



**MINISTER
ENVIRONMENTAL AFFAIRS
REPUBLIC OF SOUTH AFRICA**

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Dear Mr van Deventer

APPEALS AGAINST THE DECISION TO GRANT AN ENVIRONMENTAL AUTHORISATION IN RESPECT OF A PROSPECTING RIGHT APPLICATION TO PROSPECT FOR DIAMONDS (ALLUVIAL, GENERAL AND IN KIMBERLITE), COPPER, GOLD, ZINC, NICKEL, SILVER MOLYBDENUM ORE AND PLATINUM GROUP METALS ON PORTION 3 (OF A PORTION OF PORTION 1 OF THE FARM STOMP OOR A) OF THE FARM STOMP OOR 109, WITHIN THE MAGISTERIAL DISTRICT OF PRIESKA, IN NORTHERN CAPE PROVINCE

The Minister of Environmental Affairs, Ms N P Mokonyane, MP, has considered the appeal lodged against the decision by the Department of Mineral Resources to grant the Environmental Authorisation (EA) to yourselves, for the proposed prospecting right.

After evaluating the appeal, the Minister has reached a decision in respect thereof, a copy of which is attached hereto.

MINISTRY OF ENVIRONMENTAL AFFAIRS

DATE: 02-05-2019



**MINISTER
ENVIRONMENTAL AFFAIRS
REPUBLIC OF SOUTH AFRICA**

Reference: LSA 180046

APPEAL DECISION

APPEALS AGAINST THE DECISION TO GRANT AN ENVIRONMENTAL AUTHORISATION IN RESPECT OF A PROSPECTING RIGHT APPLICATION TO PROSPECT FOR DIAMONDS (ALLUVIAL, GENERAL AND IN KIMBERLITE), COPPER, GOLD, ZINC, NICKEL, SILVER MOLYBDENUM ORE AND PLATINUM GROUP METALS ON PORTION 3 (OF A PORTION OF PORTION 1 OF THE FARM STOMP OOR A) OF THE FARM STOMP OOR 109, WITHIN THE MAGISTERIAL DISTRICT OF PRIESKA, IN NORTHERN CAPE PROVINCE

1. INTRODUCTION

- 1.1 In terms of Chapter 4 of the Environmental Impact Assessment Regulations, 2014, published under Government Notice R982 in Government Gazette 38282 of 4 December 2014 (2014 EIA Regulations), regarding activities identified under section 24 of the National Environmental Management Act, 1998 (Act No. 107 of 1998) (NEMA), the Regional Manager: Mineral Regulation of the Department of Mineral Resources, Northern Cape Regional Office (DMR) granted an Environmental Authorisation (EA) to Alidabix (Pty) Ltd (applicant) on 20 November 2018, in respect of a prospecting right application to prospect for diamonds (alluvial, general and in kimberlite), copper, gold, zinc, nickel, silver

molybdenum ore and platinum group metals on portion 3 (of a portion of portion 1 of the farm Stomp Oor A) of the farm Stomp Oor 109, within the Magisterial District of Prieska, in the Northern Cape Province.

2. BACKGROUND AND APPEAL

- 2.1 On 26 January 2018, the applicant lodged an application for EA with the DMR in respect of a prospecting right application for diamonds (alluvial, general and in kimberlite), copper, gold, zinc, nickel, silver molybdenum ore and platinum group metals on the abovementioned property.
- 2.2 The applicant commissioned M & S Consulting (Pty) Ltd as an independent Environmental Assessment Practitioner (EAP) to undertake the environmental impact assessment (EIA) process for the abovementioned project. The applicant thereafter submitted a Basic Assessment Report (BAR) and Environmental Management Programme (EMPr) to the DMR on 7 July 2018.
- 2.3 The DMR was accordingly satisfied that the applicant complied with the minimum requirements of Regulation 19 of the 2014 EIA Regulations and that the BAR adequately assessed the impacts associated with the proposed activities. As a result thereof, the DMR granted an EA to the applicant on 20 November 2018 in respect of the aforementioned proposed activities.
- 2.4 On 20 December 2018, the Directorate: Appeals and Legal Review within the Department of Environmental Affairs (Appeals Directorate) received the first appeal from the South African Heritage Resources Agency (SAHRA) (the first appellant) against the DMR's decision to grant the aforementioned EA. The appeal was timeously lodged in terms of section 43(1) of NEMA, read with Regulations 4 of the National Appeal Regulations, 2014.
- 2.5 On 18 January 2019, the Appeals Directorate received the second appeal from Lange Carr & Wessels Attorneys on behalf of the Flip van der Westhuizen Trust (the second

appellant). This appeal was accompanied by a request for condonation for the late submission thereof, which was subsequently granted on 27 March 2019.

2.6 The grounds of appeals were provided to the applicant, who submitted responding statements thereto on 25 January 2019 and 7 February 2019 respectively.

2.7 Comments on the grounds of appeals were thereafter received from the DMR on 20 February 2019 and 11 March 2019 respectively.

3. DECISION

3.1 In reaching my decision on the appeals against the aforesaid decision of the DMR, I have taken the following into consideration:

3.1.1 Information contained in the project file (NC 30/5/1/1/3/2/1/12131 EM);

3.1.2 The appeal submitted by the first appellant on 20 December 2018;

3.1.3 The appeal submitted by the second appellant on 18 January 2019;

3.1.4 Responding statements submitted by the applicant on 25 January 2019 and 7 February 2019; and

3.1.5 Comments submitted by the DMR on 20 February 2019 and 11 March 2019.

3.2 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 of the DMR, or to make any other appropriate decision.

3.3 Having considered the above information, and in terms of section 43 (6) of NEMA, I have decided to uphold the appeal by the first appellant, and to set aside the decision of the DMR to grant the aforementioned EA to the applicant. The matter is remitted back to the DMR for further consultation and reconsideration. The appeal by the second appellant is however dismissed.

3.4 In arriving at my decision on the appeals, it should be noted that I have not responded to each and every statement set out in the grounds of appeals and/or responding statements thereto, and where a particular statement is not directly addressed, the absence of any response should not be interpreted to mean that I agree with or abide by the statement made.

3.5 Furthermore, should any party be dissatisfied with any aspect of my decision, it 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).

4 THE REASONS FOR MY DECISION ARE AS FOLLOWS:

4.1 The first appellant submits that on 27 September 2018, the applicant created an application on its system for the proposed EA application with documents including the BAR and associated appendices such as a desktop Heritage Impact Assessment (HIA). The appellant submits that on 25 October 2018, it submitted its interim comment to the applicant requesting that a desktop Palaeontological Impact Assessment (PIA) be conducted as part of the BAR and EA application. The appellant states that a PIA was then submitted via its system on 21 November 2018. The appellant submits that, whilst it was still in the process of reviewing a PIA, the EAP uploaded a letter on 28 November 2018 notifying the appellant that the EA was granted. It is therefore the appellant's submission that the EA was granted without the final comment from SAHRA as per section 38(8) of the National Heritage Resources Act, 1999 (Act No. 25 of 1999) (NHRA), which states: *"The provisions of this section do not apply to a development as described in subsection (1) if an evaluation of the impact of such development on heritage resources is required in terms of the Environment Conservation Act, 1989 (Act No. 73 of 1989), or the integrated environmental management guidelines issued by the Department of Environment Affairs and Tourism, or the Minerals Act, 1991 (Act No. 50 of 1991), or any other legislation: Provided that the consenting authority must ensure that the evaluation fulfils the requirements of the relevant heritage resources authority in terms of subsection (3), and*

any comments and recommendations of the relevant heritage resources authority with regard to such development have been taken into account prior to the granting of the consent".

4.2 Further, the first appellant submits that that the EA was granted without crucial heritage specific conditions for the protection and management of heritage resources as per section 38(4) of the NHRA, which provides that *"The report must be considered timeously by the responsible heritage resources authority which must, after consultation with the person proposing the development, decide —*

- (a) whether or not the development may proceed;*
- (b) any limitations or conditions to be applied to the development;*
- (c) what general protections in terms of this Act apply, and what formal protections may be applied, to such heritage resources;*
- (d) whether compensatory action is required in respect of any heritage resources damaged or destroyed as a result of the development; and*
- (e) whether the appointment of specialists is required as a condition of approval of the proposal".*

4.3 The second appellant submits that the description of the subject property is incorrect. The appellant further submits that the applicant is compelled to apply for water use license in terms of National Water Act, 1998 (Act No. 36 of 1998) (NWA).

4.4 In response to the grounds of appeal by the first appellant, the applicant proposes the following amendments on the EMPr for the protection of heritage resources:

- the inclusion of Chance Fossil Finds Procedure for the non-invasive phases of the prospecting programme as outlined in the Paleontological Impact Assessment (PIA) report; and
- the appointment of a professional palaeontologist and a qualified heritage practitioner before the commencement of the invasive phases of the prospecting programme and report on recommendations for any mitigation or monitoring measures to be followed during siting, drilling and rehabilitation of the boreholes

as well as for conservation of sedimentary borehole core material for future paleontological analysis.

- 4.5 In response to the grounds of appeal by the second appellant, the applicant submits that the property description in paragraph C of the EA was clearly a human typing error, which does not constitute a ground of appeal. The applicant submits that the error may be corrected in terms of section 47A(1)(b) (i) and (ii) of NEMA which states that *"A regulation or notice, or an authorisation, permit or other document, made or issued in terms of this Act or a specific environmental management Act may be amended or replaced without following a procedural requirement of the relevant Act if the purpose is to correct an error; and the correction does not change the rights and duties of any person materially"*.
- 4.6 With regards to the water use license, the applicant submits that it is not required to apply for a water use license for its intended prospecting activities since it will not be engaging in a water use activity in terms of section 21 of NWA.
- 4.7 In evaluating the grounds of appeal by the first appellant and the response thereto by the applicant, I take note of the comments submitted by the DMR in respect of the first appellant's grounds of appeal. The DMR submits that the decision in respect of the EA was based on the desktop HIA report submitted by the applicant. The DMR submits that condition 3.17 of the EA is deemed sufficient to address the concerns from SAHRA. This condition states that *"Should any heritage remains be exposed during operation or any actions on the site, these must immediately be reported to the South African Heritage Resource Agency (SAHRA) and or Northern Cape Heritage Resource Agency (NCHRA) (in accordance with the applicable legislation). Heritage remains uncovered or disturbed during earthworks must not be further disturbed until the necessary approval has been obtained from the South African Heritage Resource Agency (SAHRA) and or Northern Cape Heritage Resource Agency (NCHRA). Heritage remains include: archaeological remains (including fossil bones and fossil shells); coins; middens, indigenous and/or colonial ceramics; any articles of value or antiquity; marine shell heaps; stone artifacts and bone remains; structures and other built features; rock art and rock engravings; shipwrecks; and graves or unmarked human burials. A*

qualified archaeologist must be contracted where necessary (at the expense of the applicant and in consultation with the relevant authority) to remove any human remains in accordance with the requirements of the relevant authority".

- 4.8 Further, the DMR submits that the applicant submitted a PIA report two days after the EA was issued, thereby addressing SAHRA's concerns. According to the DMR, the applicant has also complied with Regulation 7(2) of the 2014 EIA Regulations.
- 4.9 The information before me indicates that the EA was granted on 20 November 2018 whereas the PIA report completed and uploaded to SAHRIS on 21 November 2018. It thereafter follows that the DMR granted the aforementioned EA without the PIA report as recommended by the first appellant. I must stress that this is not disputed by either the applicant or the DMR. In this regard, I am of the view that the decision of the DMR to grant the aforementioned EA without a PIA report and the final comments thereto by the first appellant constitutes a fatal flaw and/or gross irregularity. On this ground, the aforesaid decision of the DMR ought to be set aside.
- 4.10 I must further stress that the heritage impacts of the proposed project are a relevant consideration in the application for EA. In this regard, I note that section 24 (1) of NEMA requires that the environmental impacts of a listed activity must be considered, investigated, assessed and reported to the competent authority before making a decision on an EA. In addition, I note that section 24O (1) of NEMA obliges competent authorities to take into account all relevant factors before making a decision on the application for EA. EA. I note, furthermore, that these requirements are peremptory.
- 4.11 It is against this background that I have decided to uphold the appeal by the first appellant and to set aside the decision of the DMR to grant the aforementioned EA to the applicant. The matter is remitted back to the DMR for further consultation and reconsideration.
- 4.12 The applicant is afforded an opportunity to incorporate the HIA and PIA reports into the BAR. Due to significant changes or new information added to the BAR, the revised report must be subjected to a public participation of at least 30 days as required by Regulation 19 (1) (b) of the 2014 EIA Regulations. This will afford all registered interested & affected

parties (I&APs), including the first appellant, with an opportunity to review the revised reports and comment accordingly.

- 4.13 Any comments received from I&APs as well as responses thereto by the applicant must be incorporated into the final BAR for submission to the DMR for reconsideration of the application for EA. In this regard, the timeframes prescribed by the 2014 EIA Regulations in respect of PPP and decision making must be adhere to.
- 4.14 In evaluating the second appellant's grounds of appeal and the response thereto by the applicant, I have noted that Section C of the EA contains a wrong description of the subject property. However, I am of the view that this is a typographical error on the part of the DMR which does not detract from the overall reasons for granting the aforementioned EA. I must add that this ground of appeal is rendered moot since the EA has been set aside.
- 4.15 Regarding the appellant's concern in relation to water use licence, I take note of the applicant's submission that it is not required to apply for a water use license for its intended prospecting activities since it will not be engaging in a water use activity in terms of section 21 of NWA. In this regard, I must stress that whether a water use licence would be required or not will be determined by the Department of Water and Sanitation in terms of NWA. In light thereof, this issue falls outside the mandate of the DMR and therefore not part of the decision to grant the aforementioned EA.
- 4.16 In light thereof, the appeal by the second appellant is accordingly dismissed.



MS N P MOKONYANE, MP

MINISTER OF ENVIRONMENTAL AFFAIRS

DATE: 30.04.19.