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 hertitage 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.