

**SUBMISSION: CULTURAL RIGHTS AND SUSTAINABLE DEVELOPMENT**

**Introduction**

Natural Justice and Earthlife Africa welcome the opportunity to submit comments for this report on cultural rights and sustainable development. While development projects threaten cultural rights throughout South Africa, this submission highlights the Musina-Makhado Special Economic Zone (MMSEZ), a key “sustainable development” project in the Vhembe District of Limpopo Province focused on energy, metallurgy, manufacturing, agro-processing and logistics. MMSEZ is emblematic of the cultural rights violations that plague many “sustainable development” projects throughout South Africa, and the support it has received from the United Nations Development Programme (UNDP) makes it an example worth highlighting in this particular submission. As of the writing of this submission, an environmental authorisation was issued permitting the project proponents to clear thousands of hectares of biodiverse land—including the clearing of significant natural, cultural and heritage resources.

Section I of this submission describes the legal framework for sustainable development in South Africa and the provisions for protection of cultural rights encapsulated in these laws and policies. Section II describes the violations of cultural rights that are likely to occur when the land is cleared for the creation of MMSEZ against the will of the communities in the area as an illustrative example of the violations of cultural rights that occur in the name of “sustainable development” throughout South Africa. Section III describes the international support that MMSEZ has received, including from UNDP, and articulates the ways in which this international support contributes to the violation of cultural rights in the name of “sustainable development”. Finally, this submission concludes with recommendations for the South African government and international institutions.

1. **Legal Framework for Sustainable Development and Protection of Cultural Rights**

***Constitutional Framework for Sustainable Development in South Africa***

Section 24 of South Africa’s Constitution includes the right to laws which “secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.” Sustainable development in the South African context requires that development aligns with the preservation of a quality environment, including preservation of natural resources integral to traditional ways of life for South African communities.

Many communities in rural South Africa, including communities in the Vhembe District, adopt an eco-centric approach to living and earning livelihoods. Their cultural identities and expression of their traditional ways of life are inextricably tied to their natural environment. Through their cultural, spiritual and heritage connections to the environment, they recognise the intrinsic value that the environment has for all life independent of its utility to mankind. While economic growth is integral to sustainable development, for many communities it is not the sole guarantee of human well-being which is holistically connected to the well-being of the environment. Therefore, sustainable development for these communities is linked to recognition of their cultural, spiritual and heritage rights and duly connected to efforts to protect the environment.

***Legal Framework Recognising the Interconnectedness of Environmental and Cultural Rights***

The South African Constitution recognises the indivisibility and interdependence of the rights to culture, heritage and a healthy environment. The right to a healthy environment encapsulated in Section 24 of South Africa’s Constitution explicitly encompasses peoples’ well-being, meaning that ensuring the right to a healthy environment is inextricably linked to the protection and fulfilment of other human rights, including cultural rights. For example, in a December 2021 interdict halting Shell from conducting offshore seismic tests which violated coastal communities’ cultural rights, the High Court stated the following: “In terms of the constitutional [*sic*] those practices and beliefs must be respected and where conduct offends those practices and beliefs and impacts negatively on the environment, the court has a duty to step in and protect those who are offended and the environment.”[[1]](#footnote-2)

The National Environmental Management Act (NEMA) and the National Heritage Resources Act (NHRA) also recognise the interconnectedness of cultural and environmental rights. The NHRA defines "heritage resource" as any place or object of cultural, social, and spiritual significance, meaning that all culturally relevant places and objects, including landscapes and natural resources, fall within the purview of the Act’s protection—as does intangible or “living” heritage. NEMA defines the "environment" to mean the surroundings within which people exist, which are made up *inter alia* of "aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being". Section 2(b) of NEMA provides that environmental management must be integrated, acknowledging that all elements of the "environment" (with links to cultural heritage) are "linked" and "interrelated," and must consider the effects of decisions on all aspects of the "environment" and all people in the "environment" by pursuing the selection of the best practicable environmental option. Finally, as a party to the Convention on Biological Diversity, the preamble of which explicitly recognises the connection between biodiversity and culture, South Africa must endeavour to minimise adverse effects on biological diversity as a means of protecting cultural rights.[[2]](#footnote-3) In short, under South African law, consideration must be given to cultural rights when applying environmental protection measures and governance in furtherance of sustainable development.

***Role of Impact Assessment and Public Participation Processes in Protecting Cultural Rights***

The environmental impact assessment (EIA) process is the primary tool for ensuring that large development projects are in fact sustainable and that such projects are justifiable in light of their impact on environmental and cultural resources. EIA processes require assessment of heritage impacts, and for developments that are likely to have a significant impact on cultural and heritage resources, the decision-maker may require the preparation of a heritage specialist report. While the NHRA defines “heritage resources” to including living heritage, living heritage is rarely considered in these assessments, which often limit their analysis to the identification of gravesites and presence of fossils. Similarly, in assessing the impacts of a project on the environment, EIAs often fail to assess the cultural significance of particular natural resources to communities in the surrounding area.

This failure to identify heritage resources and the cultural significance of natural resources results from inadequate consultation with indigenous and local communities, despite the requirement that EIA preparers facilitate meaningful public participation processes with affected parties. Instead of inviting communities to assist in identifying these key cultural resources, EIA preparers often write lengthy reports and expect these communities to provide comments highlighting the resources that are missing from the analysis. When communities are able to overcome numerous barriers to actually provide such comments, the comments are often ignored—first by the EIA preparer and subsequently by the decisionmaker issuing the authorisation for the project. This was the case for the MMSEZ EIA process, which was plagued with procedural irregularities, secrecy, and community exclusion. As described in the following section, MMSEZ will violate local communities’ cultural rights, yet this information was not put before, or not given due consideration by, the authority who issued the environmental authorisation for the project.

1. **Violations of Cultural Rights Associated with the Musina-Makhado Special Economic Zone**

Prior to obtaining an environmental authorisation to clear the land for MMSEZ, the project’s proponents commissioned an environmental impact assessment and heritage specialist report pursuant to the laws described in Section I. However, the preparers of these reports did not properly consult the communities that will be impacted by MMSEZ and consequently failed to identify culturally significant heritage and natural resources in the project area, including intangible heritage resources, as well as the adverse impact that MMSEZ will have on these communities’ cultural rights.

Members of the communities living on and near the proposed MMSEZ site hold deep connections to certain sacred sites and natural resources—tangible and intangible—in the Musina Makhado area. These sites carry with them a range of sacred rules, rituals and regulations regarding the communities’ behaviour in relation to a set of cultural, spiritual and traditional beliefs. Such sacred sites are subject to protection under international and regional instruments, such as the African Commission on Human and Peoples’ Rights’ Resolution on the Protection of Sacred Natural Sites and Territories, which calls on governments “to recognize and respect the intrinsic value of sacred natural sites and territories.”[[3]](#footnote-4)

Some Tshivenda communities in the area visit the lakes and rivers to communicate with their ancestors, and some believe that this is where the god of fertility and other mystical water spirits (zwidutwane) live. The interaction between the Tshivenda people and the spirits of water—lakes and rivers—involves a number of rituals and traditions, yet the impact assessment did not take cognisance of these living heritage practices and thus did not adequately assess the potential impact on communities who would be restricted from accessing these sites. The proposed MMSEZ project area is already water scarce, and climate change is expected to exacerbate these water shortages further in the coming years. The EIA found that there are insufficient freshwater resources to supply MMSEZ, and the authorisation for land clearing was issued without any concrete indication regarding the necessary additional water resources. EIAs must consider both the climate impacts *of* and *on* the project, including cumulative impacts,[[4]](#footnote-5) but the climate analysis undertaken in the MMSEZ EIA failed to address the cumulative impact on cultural rights resulting from MMSEZ and climate change depleting these cultural important water sources.

The land to be cleared is home to culturally important protected tree species, including marula, baobab, and mopane trees.[[5]](#footnote-6) Archaeological evidence suggests that marula trees have been a source of nutrition dating back as long ago as 10,000BC, while baobab trees can live up to 3000 years. Marula, mopane and baobab trees and their products have long played an important role in the culture, diets, livelihoods, healthcare, traditions, rituals and spirituality of local communities living within the project area.[[6]](#footnote-7) The removal of, and restriction of access to, these trees will harm local communities whose livelihoods and cultural practices rely on these trees.

The specialist charged with assessing the impact of MMSEZ development on heritage resources identified only nineteen gravesites of high significance in the project area—only assigning value to marked gravesites from a traditional built environment perspective, and overlooking the intangible heritage attached to unmarked graves. During a site visit with the Mulambwana community, who are a known community residing within the affected area, community residents mapped out a number of caves and *more than four hundred* graves in the project area where picking, digging or exhuming the remains found on sacred sites would be culturally prohibited. These are places of worship for the people of the community, and the relocation of graves to make way for MMSEZ is taboo and offensive to their beliefs.

These communities’ rights are protected by the Interim Protection of Informal Land Act and any authorisation to develop or exploit their land and resources without these communities free, prior, and informed consent obtained in compliance with the living customary law of these communities—protected by Sections 211 and 212 of the Constitution.[[7]](#footnote-8) Free, prior, informed consent was not obtained from the communities residing in the MMSEZ project area prior to the approval of land clearing, which will desecrate key cultural resources and disturb living heritage practices. Despite improper consultation and inadequate assessment of impacts on cultural rights in violation of the aforementioned laws, in March 2022, the decision-maker issued an environmental authorisation to clear thousands of hectares of biodiverse and culturally significant land for the construction of MMSEZ. This will have significant, irreversible effects on the cultural resources and rights of the communities in the area.

1. **The Role of International Organisations and International Funding in Perpetuating Cultural Rights Violations Associated with MMSEZ**

The United Nations Development Programme (UNDP), United Nations Conference on Trade and Development (UNCTAD) and the World Bank have promoted special economic zones (SEZs) as effective mechanisms for facilitating economic growth in the Global South, and China has also promoted SEZs in its development partnerships, including through its support of MMSEZ. While MMSEZ is touted as a “sustainable development” initiative, its anticipated carbon emissions will prevent South Africa from fulfilling its obligations under the Paris Agreement and exacerbate climate impacts on human rights, including cultural rights. The MMSEZ EIA indicated that renewable energy sources would be insufficient to meet MMSEZ’s energy needs and included plans for a coal-fired powerplant, though it has yet to secure funding to make this—and thus the actual functioning of the MMSEZ—feasible. As indicated above, the uncertainty remains with respect to obtaining adequate water resources in the already water-deficient area. In supporting sustainable development initiatives in South Africa, the international community has a duty to fund only those projects which will not continue to exacerbate the climate crisis or its impacts.

In addition to the foreign investment that has made MMSEZ possible, international support from UNDP has lent unwarranted credibility to the MMSEZ project. On 18 March 2022, UNDP announced that it had signed a memorandum of understanding with MMSEZ authorities—providing support for this problematic development without disclosing the terms or nature of the agreement.[[8]](#footnote-9) This lack of transparency has plagued all processes associated with MMSEZ, but it is particularly concerning in light of the credibility that the UNDP name lends to the project. It appears that UNDP has provided this backing to MMSEZ without consulting local communities about the adverse impacts that the project will have on their environmental and cultural rights. UNDP’s support for the project fails to acknowledge these violations, directly contradicts international commitments to move away from coal and toward renewable energy sources, and implicitly gives South African authorities license to continue committing cultural and environmental rights violations in the future—and to do so with the approval of international organisations like UNDP.

**Recommendations**

**Recommendations for the South African Government**

* Require meaningful consultation with impacted communities in identifying heritage resources that may be impacted by a proposed project as part of the preparation of a draft heritage assessment
* Reject as insufficient any impact assessment or specialist report that fails to address living or intangible heritage, or the cultural significance of impacted natural resources
* Withdraw the environmental authorisation for MMSEZ until a new EIA and public participation process is conducted in accordance with South African law
* Ensure that all future EIA processes account for all foreseeable greenhouse gas emissions resulting from the full lifecycle and extent of the project, and that these emissions comply with South Africa’s international climate obligations
* Abide by its international and regional legal obligations to protect biodiversity and natural sacred sites

**Recommendations for Multilateral Institutions, including UNDP**

* Publicly withdraw support from MMSEZ until a new EIA and public participation process is conducted in accordance with South African law
* Engage in community consultations to identify cultural impacts of development projects prior to supporting a project
* Provide a mechanism for communities to challenge support for a project *prior* to the project commencing in order for communities to demand protection for their cultural rights before violations occur
* Refuse support for projects that will undermine international climate obligations, including any projects involving the extraction or burning of coal

**Signatory Organisations**

Natural Justice, Cape Town, South Africa (website: [naturaljustice.org](http://naturaljustice.org/))

Earthlife Africa, Johannesburg, South Africa (website: <http://www.earthlife.org.za/>)

1. *Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy* (2021), para 32, available at: <http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20211228_Case-No.-34912021_decision.pdf> [↑](#footnote-ref-2)
2. Convention on Biological Diversity, Article 14. [↑](#footnote-ref-3)
3. 372 Resolution on the Protection of Sacred Natural Sites and Territories - ACHPR/Res.372(LX)2017, available at: <https://www.achpr.org/sessions/resolutions?id=414> [↑](#footnote-ref-4)
4. *Earthlife Africa Johannesburg v Minister of Environmental Affairs and others* (2017), para 91, available at: http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2017/20170306\_Case-no.-6566216\_judgment.pdf [↑](#footnote-ref-5)
5. K Magwede, B-E van Wyk, a.e. VAN Wyk. 2018. “An inventory of Vhavenda useful plants” South African Journal of Botany available at: https://iks.ukzn.ac.za/sites/default/files/An%20inventory%20of%20Vhavenda%20useful%20plants.pdf. [↑](#footnote-ref-6)
6. Azwindini Issac Ramaano. 2021. “Views of utilizing sustainable tourism to improve community sustenance: a case study of impoverished communities of Musina accessible at: https://www.emerald.com/insight/2516-8142.htm [↑](#footnote-ref-7)
7. *Baleni and Others v Minister of Mineral Resources and Others* (2019), para 28, available at: [http://www.saflii.org/za/cases/ZAGPPHC/2018/829.html (“](http://www.saflii.org/za/cases/ZAGPPHC/2018/829.html)It is declared that in terms of the *Interim Protection of Informal Land Act* 31 of 1996, the First Respondent is obliged to obtain the full and informed consent of the Applicants and their community, the Umgungundlovu Community, as holder of rights in land, prior to granting any mining right to the Fifth Respondent in terms of section 23, read with section 22 of the *Mineral Petroleum Resources Development Act* 28 of 2002.”) [↑](#footnote-ref-8)
8. *UNDP and MMSEZ sign a memorandum of understanding on achieving sustainable development* (2022), available at: <https://www.za.undp.org/content/south_africa/en/home/presscenter/pressreleases/2021/undp-and-mmsez-sign-a-memorandum-of-understanding-on-achieving-s.html> [↑](#footnote-ref-9)