

JAGERSFONTEIN COMMUNITY TRUST

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THE DEPARTMENT OF WATER AND SANITATION

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SOUTH AFRICAN HERITAGE RESOURCES AGENCY (SAHRA)

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AND TO: FREE STATE HERITAGE RESOURCES AUTHORITY (FSHRA)

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C.K. LEBONA (Permit Committee Chairperson)
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Your Ref: 9/2/321/0001

Our Ref: JCT-02/2022

Date: 21 February 2022

NOTICE OF FORMAL OBJECTION-
IN RE: MOTIVATION FOR APPLICATION BY JAGERSFONTEIN DEVELOPMENTS (PTY) LTD FOR A PERMIT IN TERMS OF SECTION 38(1) OF THE NATIONAL HERITAGE RESOURCES ACT, NO 25 OF 1999 (“NHRA”) FOR THE PROPOSED BACKFILLING OF THE OLD JAGERSFONTEIN OPEN PIT LOCATED ON PORTION 15 OF THE FARM JAGERSFONTEIN 14 IS, SITUATED IN THE MAGISTARIAL DISTRICT OF XHARIEP, FREE STATE PROVINCE¹

¹ For ease of reference, the author hereof attached hereto a copy of the ‘Motivation for Application’ as Annexure ‘A’.

The subject refers.

This correspondence serves to, at the outset, notify the relevant parties and/or authorities that the Jagersfontein Community Trust (JCT), on behalf of the community it represents, hereby vehemently objects to the approval of the abovementioned permit application brought by Jagersfontein Developments (Pty) Ltd. The author hereof endeavors to, in the paragraphs which follow hereunder, reiterate and notify the recipients hereof of the facts warranting the aforementioned objection.

1. JCT's 2013 appeal to dismiss the issuing of Permit No. 308 (Case 508)-

1.1 The Appeals Authority had in 2013 upheld the appeal lodged by the JCT against the issuing of the abovementioned permit number, so issued to JD. Accordingly, the decision to issue said permit was subsequently set aside on 30 August 2013.²

1.2 JCT's successful appeal referred to in 1.1 above was primarily based on JD's inconsiderate infringement on the community's constitutional³ and statutory right to be consulted as a community who were to be materially and adversely affected by the proposed development approved under Permit Number 308 (Case No. 508).

1.3 On 21 January 2014, JD's attorneys withdrew the then impugned application in a letter addressed to the South African Heritage Authority (SAHRA).⁴ From the aforementioned correspondence, the only ostensible

² Kindly refer to the Appeal Authority's Ruling attached hereto as **Annexure 'B'**.

³ Section 33(1), read with sections 59, 72 and 162 of the Constitution of the Republic of South Africa, 1996

⁴ Kindly refer to JD's withdrawal notice attached hereto as **Annexure 'C'**

reason for such withdrawal was to avoid consulting the public on the issue of the back filling of the tailings.

2. JCT's objection to the current permit application (2019 – 2022)-

2.1 JD had around 2019 lodged the exact application as the application lodged in 2012 namely; a permit to rehabilitate the open cast mines. In 2019, JD's attorneys issued out a document entitled -

“MOTIVATION FOR APPLICATION BY JAGERSFONTEIN DEVELOPMENTS (PTY) LTD FOR A PERMIT IN TERMS OF SECTION 38(1) OF THE NATIONAL HERITAGE RESOURCES ACT, NO 25 OF 1999 (“NHRA”) FOR THE PROPOSED BACKFILLING OF THE OLD JAGERSFONTEIN OPEN PIT LOCATED ON PORTION 15 OF THE FARM JAGERSFONTEIN 14 IS, SITUATED IN THE MAGISTARIAL DISTRICT OF XHARIEP, FREE STATE PROVINCE”

Thereafter, JD's experts completed the Notification of Intention to Develop (NID) which appears to be a carbon copy of their 2013 application.

2.2 The following will illustrate how JD has, again, failed to meaningfully engage the community through participatory consultations and subsequent considerations of the community of Jagersfontein's legitimate and desperate concerns:

2.2.1 On 30 December 2021, JD handed out a few pamphlets in the town area of Jagersfontein, a town which their lawyer had, on her own

version, described as a *'ghost town'*, and failed to do so in the Itumaleng Township in which most of Jagersfontein's community members reside.

2.2.2 The abovementioned pamphlets advertised the holding of a public participation meeting which was held on 2 December 2021,⁵ a mere two days after their so-called invitation was ostensibly distributed.

3. The events that transpired on the date of the purported community consultation-

3.1 On 2 December 2021, the intended community consultation was not attended by the majority of the community and the relevant stakeholders because of the short notice as well as due to the fact that the meeting's venue had changed from the school where it was advertised to be held to the Community Hall, just prior to the commencement of the meeting at 14h00.

3.2 The community members who managed to attend the meeting vividly expressed their outrage in the way JD has conducted itself during the abovementioned public participation process, as well as their contentions to the approval of the proposed development.

3.3 The meeting was abruptly adjourned by JD when the attending community members raised their contention to the procedurally unfair process adopted by JD.

⁵ Kindly refer to **Annexure 'D'** which is the ostensible, but clearly reluctant invitation for public participation

4. The relevant legal authorities-

- 4.1 When we consider the constitutional demands of openness, transparency⁶ and fairness, administrative hearings have to be open to the public at large.
- 4.2 JD is an organ of state, and thereby regarded as an administrator for all intent and purposes, because the intended rehabilitation is of course a public function. Therefore, JD is a private person performing a public function.⁷
- 4.3 Included in its Impact Assessment Report (IAR) JD must (or must have) report to the Heritage Resources Agency (HRA) the results of the consultation with the communities affected by the proposed development.⁸
- 4.4 It is therefore submitted, in amplification of the objection made herein, that JD has neither regard for nor intention to positively and meaningfully engage with the members of Jagersfontein, and it is thus requested, on behalf of said community members, that the Permit Committee Members deny or stay JD's application until such meaningful engagement with the public on the impugned issue, including JD's as well as their predecessor's refusal to make the much-needed Corporate Social Investment (CSI) to revive the "*ghost town*" status Jagersfontein is now plagued with.

⁶ Section 1(d) of the Constitution

⁷ Section 239 of the Constitution

⁸ Section 38(3)(e) of the National Heritage Resources Act No. 25 of 1999

5. Conclusion-

From the facts above, it would clearly seem as though JD has repeated its mistake in its previous application which JCT had set aside on 30 August 2013. The Jagersfontein community implores the relevant heritage authorities to order JD back to the public participation process and notify the community members within a reasonable period, of the date set for such consultation.

Signed

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ESIAS JEREMIA GERBER
(Duly authorised representative of the JCT)



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Date	25 June 2019

MOTIVATION FOR APPLICATION BY JAGERSFONTEIN DEVELOPMENTS (PTY) LTD FOR A PERMIT IN TERMS OF SECTION 38(1) OF THE NATIONAL HERITAGE RESOURCES ACT, NO 25 OF 1999 ("NHRA") FOR THE PROPOSED BACKFILLING OF THE OLD JAGERSFONTEIN OPEN PIT LOCATED ON PORTION 15 OF THE FARM JAGERSFONTEIN 14 IS, SITUATED IN THE MAGISTARIAL DISTRICT OF XHARIEP, FREE STATE PROVINCE

1 INTRODUCTION

- 1.1 We act on behalf of Jagersfontein Developments (Pty) Ltd ("JD").
- 1.2 As described further below, JD proposes to backfill the old Jagersfontein open pit ("Pit") with fine tailings suspended in water ("Paste") and coarse tailings from its tailings processing operations ("Tailings Operations"). As the Pit has a surface area of 19.65 hectares (196,500 square metres) and the backfilling will change its character, the proposed project constitutes a development / activity as contemplated under section 38(1)(c)(i) of the NHRA, namely –

"any development or other activity which will change the character of a site exceeding 5000m² in extent".

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CLIFFE DEKKER HOFMEYR SERVICES PROPRIETARY LIMITED DIRECTORS: GC Badenhorst ES Burger JA Cassette TR Cohen⁵ AB Hoek MW Linington R Mouton B Williams

¹British ²Dutch ³Cape Town Managing Partner ⁴Business Development Director

Appeal Hearing
held at SAHRA's offices
Friday, 30 August 2013

Appeal by Jagerfontein Community Trust (JCT) against the decision of the South African Heritage Resources Agency (SAHRA) in respect of the issue of Permit 308 (Case 508) in terms of section 35(4) of the National Heritage Resources Act, No 25 of 1999, to allow Jagersfontein Developments (Pty) Ltd (JD) to fill the historical open pit mine at Jagersfontein.

1. This concerns an application (at first instance) under section 35(4). JD applied for a permit under this section that would allow it to fill a mine pit at Jagersfontein. The SAHRA APMHOB permit committee granted the permit subject to certain conditions and recommendations. Amongst those recommendations was that the social consultation process undertaken under NEMA or the MPRDA should take into consideration the heritage aspect of the pit. There was also an indication that SAHRA would comment further once applications under NEMA and/or the MPRDA were submitted.
2. The JCT lodged an appeal under section 49 of the NHRA against the grant of the permit.
3. JCT was represented by Abrahams and Gross Inc who instructed advocate Engers SC and JD by DLA Cliffe Dekker Hofmeyr, who was represented by Ms Sandra Gore.
4. At the hearing JD raised a point *in limine* as regards the locus standi of JCT (The Tribunal determined that the other two points styled *in limine* by JD were not properly so). At the request of the tribunal, JCT provided copies of documents relevant to the locus standi of JCT. In the circumstances the Tribunal is satisfied that JCT represents the interests of the Jagersfontein Community.
5. The point *in limine* is accordingly dismissed.
6. The issue before us for determination is whether the permit was properly granted under section 35. (What might or might not happen under section 38 or any other legislation is not before us).

7. The appellant argues that a decision under section 35 of the NHRA that might have a detrimental affect on others requires PAJA compliance. Amongst others, consultation with those affected is required. This tribunal, accordingly, must determine whether such consultation ought to have occurred before the decision at first instance was taken, considering that the JCT claims that the filling of the dump would be to its prejudice.
8. PAJA requires public consultation. It applies to all legislation (being derived from the Constitution) and therefore also to the NHRA. Therefore, the community ought to have been consulted. It is no answer to allege, as the respondent does, that other legislative terms which might be followed will require public consultation. When section 35, 'or any other section of the Act, requires public consultation, then that requirement must be followed. We take into consideration that *the site derives from a historical event that was crucial in the formation of the community and the town. It is part of the communal historical identity. The objections of the appellants indicate that there had not been sufficient public participation to inform SAHRA adequately.* If SAHRA is to make a decision, then that decision must be aligned with PAJA. For that reason, the decision is referred back to the committee to enable it to comply with PAJA.
9. In addition, the appellant argued that the Permit Committee failed to take into consideration litigation in the High Court in relation to the pit. The issue is, in our view, rather that a person who may be affected by a decision of the Permit Committee had, in terms of section 10(2)(c) of the NHRA a right to be present at any meeting of the Permit Committee so affecting it. In these circumstances, the decision of the relevant Permit Committee ought not to be taken without input from those affected by it. The idea is not to snatch a ride on interested parties because applications are brought without alerting interested parties as to their rights under both PAJA and the NHRA.
10. JD argued that section 38 of the NHRA provided sufficiently for a public participation process. Therefore, according to JD, public participation was not required in respect of section 35 applications. We find this argument unattractive. A decision under section 35 may, as contemplated by section 10(2), affect the rights and interests of parties. Where public consultation might lead to a result different to a decision taken without public consultation, the latter decision must be wrong and should, therefore, not have been taken. Apart from that, decisions under sections 35 and 38 do not necessarily involve identical considerations. Each decision must be made on its own merits. We are not

persuaded that any grounds exist as contemplated in PAJA to justify decision making that affects a community without consultation of that community.

11. Proper decision making accordingly requires that the decision under consideration be set aside and referred back to the Permit Committee for consideration following proper public consultation and allowing affected parties to be heard.

12. There is a further reason why the decision is to be referred back. SAHRA APMHOB Committee was not in possession of sufficient information to evaluate the significance of the site.

12.1. Although the Geological Society of South Africa had sent a letter indicating that the filling could go ahead, this view is seriously challenged by the email of Steven Haggerty. Professor Haggerty is an Economic Geologist employed as a Distinguished Research Professor in the United States. He has had any number of honours including having had a Kimberlite (Jagersfontein is, of course, a mined Kimberlite pipe) mineral named after him. He has been advisor to various governments and mining companies, including De Beers. The record also shows that the geologist on the Permit Committee, John Rogers, who is there because he understands heritage issues, also was concerned about filling the site. Besides, it is not the geology that will be permanently affected but the historical evidence of deep mining that is unequalled elsewhere. Proper evaluation of the heritage value and significance of the site remains unclear.

12.2. A further limitation relates to the fact that the heritage assessment used was in fact drawn up for an entirely different purpose than the one it serves here. A properly considered decision therefore requires further information. The detail of this information is for the decision of the Permit Committee. However, it is suggested that such information should be substantiated by a full Heritage Impact Assessment (HIA) undertaken by the appropriate specialist/specialists and directed at understanding the impacts of the infilling of the mine, including:

12.2.1. identification, mapping, and assessment of all heritage resources in the area affected;

- 12.2.2. full assessment of the historical, archaeological and geological significance of the site in terms of the heritage assessment criteria set out in section 3(2&3) or prescribed under section 7;
- 12.2.3. consideration of alternatives, as heritage resources will be adversely affected by the proposed development;
- 12.2.4. consideration of the social impact of filling the pit;

13. Accordingly, the following ruling is made:

- 13.1. The decision of the Permit Committee of SAHRA in respect of the issue of Permit 308 (Case 508) under section 35(4) is set aside and referred back to enable the Committee to comply with the requirement of public consultation and other requirements of section 10 of the NHRA and to enable the Committee to obtain information sufficient to enable it to come to a decision on the basis of all relevant facts.
- 13.2. The prayer for costs is dismissed.



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Date 21 January 2014

Dear Ms Halley

WITHDRAWAL OF APPLICATION IN TERMS OF SECTION 35 OF THE NATIONAL HERITAGE RESOURCES ACT NO. 25 OF 1999

Jagersfontein Developments (Pty) Ltd has instructed us that it wishes to withdraw its application for a section 35 permit under the National Heritage Resources Act No. 25 of 1999 (the "NHRA"). Public participation will therefore not be required under section 35 of the NHRA.

Yours sincerely

SANDRA GORE
CLIFFE DEKKER HOFMEYR INC

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'D'



JAGERSFONTEIN
DEVELOPMENTS

**PUBLIC CONSULTATION FOR SAHRA AND WULA
APPLICATIONS TO BACKFILL THE JAGERSFONTEIN PIT**

For Jagersfontein Developments (JD) to continuing operating, JD is applying to the South African Heritage Resource Agency ("SAHRA") for permission to backfill the historically mined Jagersfontein Pit.

To provide stakeholders with information about the proposed backfilling project, its potential environmental, heritage, and socio-economic impacts, JD is hosting a public consultation meeting.

The public consultation meeting will be held on Thursday, 2nd December 2021, at 2pm, at the **Middelbare School Hall** in Jagersfontein.

Your attendance at this public consultation meeting is appreciated.

