 253-265), draft BAR (page 212-215) and the final BAR (page 216-219) and concluded that the maps remained identical. I therefore conclude that the maps were subjected to PPP and the appellants were afforded an opportunity to review the maps. I have furthermore considered the PPP followed in the BA process as well as the S&EIR process. In both application processes, the applicant complied with the requirements prescribed in terms of Chapter 6, regulation 41 of the 2014 EIA Regulations.

9.1.2 I am furthermore satisfied that the EMPr amendment process will be subject to another round PPP, and will provide further opportunities for technical engagements between the appellants and the applicant.

9.1.3 I further note that the comment referred to on page 45 of the Comments and Response Report relate to the financial viability of the project and the whether the Municipality will be able to make payments due to their current debt owed to Eskom. The appellant further object that the technical meetings between the parties have not yet been concluded. Both concerns highlighted by the appellants fall outside the scope of the EIA process.

9.1.4 In light of the foregoing, I find that the procedure followed was in compliance with the relevant legislative regime and therefore conducted in a fair and procedurally correct manner. This ground of appeal therefore falls to be dismissed.

9.2 ***Failure to comply with the requirement to consider alternative sites***

9.2.1 On this aspect relating to the failure to consider alternatives, I considered the EIAr against the requirements in Appendix 2 of the 2014 EIA Regulations. In this regard, the assessment of only two alternatives, namely the preferred alternatives and the no-go alternatives, were relevant. It must be noted that the alternatives referred to in the regulations are not limited to renewably energy alternatives, but also refer to types of activities to be undertaken, design and layout, site location where the activity is proposed to be undertaken and operational aspects of the activity.

9.2.2 The information before me indicates that the applicant assessed two alternatives to identify the preferred options, namely Layout Alternatives A and B, as well as the Phase 1 Battery Energy Storage System Options 1 and 2 alternatives, as well as the "no go" option. In this regard I refer to page 71 and 72 of the EIAr which address site alternatives, layout/ design alternatives, technology alternatives and the No Go option.

9.2.3 I am therefore satisfied that the applicant complied with the requirement to consider alternatives, as prescribed by the 2014 EIA Regulations. This ground of appeal falls to be dismissed.

10. DECISION

10.1 In reaching my decision on this appeal, I have taken the following into consideration:

10.1.1 The appeal lodged by the appellants on 20 April 2022.
10.1.2 The responding statement filed by the applicants on 13 May 2022;
10.1.3 The comments submitted by the CD: IEA on 30 May 2022;
10.1.4 The answering statements received on 13 July 2022;
10.1.5 The information contained in the project file (14/12/16/3/3/2/2091); and
10.1.6 The information contained in the project file (14/12/16/3/3/1/2410).

10.2 In terms of section 43(6) of NEMA, I have the authority, after considering the appeal, to confirm, set aside or vary the decision, provision, condition or directive or to make any other appropriate decision.

10.3 Having duly considered the abovementioned information, in terms of section 43(6) of NEMA, I have decided to:

10.3.1 Dismiss all the ground of appeal raised by the appellants and
10.3.2 Confirm the decisions of the CD: IEA.

10.4 In arriving at my decision, I have not responded to every statement set out in the appeal and/or responses thereto, and where a particular statement is not directly addressed, the absence of any response thereto should not be interpreted to mean that I agree with or abide by the statement made.

10.5 Should the appellants be dissatisfied with any aspect of my decision, they may apply to a competent court to have this decision judicially reviewed. Judicial review proceedings must be instituted within 180 days of notification hereof, in accordance with the provisions of section 7 of the Promotion of Administrative Justice Act, 2000 (Act No.3 of 2000) (PAJA).

MS B D CREECY, MP
MINISTER OF FORESTRY, FISHERIES AND THE ENVIRONMENT
DATE: 8/10/2022