Submission on environmental impact assessments, strategic environmental impact assessments and the right to a clean, healthy and sustainable environment

By: The synthesis team on a Climate Justice Centred-Approach to Environmental Impact Assessment in Rural Southern Africa of the African Synthesis Centre for Environment, Development and Climate Change (ASCEND)

To: The UN Special Rapporteur on Human Rights and the Environment

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About ASCEND and the synthesis team

The African Synthesis Centre for Environment, Development and Climate Change (ASCEND) is the first climate change synthesis centre for Africa, hosted at the University of Cape Town, South Africa. A key aim of ASCEND is to facilitate collaborative research that integrates climate science, legal research, and community perspectives. Our ASCEND synthesis team is developing a climate justice centred-approach to environmental impact assessments (EIA) responsive to the experiences of vulnerable communities in rural Southern Africa, with lessons from the legal systems of South Africa, Zimbabwe, and Lesotho.

Scope and focus of this submission

Our below submission (2497 words in length) contributes to answering questions 1 and 4 of the Special Rapporteur's request for inputs with reference to relevant laws of South Africa, Zimbabwe, and Lesotho, respectively. References and links to sources have been included,[1] but a list of sources can also be provided upon request. An analysis of laws, rather than policies, formed the focus of this submission.

[1] All online sources were accessed as at 14 April 2025.

Climate change in South African, Zimbabwean and Lesotho EIA law

In South Africa, the National Environmental Management Act 107 of 1998 ("NEMA") is required to give effect to a constitutionally entrenched right to an environment not harmful to health or wellbeing.[2] NEMA imposes an obligation on developers to conduct an EIA to obtain an environmental authorisation before commencing with activities listed in frequently amended subordinate instruments promulgated in terms of the Act. Section 24O of NEMA requires that authorities take into account "all relevant factors" when determining whether to grant an environmental authorisation to a developer, following an EIA process. NEMA does not impose an *express* obligation on developers, or the environmental assessment practitioners ("EAPs") they must appoint, to conduct climate change impact assessments as part of EIA, nor are authorities who decide applications for environmental authorisations *expressly* required to consider climate change impacts.[3] However, an obligation to consider climate change mitigation and adaptation concerns in EIAs has emerged through judicial interpretation of section 24O of NEMA.[4] Different scopes of emissions have *not yet* been the focus of such rulings.

Draft guidelines on the inclusion of climate change considerations into EIAs were prepared by the Department of Forestry, Fisheries and Environment in 2021.[5] Yet, there is no timeline for their finalisation or implementation. Meanwhile, where authorities act in a manner inconsistent with procedural and/or substantive rights entrenched in the Constitution (including the environmental right), courts are empowered to fill gaps where the legislature has not provided for the holistic protection of these rights.[6]

Zimbabwe's Constitution[7] contains a substantive environmental right in section 73. The Environmental Management Act 13 of 2002 ("EMA") and accompanying Environmental Impact Assessment and Ecosystems Protection Regulations of 2007 ("EMA regulations")[8] are intended to give effect to that right. These laws do not contain *express* provisions requiring developers or environmental impact assessment consultants to take climate change considerations into account when applying for authorisation for a prescribed project. However, section 99 of EMA requires that the contents of an EIA report should include "direct, indirect,

[2] Section 24 of the Constitution of the Republic of South Africa, 1996.
[3] In South Africa, a recently promulgated Climate Change Act 22 of 2024 incorporates principles that could promote the consideration of climate change issues in government decisions, but the Act does not govern EIAs.
[4] See: *Earthlife Africa Johannesburg v Minister of Environmental Affairs* (2017) 2 All SA 519 (GP) para 88; *Philippi Horticultural Area Food & Farming Campaign v MEC for Local Government, Environmental Affairs and Development Planning: Western Cape* 2020 (3) SA 486 (WCC) paras 100-102, 142; *Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy* 2022 (6) SA 589 (ECMk) paras 33, 107, 120-125; *Thungela Operations (Pty) Ltd v. Chief Director, Water Use License Management: Department Of Water And Sanitation* (WT04/22/GP) (2023) ZAWT 1.
[5] See: Centre for Environmental Rights "Climate litigation prompts new guideline for assessing climate impacts".
[6] Murcott & Vinti "The Judge-Made "Duty" to Consider Climate Change in South Africa" (2024) 126, 133
[7] Constitution of Zimbabwe Amendment (No. 20) Act, 2013.
[8] Statutory Instrument No. 7 of 2007.

cumulative, short-term and long-term effects of the project", which could be interpreted to include climate change considerations. Indeed, in practice, there is growing recognition of the need to integrate climate change concerns into the EIA process.

Given political barriers to judicial independence and activism in Zimbabwe,[9] there is limited scope (in contrast with South Africa) for courts to set precedent that would compel climate change impact assessments or consideration of community experiences of climate injustice.[10] The Zimbabwean courts have not ruled positively on these issues recently,[11] despite showing initial promise.[12]

Rather than an environmental right, section 36 of Lesotho's Constitution contains a directive principle that requires the adoption of policies aimed at protection of the environment. However, there is a statutorily conferred right to a scenic, clean and healthy environment in section 4(1) of the Environment Act 10 of 2008 ("EA"). Like South Africa and Zimbabwe, Lesotho's EA contains no express provisions that oblige developers to include climate change considerations as part of the EIA process. The Director of the Department of the Environment is empowered to confer an EIA license with reference to an environmental impact assessment statement. This official has a wide discretion to determine whether an environmental impact assessment statement submitted is adequate.[13] Section 3 of the EA states that the Director must prevent "any interference with the climate and adverse disturbances of the atmosphere and take compensatory measures for any unavoidable interference", but this provision has not yet been interpreted to mean that the Director shall require climate change impact assessment in EIAs. Given the wide discretion conferred on the Director, it would be difficult to take legal action in Lesotho's courts to challenge a failure on his part to consider climate change. Moreover, there are political barriers to judicial independence in Lesotho.[14] Nevertheless, there is some evidence that climate change impact assessments occur in some instances, albeit on a voluntary basis.

Analysis: Climate change in EIA law in South Africa, Zimbabwe and Lesotho

The absence of unified national standards on whether and how climate change considerations are to be integrated in EIAs creates legal uncertainty and leads to inconsistencies in the approach and quality of EIAs in relation to climate change considerations. Developers and

[9] Tembo & Singh "Mutilation of the Judiciary: Threats, Intimidation and Constitutional Amendment in Zimbabwe" (2023) 554-555.
[10] The court in *New Life Covenant Church v Trustees of the Harare Wetlands Trust* (74 of 2022) (2021) ZWSC 74 for instance did not connect infringements of the environmental right to the role of wetlands in combatting climate change, and how this is a relevant consideration in obtaining authorisations.
[11] *Simba v The Director General of the Environmental Management Agency* (2024) ZWHHC 111.
[12] *Harare Wetlands Trust and Newlands Residents Association v Life Covenant Church*, HH 819/19 (2019).
[13] Environment Act 10 of 2008, section 25(1) and (2).
[14] Nyane "Judicial Review of the Legislative Process in Lesotho: Lessons from South Africa" (2019).

governments cannot easily be held accountable for failure to assess and address climate change mitigation and adaptation concerns.

Scope 1, 2 and 3 emissions are not mentioned in the framework legislation, specific environmental legislation, or regulations of South Africa, Zimbabwe, or Lesotho governing EIA. There is a pathway in South Africa for emissions to be considered broadly, through the National Environmental Management Air Quality Act 39 of 2004. However, uncertainty remains regarding the consideration of scope 1, 2 or 3 emissions. The absence of clear legal obligations requiring climate change impact assessment limits legal recourse on the part of aggrieved communities to challenge decisions following EIA processes. Judicial intervention can positively influence EIAs, though communities do not necessarily know or understand the implications of relevant judicial precedent, nor have the time or resources to access justice in the courts.

Public participation requirements in South Africa, Zimbabwe and Lesotho

In South Africa, participation in administrative decision-making processes (such as a decision about an application for an environmental authorisation) is facilitated by human rights protecting access to information[15] and administrative justice[16] entrenched in the Constitution. Moreover, NEMA requires the participation of all interested and affected parties in environmental governance.[17] Interested and affected parties must have access to relevant information about the activity.[18] The Environmental Impact Assessment Regulations provide detailed information on practical aspects of conducting public participation.[19]

In practice, public participation and other information dissemination processes are frequently foregone by developers, or ineffectively implemented in ways that discourage, limit or inhibit community participation resisting the relevant activity.[20] The Minister of Mineral Resources in the South African government has accused dissenting perspectives by local and indigenous communities as amounting to "colonialism and apartheid of a special type".

In response to implementation failures, constitutional rights (as given effect to by subsidiary legislation)[21] have been successfully relied upon by communities (sometimes in tandem with their environmental right) to advance their meaningful inclusion in decision-making about

[15] Section 32.
[16] Section 33.
[17] NEMA Section 24(4)(a)(v) requires this to be reasonable opportunity to participate.
[18] NEMA Section 24(4)(b).
[19] Chapter 6 to the Environmental Impact Assessment Regulations.
[20] See *Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy 2022* (6) SA 589 (ECMk).
[21] These are the Promotion of Access to Information Act 2 of 2002 and the Promotion of Administrative Justice Act 3 of 2000 (PAJA). PAJA must also be read together with other relevant legislation, such as those containing public participation requirements, see *Minister of Mineral Resources and Energy v Sustaining the Wild Coast NPC and Others* 2024 (5) SA 38 (SCA) para 20.

environmental authorisations in the courts, including requiring consideration of cultural practices, and consultation in languages that rural communities speak.[22]

In Zimbabwe, the EMA provides for participation in the implementation of environmental management legislation and policy[23] and in environmental governance.[24] Moreover, communities can rely on human rights of access to information[25] and administrative justice,[26] entrenched in Zimbabwe's Constitution (and subsidiary legislation),[27] though with less scope than in South Africa to enforce these rights, given political barriers to judicial independence in Zimbabwe. In terms of the EMA regulations, developers are required to undertake extensive consultations with stakeholders before submitting an EIA report to the Director-General,[28] and their participation must be verified by the Director-General.[29] However, as in South Africa, there are significant implementation challenges. It is estimated that around 70% of Zimbabwe's population lives in rural areas, and participatory processes often exclude Shangaan and Shona peoples, including because documents are not translated into their languages.[30] Participatory processes are highly politicised in Zimbabwe, and communities are understandably distrustful of developers' commitments concerning commitments to respect cultural practices or rehabilitate the environment.

Participation is a key environmental management principle in Lesotho.[31] Courts are further empowered to determine whether there has been participation in environmental management.[32] However, sections 20(4) and 22(a) of the EA only confer a discretionary power on the Director of the Department of Environment to invite participation on a project brief or environmental impact statement where they deem it to be necessary. The absence of a right of access to information is a further challenge,[33] and Lesotho's specific Access to Information Bill has not yet been passed. This law would empower parties to engage with the contents of a decision by the Director.[34] Appeals are possible to the Environmental Tribunal,[35] and to the High Court of Lesotho.[36] However, meaningful challenges require that communities be made

[22] *Baleni v Minister of Mineral Resources* 2019 (2) SA 453 (GP); *Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy* 2022 (6) SA 589 (ECMk).
[23] Section 4(1)(b).
[24] Section 4(2)(c).
[25] Section 62.
[26] Section 68.
[27] Freedom of Information Act (2020) and The Administrative Justice Act (2004).
[28] Regulation 10(4).
[29] Regulation 10(5).
[30] Natural Justice "Review of National Laws and Policies that Support or Undermine Indigenous Peoples and Local Communities" (2014) 10.
[31] Section 3(g) Environment Act 10 of 2008.
[32] Section 4(d).
[33] Section 20 of the Lesotho Constitution does provide for a right to participate in government, which might need access to information.
[34] See M Sebusi "MISA Calls for Enactment of Access to Information Law" *Lesotho Times* (October 5 2024).
[35] Section 100(1).
[36] Section 100(3).

aware of their rights and have access to legal resources, and that communities engage in bureaucratic modes of engagement frequently not in line with their language or customs.[37] There are few NGOs in Lesotho with capacity to pursue public interest environmental litigation. As such, there is limited legal mobilisation to enforce public participation in environmental decision-making using the legal system.

Analysis: Participation in EIA law in South Africa, Zimbabwe and Lesotho

Participatory processes in EIAs in South Africa, Zimbabwe and Lesotho are developer-led and controlled, and often serve to advance corporate interests. In other words, participation in EIAs is generally not bottom-up or community-driven and therefore do not enable meaningful inclusion.

Developers tend to focus on formal compliance with practical requirements of the EIA process (such as time periods) to obtain an authorisation, rather than implementing substantive environmental management principles (like skills and knowledge development or polluter pays) that would build capacities and capabilities of communities and promote environmental justice. Judicial intervention can make a positive difference by holding developers and environmental authorities accountable. For example, in *Sustaining the Wild Coast*, the developers' failure to engage meaningfully, in appropriate mediums and languages, with the local and indigenous communities (the Amadiba and Dwesa-Cwebe communities), rendered the authority's decision to grant them an exploration right unconstitutional and unlawful.[38] The developers' representatives approached community monarchs to the exclusion of building consensus within the broader community itself, and published notices in English and Afrikaans, not in their spoken languages, isiZulu and isiXhosa. The courts found this approach to be inconsistent with the communities' human rights, and therefore unlawful.

However, rural, local and indigenous communities are not necessarily empowered with knowledge of their rights to participate or the effect that their participation will have on the development process. Further, these communities may not have the means to access and participate in formal settings outside of their communities.[39] There is also a lack of alignment between EIA process and customary laws, and what the obligations of developers are in this respect.[40]

While there is a lack of available data on the incorporation of IKS in EIAs, it appears Indigenous knowledge systems ("IKS") in relation to climate change are generally not adequately

[37] K Mankuebe & D Manicom "Public Participation in Public Policy Making: The Case of the Lesotho National Decentralisation Policy" (2020) 381-382.
[38] Para 99.
[39] Development Bank of Southern Africa "Zimbabwe: Environmental Impact Assessments" (2020) 16-17.
[40] *Baleni v Minister of Mineral Resources* 2019 (2) SA 453 (GP).

considered.[41] Indigenous communities are not monolithic, and consist of diverse racial, socio-economic, and cultural backgrounds. Given that customary rights are constitutionally protected in South Africa, Zimbabwe, and Lesotho, communities' perspectives on the intersection of custom and law ought to be fully factored or weighted in environmental governance;[42] and this extends to climate change. Moreover, the Intergovernmental Panel on Climate Change has recognised the importance and centrality of IKS to inform mitigation, adaptation and resilience measures, as a form of specialised knowledge that can drive context sensitive solutions to climate impacts suited to the local culture, customs and eco-systems.[43]

Overall, there is a need to design and implement more inclusive participatory processes in EIA in South Africa, Zimbabwe, and Lesotho that are responsive to climate injustice; entrench free, prior, informed consent; and ensure EIA information is disseminated to affected communities.[44]

[41] Mayembe et al. "Integrating Climate Change in Environmental Impact Assessment: A Review of Requirements across 19 EIA Regimes" (2023) 3. This is also evidenced by *Sustaining The Wild Coast NPC v Minister of Mineral Resources and Energy* 2022 (2) SA 585 (ECG) paras 31-33; *Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy* 2022 (6) SA 589 (ECMk) paras 112-114.

[42] Bishop "Asserting Customary Fishing Rights in South Africa" (2021) 300-303.

[43] IPCC *Sixth Assessment Report* 1943-1945, 2342-2344.

[44] Maphanga et al "The State of Public Participation in the EIA Process and its Role in South Africa: A Case of Xolobeni" 294-296.