VJJ

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 1891/2013

In the matter between:-

REALEBOGA BOSALETSE N.O.	First Applicant
LUCY AMMON N.O.	Second Applicant
PUMZILE F. NGXITO N.O.	Third Applicant
MASEHLEPHO E. MOHAJANE N.O.	Fourth Applicant
TSIETSIE JOSEPH TAU N.O.	Fifth Applicant
DITABA L. SEBONYANE N.O.	Sixth Applicant
AADIL MATHER N.O.	Seventh Applicant
PATRICK A. MABILO N.O.	Eighth Applicant
ESIAS JEREMIA GERBER N.O	Ninth Applicant
YUSUF KERBELKER N.O.	Tenth Applicant
FLOYD TEU N.O.	Eleventh Applicant
WHEATFIELDS INVESTMENTS NO. 168 (PTY) LTD	Twelfth Applicant

and

THE MINISTER OF MINERAL RESOURCES	First Respondent
DIRECTOR-GENERAL, DEPARTMENT OF MINERAL RESOURCES	Second Respondent
ACTING REGIONAL MANAGER MINERAL RESOURCES, FREE STATE REGION	Third Respondent
DE BEERS CONSOLIDATED MINES LTD	Fourth Respondent
PONAHALO HOLDINGS (PTY) LTD	Fifth Respondent
REINET FUND SCA FIS	Sixth Respondent
JAGERSFONTEIN DEVELOPMENTS (PTY) LTD	Seventh Respondent
MARIUS DE VILLIERS N.O.	Eighth Respondent

HENK JOHAN VAN ZUYDAM N.O.	Ninth Respondent
SIPHO PUWANI N.O.	Tenth Respondent
GONTHUSANG EUGINE GOLIATH N.O.	Eleventh Respondent
EZEKIEL ZAKHELE DUNJANE N.O.	Twelfth Respondent
KOPANONG LOCAL MUNICIPALITY	Thirteenth Respondent

HEARD ON: 6 AUGUST 2013

DELIVERED ON: 26 SEPTEMBER 2013

JUDGMENT

MOCUMIE, J

[1] This is a review application which relates to prospecting rights of the tailings dumps on subdivision 16 of the farm Jagersfontein 14 ("subdivision 16"), district of Fauresmith, Free State.

[2] In the Notice of Motion the applicants sought, on an urgent basis, the following relief:

> "PART A, INTERIM RELIEF
>
> Only in the event of the relief sought in respect in Part B to D hereof not being determined during the hearing of the set down for 06 August 2013, the applicants intend to apply for interim order in the following:
>
> 2. That the fourth, sixth and seventh respondents (or any one of them separately, or in any combination, or through any

entity or person acting under them be interdicted and restrained, pending the final determination of the final relief herein in part B,C,D, from

2.1 conducting any mining operations, prospecting operations and/or any related activities without due authorisation under the Mineral and Petroleum Resources Development Act 28 of 2002 ("the MPRDA") and the provisions of \national Heritage Resources Act 25 of 1999 ("the NHRA"), the National Water Act 36 of 1998 ("the NWA"), the National Environment Management Act 107 of 1998 ("the NEMA") and/or the Townships Ordinance 9 of 1969 ("the Zoning Ordinance"); on the land as

2.1.1 Subdivision 16 of the Remainder of the Farm Jagersfontein 14 in the district of Fauresmith ("Subdivision 16")

2.1.2 the Remainder of the Farm Jagersfontein 14 in the district of Fauresmith ("the Remainder")

2.1.3 Subdivision 1 of the Remainder of the Farm Jagersfontein 14 in the district of Fauresmith ("Subdivision 1"); and

2.1.4 Subdivision 15 of the Remainder of the Farm Jagersfontein 14 in the district of Fauresmith ("Subdivision 15")

in respect of diamonds occurring in or on the land, being such portions as described above (hereinafter also referred to as "the Jagersfontein mine") and the mine dumps located on such land, ("the Jagersfontein dumps");

3. That the first respondent (with second and third respondents) be interdicted and restrained, pending the determination of the final relief herein in Part B to D:

3.1 from issuing any written authority under the MPRDA to the fourth, sixth and/or seventh respondents;

3.2 from issuing any written consent under section 11(1) of the MPRDA to the fourth respondents, the sixth and /or seventh respondents (or to seventh respondents), in respect of any existing prospecting rights or hold or purport to hold;

3.2.1 that will result in the transfer, cession, letting, subletting, alienation, encumbrance by mortgage or variation of a prospecting right or mining right or an interest in such right, or a controlling interest in a company or close corporation, or other entity, held by the fourth respondent;

3.3 in relation to the land, constituted by the Jagersfontein mine and the Jagersfontein;

4. That the fourth, sixth and seventh respondents (or any person acting under them) be interdicted and restrained, pending the final determination of the relief herein in Part B, C, and D, from conducting an mining operations or any occurring on or found on land constituted by the Jagersfontein mine and the Jagersfontein dumps, without due authorisation under the MPRDA;

5. That the fourth, sixth and seventh respondents (or person acting under the) be interdicted and restrained, pending the final determination of the relief herein in Part B, C and D, from conducting any mining operations or any prospecting operation and/or from removing and disposing of diamonds occurring on or found on land constituted by the Jagersfontein mine and the Jagersfontein dumps, without due authorisation

5.1 under the NHRA, the NWA, the NEMA and the Zoning Ordinance;

and

5.2 that all mining operations, prospecting operations and/or any related regulated or listed activities under MPRA in respect of land constituted by Subdivisions 1, 15 and/or 16, shall forthwith cease;

6. That such alternative and/or further relief be granted as Honourable Court in the circumstances may deem fit;

7. An order that the costs of the application for interim relief, including the costs of two counsel, be borne jointly and severally by the respondents that oppose the relief sought in this part.

PART B: REVIEW AND RELATED RELIEF

8. An order reviewing and sitting aside

8.1 the first respondent's decision to grant the fourth respondent a converted prospecting right for five years with effect from 13 January 2011;

8.2 the notarial execution of converted prospecting right (with reference FS 30/5/1/1/2/391 PR) between the first respondent and the fourth respondent on 13 January 2011 in relation to Subdivision 1, Subdivision 16 and the Reminder, excluding the mine dumps (or "tailings dumps", as set out in annexure "SG7");

8.3 the registration , if any, of such right in the Mineral and Petroleum Titles Registration Office pursuant to the notarial execution of the converted prospecting right;

9. An order reviewing and setting aside any decisions, proceeding, permission granted or steps, if any, that may have been taken by the first, second and third respondent (read with section 103 (1)), as the case may be,

9.1 regarding an application, if any, by fourth respondent under section 11(1) for the written consent of first respondent under the MPRDA; in relation to land constituted by the Jagersfontein mine or Jagersfontein dumps;

9.2 including, but not limited to grant if first respondent's written permission to the fourth, sixth and/or seventh respondents (or to any other entity or person acting under them or related to them) in terms of section 11(1) of the MPRDA;

9.3 in relation to land constituted by Jagersfontein mine or the Jagersfontein dumps.

JAGERSFONTEIN COMMUNITY TRUST'S PROSPECTING RIGHT

10. Reviewing the first to third respondents' administrative action in failing to process, determine and grant the first to eleventh applicants' ("the Jagersfontein Community Trust") application for prospecting rights accepted on and dated 13 September 2009, under reference number FS 30/5/1/1/2/866PR (in respect of mine dumps 1,2,3,4,5,9,11,12 and 13 and diamonds in general and in kimberlite);

11. Declaring that the Jagersfontein Community Trust's application for a prospecting right dated 13 September 2009, under reference number FS 30/5/1/1/2/866PR be granted;

12. Directing the first respondent:

12.1 to reflect the grant of the said prospecting right as having been granted in accordance with the provision of section 17 of MPRDA; and

12.2 to administer the prospecting right of the Jagersfontein Community Trust so granted under the MPRDA;

RE WHEATFIELD'S PROSPECTING RIGHT

13. Alternative to paragraphs 8 to 10 above,
an order reviewing and setting aside the third respondent's ("Wheatfields") application for prospecting right dated 27 July 2009 under reference number FS 30/5/1/4/838PR (*inter alia* in respect of mine dumps 1,2,3,4,5,9,11,12 and 13 and diamonds in general and kimberlite); and

13.1 Declaring that the Wheatfields' application for prospecting rights dated 27 July 2009 under reference number FS 30/5/1/1/838PR granted:

13.2 Directing the first respondent to

13.2.1 reflecting the grant to Wheatfields Investment as having been granted in accordance with provision of section 17 of MPRDA; and

13.2.2 administer the prospecting right under the MPRDA;

14. Alternative to paragraph 11, read with paragraphs 8 to 10 above, an order reviewing and setting aside the first to third respondents' refusal, delivered on 09 January 2013 to accept the Wheatfields' application for a prospecting right under reference number FS 30/5/1/1/2/1014PR; and

14.1 Declaring that the Wheatfields' application for prospecting rights dated 27 July 2009 under reference number FS 30/5/1/1/2/1014PR be duly accepted, processed and/or granted; and

14.2 Directing the first respondent to

14.2.1 reflecting the granted to Wheatfields Investment as having been granted in accordance with the provision of section 17 of the MPRDA; and

14.2.2 administer the prospecting right under MPRDA.

GENERAL

15. Declaring and confirming that first respondent, in respect of the prospecting right granted to the Jagersfontein Community Trust (alternatively, to Wheatfields, is bound to:
    15.1 consider facilitating assistance to the Jagersfontein Community trust as a historically disadvantaged person conducting prospecting operations;
    15.2 take into account all relevant factors under section12 (3) (a) to (d) of MPRDA should the first respondent make any discretionary determination in section 12(1) to facilitate assistance to the Jagersfontein Community Trust; and
    15.3 to serve the purpose and achieve any object of the MPRDA including those referred to in section 2 (c), (d) and (e), should any determination in section 12(1), read with section 12(4) be made; and

16. Declaring and confirming that MPRDA applies to the Jagersfontein mine and the Jagersfontein dumps in respect of minerals, including diamonds, occurring on such land or in the mine dumps;

17. Declaring and confirming that prospecting and mining may not be undertaken by the fourth respondent and/or seventh respondent on Jagersfontein mine and the Jagersfontein dumps (including Subdivision 16, or any other land), unless and until authorisation under the law therefore has been granted and the mining operations, prospecting operations or any related or listed activities, and that they comply with the NHRA, the NWA, the NEMA and the Zoning Ordinance and any other relevant law intended in the MPRDA;

18. That the fourth, sixth and seventh respondents (or any one of them separately, or in any combination, or through or any entity or person acting under them) be

    18.1 interdicted and restrained and directed to cease all mining operations, prospecting operations or any related activities in respect of diamonds, on or in relation to mine dumps situated on Subdivision 16;

    18.2 interdicted and restrained from interfering with or obstructing the Jagersfontein Community Trust or any one acting under them from exercising any activity related to the prospecting right granted to the Jagersfontein Community trust any manner; and

    18.3 interdicted and directed to vacate Jagersfontein mine and the Jagersfontein dumps; and

    18.4 further, subject to any orders issued under paragraphs 21 and 21.2 and 21.2 below, interdicted and directed to remove all mining and prospecting installations, structures and/or equipment that they have installed at, placed or positioned at the Jagersfontein mine and the Jagersfontein dumps, within a period of 90 days of this order;

19. An order exempting the applicant from failing to exhaust any available internal remedies, if it is found that Wheatfields did not so exhaust all internal remedies, as envisaged in section 7(2) of the Promotion of Administrative Justice Act 3of 2000 ("PAJA") prior to the launching of these proceedings;

20. An order condoning the applicants' non-compliance with the requirements and time period in section 7(1) of PAJA for the institution of review proceedings in respect of the relief sought herein above, where such periods may find application in relation to the proceedings herein

PART C: FORFEITURE AND COMPENSATION

21. An order directing that fourth respondent, sixth respondent (and all those acting under them or related to them), as the case may be, forfeit in favour of the State (represented by the first respondent)

    21.1 the proceeds and returns a of any unauthorised and illegal prospecting, mining and/or sale of diamonds that they may have achieved pursuant to their prospecting or mining at the Jagersfontein mine and the Jagersfontein dumps from about 2010 to present date, and

    21.2 the plant, infrastructure and equipment installed, located or used by the fourth respondent, sixth respondent and/or seventh respondent in respect of the prospecting and mining at Jagersfontein mine and Jagersfontein dumps; and/or

    21.3 That such alternative and/or further relief be granted as the Honourable Court in the circumstance may deem fit.

22. An order in terms of the provisions of section 8(1)(c)(ii)(bb) of PAJA that the fourth respondent, sixth respondent and /or seventh respondent (and/or such respondent in any combination including parties under their control or associated with them) be directed, jointly and severally, to pay compensation to the Jagersfontein Community Trust, alternatively to Wheatfields, in an amount equal to the value of diamonds mined by them;

23. Alternatively, further and in any event,

    23.1 that such amount of compensation be determined as the Honourable Court in the circumstances deems fit;

23.2 an order that fourth respondent, sixth respondent and/or seventh respondent provide full disclosure of all results obtained in respect of mining operations, prospecting operations and/or any related activities including the removal and disposal of diamonds of trading, in any manner, from 13 September 2009, under reference number FS 30/5/1/1/2/866PR to the date of this order;

23.2.1 with reference to section 30 of the MPRDA, read with section 21 and 28;

23.2.2 with sufficient detail to establish the value of all diamonds mined, removed and/or disposed of during period as the Court may determine, by the said respondent;

23.2.3 with sufficient detail to enable a calculation of the benefits(s) derived or gross value of diamonds derived by said respondents from the removal and disposal of diamonds through their mining operations or prospecting operations on the land constituted by Subdivision 16 and/or Subdivision 1 and/or Subdivision 15;

23.3 That such alternative and/or further relief be granted as the Honourable Court in the circumstances may deem fit.

PART D GENERAL

24. That such alternative and/or further relief be granted as the Honourable Court in the circumstance may deem fit.

25. An order that the costs of this application, including the costs of two counsel, be borne jointly and severally by the respondents that oppose the relief sought in these proceedings."

[3] The Department filed a Notice to Abide together with an affidavit entitled: **Written Reasons**. The 4th to the 13th respondents oppose the application.

[4] Mr Ellis on behalf of the applicants in his closing argument narrowed down the interim relief sought comprehensively in a proposed draft order which reads as follows:

> "1. Pending the finalisation of parts B-D of the Notice of Motion:
>
> (a) The fourth and seventh to twelfth respondents are interdicted from winning, removing selling or otherwise disposing of any diamonds derived from any tailing dumps on subdivision16 of the farm Jagersfontein no 14, in the district of Fouriesburg "the property".
>
> (b) The first to third respondents are interdicted from issuing any further consent in terms of section 11 of the MPRDA for the transfer, session, letting, subletting, alienation, encumbrance or variation of any prospecting or mining right in respect of the tailing dumps on the property."

A. DESCRIPTION OF THE PARTIES

[5] The first applicant **REAOLEBOGA BOSALETSE N.O;** the second applicant **LUCY AMMON N.O.**, the third applicant **PUMZILE F. NGXITO N.O.**, the fourth applicant **MASEHLEPHO E. MOHAJANE N.O.**, the fifth applicant **TSIETSIE JOSEPH TAU N.O.**, the sixth applicant **DITABA L. SEBONYANE N.O.**, the seventh applicant **AADIL MATHER N.O.**, and the eighth applicant **PATRICK A. MABILO N.O.**, are all residents of Itumeleng township,

Jagersfontein, acting as a duly appointed trustees of the Jagersfontein Community Trust.

The ninth applicant, **ESIAS JEREMIA GERBER N.O** is a businessman and resident of Kimberley, acting as a duly appointed trustee of the Jagersfontein Community Trust. He is a director and shareholder of Wheatfields. He was authorised to depose to the affidavits and institute this application on behalf of Wheatfields and the Jagersfontein Community Trust. The resolutions are appended to the papers as "**SG5**" and "**SG6**".

The eleventh applicant is **FLOYD TEU N.O.**, a resident of Kimberley, acting as a duly appointed trustee of the Jagersfontein Community Trust.
The tenth applicant is **YUSUF KERBELKER N.O.**, a businessman and resident of Cape Town, acting as a duly appointed trustee of the Jagersfontein Community Trust.

The twelfth applicant is **WHEATFIELDS INVESTMENTS NO. 168 (PTY) LTD** ("Wheatfields"), a private company with limited liability duly incorporated in accordance with the company laws of the Republic of South Africa, with its principal place of business in Kimberley.

The first to eleventh applicants will collectively be referred to as "the Jagersfontein Community Trust", and Wheatfields and Esias Jeremia Gerber, referred to collectively as "Wheatfields".

The first respondent is the **MINISTER OF MINERAL RESOURCES** in her official capacity as the responsible Minister for the purposes of the Minerals Petroleum Resources Development Act ("the MPRDA"), with her main office in Sunnyside, Pretoria.

The second respondent is the **DIRECTOR-GENERAL, DEPARTMENT OF MINERAL RESOURCES** in his official capacity and based in the Minister's Office.

The third respondent is the **ACTING REGIONAL MANAGER MINERAL RESOURCES; FREE STATE REGION** (or "Regional Manager") of the Department of Mineral Resources in her official capacity as contemplated by the MPRDA, with offices in Welkom, Free State.

The first to third respondents will collectively be referred to as ("the Department".),

The fourth respondent is **DE BEERS CONSOLIDATED MINES LTD** ("De Beers"), a public company duly incorporated in accordance with the company laws of the Republic of South Africa, with its principal place of business in Johannesburg.

The fifth respondent is **PONAHALO HOLDINGS (PTY) LTD** ("Ponahalo"), registration number 2005/0.30841/07, a private company with limited liability, duly incorporated in

accordance with the company laws of the Republic of South Africa, with its office in Kimberley.

The sixth respondent is **REINET FUND SCA FIS** ("Reinet Fund"), a private company incorporated in accordance with the laws of the Grand Duchy of Luxembourg, care of Cliffe Dekker Hofmeyr Attorneys, Sandton, Johannesburg.

The seventh respondent is **JAGERSFONTEIN DEVELOPMENTS (PTY) LTD**, ("JFD") a private company with limited liability, duly incorporated in accordance with the company laws of the Republic of South Africa, care of Cliffe Dekker Hofmeyr Attorneys, Sandton, Johannesburg.

The eighth respondent **MARIUS DE VILLIERS N.O.,** the ninth respondent **HENK JOHAN VAN ZUYDAM N.O.**, the tenth respondent **SIPHO PUWANI N.O.**, the eleventh respondent **GONTHUSANG EUGINE GOLIATH N.O.**, the twelfth respondent **EZEKIEL ZAKHELE DUNJANE N.O.**, are all cited in their capacities as trustees of the Itumeleng Trust, care of Cliffe Dekker Hofmeyr Attorneys, 1 Protea Place, Sandton, Johannesburg.

A copy of the letters of trusteeship in respect of the trustees, with the original amended trust deed of the Itumeleng Trust is annexed hereto in a bundle as annexure "**SG11**".

The thirteenth respondent is the **KOPANONG LOCAL MUNICIPALITY** located in the Xhariep district in the

southern Free State Province where Jagersfontein, Itumeleng and Charlesville are located, with its administrative head office in Trompsburg and with offices at Jagersfontein, represented by its Municipal Manager, cited below.

The thirteenth respondent is cited as a landowner that has an interest in the relief sought and for purposes of notice as the responsible local authority.

No relief is sought against the thirteenth respondent, save in the event of the application being opposed on its behalf.

The fourteenth respondent is the **MUNICIPAL MANAGER, KOPANONG LOCAL MUNICIPALITY** care of thirteenth respondent, Trompsburg, Free State, and is cited for purposes of notice on behalf of the responsible local authority.

No relief is sought against the fourteenth respondent, save in the event of the application being opposed by the respondent.

[5] It was common cause that

5.1 in 2009 Jagersfontein Community Trust and Wheatfields applied for prospecting rights on the tailings dumps on sub division 16, Jagersfontein farm 14. These were accepted by the Department;

5.2 De Beers was the purported owner of Jagersfontein farm and the assets on it which were in turn sold to

Jagersfontein Developments Pty (Ltd) ("JD Company") on 13 September 2010;

5.3 late 2011 to early 2012 JD Company started to extract diamonds on the tailing dumps on subdivision 16, Jagersfontein farm;

5.4 on 27 January 2012,the Department per letter, **SG27** had informed Wheatfields that its application in respect of the tailings dumps situated on portion 16 of the farm Jagersfontein farm was refused in terms of section 17(3) for failure to meet the requirements of sections 17(1)(a) and (b) of the MPRDA.

[6] The main issue between the parties to be determined was whether the applicants were entitled to the relief they sought as set out in the Notice of Motion, be it for the interim or final relief. Apart from this main issue there were the ancillary issues which actually formed the basis of this case. It will be convenient to outline those issues at this introductory stage and then return to a discussion of the main issue once these have been dealt with. The first ancillary issue was whether the two decisions of this Court, **De Beers Consolidated Mines Limited v Ataqua Mining (Pty) Ltd & Others** [2009] JOL 24502 (O) ("the 1st Ataqua") and **The Regional Manager Mineral Regulation Free State Region & Others** Case No 1590/2007 (O) ("the 2nd Ataqua decision"), were 'in law unsustainable and must not be followed' as the applicants

submitted and could be overruled by this Court sitting as three Judges. The second ancillary issue was whether the subsequent decisions of the Supreme Court of Appeal and Constitutional Court with reference to the applicability of the MPRDA and mining rights overruled the two Ataqua decisions.

[7] In the event that this Court found that it could not overrule the two Ataqua decisions on the basis as submitted by the applicants, that is the end of the applicants' case. Their application must be dismissed on that basis alone. If this Court found to the contrary, then the applicants can proceed to the next step i.e. of setting aside and reviewing the decisions of the Department in respect of both applications.

The issue of the third decision (setting aside and reviewing the s11 consent the Department granted to De Beers) was dead in the water from the onset because Wheatfields had already lodged an appeal against that decision in terms of the internal appeal processes of the MPRDA as provided for in s 96 as at the time that this application got underway on 6 August 2013. No reference will be made to same henceforth.

[8] The applicants submitted that during July and September 2009, the Jagersfontein Community Trust and Wheatfields separately, submitted two applications for prospecting rights on the tailings dumps on subdivision 16. The Department accepted the Jagersfontein Community Trust application on

13 September 2009 and the Wheatfields application on 27 July 2009. Whilst they were waiting for the Department to process and finalise these applications, the Department converted De Beers' old order prospecting rights over subdivision 16 excluding the tailing dumps and consented to the sale and cession of the rights to JD Company in terms of section 11 of the MPRDA. The Department failed to give them an opportunity to make representations as interested parties as required under section 3(2) and (3) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") prior to taking decisions with regard to De Beers that may impact on the Jagersfontein Community Trust and Wheatfields' application for prospecting rights. Over and above, Jagersfontein Community Trust and Wheatfields, representing previously disadvantaged persons, should have been given first preference in line with the purpose of the MPRDA.

[9] The applicants submitted further that the 1st Ataqua decision which decided that De Beers was the owner of the tailings dumps in issue and the 2nd Ataqua decision which ordered the Department to convert De Beers' old order prospecting permit, were "unsustainable in law and not to be followed."

[10] De Beers filed an answering affidavit setting out the basis of its opposition to the application. The gravamen of De Beers' opposition was that it sold its Jagersfontein assets with the accompanying rights over the tailings dumps to JD Company in September 2010 after this Court in the 1st

Ataqua decision definitively declared that the tailings dumps belonged to it and the same Court in the 2nd Ataqua decision ordered the Department to convert its old order prospecting rights which entitled it, on the basis of the consent granted by the Department in terms of s 11 of the MPRDA to its new order prospecting right which it in turn sold to JD company.

[11] As a background to this application, De Beers submitted that it was the owner of Jagersfontein farm and the mineral rights which included all precious stones, all precious metal base minerals, oils in and under subdivision 16 of the farm Jagersfontein 14 as far back as 1973 which were acquired by way of a cession from a company called the New Jagersfontein Mining and Exploration Company Ltd ("the New Company"), Deed of Cession 85MR1973, executed on 20 September 1973, **DB1** as well as all assets, movable and immovable, corporeal or otherwise acquired by another Deed of Cession executed on 8 October 1971, **DB2.**

[12] It submitted also that sometime during May 2010 it invited several prospective buyers to submit bids for the acquisition of its Jagersfontein assets. JD Company and Wheatfields were amongst those bidders. Ultimately, through due processes of tendering, JD Company won the bid. On 13 September 2010 it concluded a Sale of Assets Agreement, **DB5**, with JD Company and sold the tailing dumps as well as the converted prospecting rights on subdivision 16 and other subdivisions which are not relevant for purposes of this application, to JD Company. The tailings dumps as recorded

under clause 2.3.1 of the Sale of Assets Agreement, **DB5**, were sold as movable assets to JD Company. The Jagersfontein Community Trust and Wheatfields lost that bid.

[13] De Beers, finally submitted that, as a result of the above mentioned legal sale of its assets and prospecting rights to JD Company, from the date of the sale and the date on which JD Company started to process on the tailings dumps on subdivision 16, it was not conducting any of the prospecting operations or activities on subdivision 16 complained about by the applicants. This was conveyed to the applicants in a letter dated 18 June 2013, **DB10**.

[14] Reinet Fund submitted that it only funded the sale of assets between De Beers and JD Company. As security for its investment, it held shares in JD Company. It was not mining or engaged in any mining activities on subdivision 16 on Jagersfontein farm.

The rest of the respondents,6th; 8th to 13th; like Reinet Fund only had shares in JD company and were also not mining or engaged in any mining activities or even prospecting on subdivision 16 Jagersfontein farm 14.

[15] The court in the 1st Ataqua decision ordered as follows:

"1. It is declared that the applicant [De Beers] is the owner of the tailings dumps situated on subdivision 16 of the farm Jagersfontein 14, Magisterial District of Fauresmith.

2. (Not relevant)

3. (Not relevant)

4. It is declared that the provisions of the Mineral & Petroleum Resources Development Act 28 of 2002, do not apply to the tailings dumps situated on Subdivision 16 of the farm Jagersfontein 14, Magisterial District of Fauresmith."

(5 – 8. Not relevant.)

[16] It was common cause between the parties that this decision was never appealed against by any of the parties involved, particularly the Department. That the applicants were not parties to it.

[17] The applicants submitted that this Court was not bound by the 1st and 2nd Ataqua decisions, particularly the 1st Ataqua decision. Mr Ellis, on behalf of the applicants argued that the two decisions were not cast in stone to mean that however wrong, the courts in the same jurisdiction were bound to follow them. He raised the following arguments including that (i) the court in the 1st Ataqua case made a declaratory order regarding the applicability of the MPRDA when the applicant in that matter, De Beers, did not seek such relief, (ii) the 1st Ataqua decision was not a judgment *in rem* and thus not binding on the current applicants as they were not parties to it (See **Lazarus-Barlow v Regent Estates Co Ltd and Another** [1949] All ER 118; **Tshabalala v Johannesburg**

Municipality 1962 (4) SA 367 (T). Compare with **Koster Kooperatiewe Landboumaatskappy Bpk v Wadee** 1960 (3) SA 197) T, and (iii) the applicability of the MPRDA was not properly ventilated.

[18] Messers Van der Nest and Loxton on behalf of the respondents impressed upon this Court that the principle that courts are bound by decisions which have not been set aside on appeal particularly those not clearly wrong was entrenched in our system and cannot be deviated from on the facts of this case, more so because the applicants did not even make out a case to show exceptional circumstances for this Court to disregard the two decisions referred to.

[19] The Court in the 1st Ataqua decision addressed several issues including the issue around the ownership of the tailings dumps on subdivision 16 and the applicability of the MPRDA over these tailings dumps. It extensively considered the history of De Beers in the mining industry in that area and how it came to become the owner of the tailings dumps based on all the documentation presented during arguments; considered the relevant sections in the MPRDA and ruled that the tailings dumps belonged to De Beers and that the MPRDA was not applicable to them.

[20] When the whole judgment of the 1st Ataqua decision is read, particularly para [56]-[68] it was clear that all issues raised were properly ventilated or litigated. The parties made full submissions on all including those raised by the Court during its interaction with counsel. Several concessions were made

including the fact that the MPRDA clearly did not provide for the tailings dump, even under the Transitional Arrangements. Thus the Court preferred in the circumstances of the case not to usurp the function of the legislator through imposing an interpretation other than what was clearly the intention of the legislature and instead to defer to the legislature to correct that lacuna itself.

[21] This Court, despite sitting as a full bench of three Judges at the special request of the applicants is bound by the 1st Ataqua decision particularly because the Department which was party to those proceedings and as the legislator and custodian of the mineral resources, representing the Government, chose not to appeal the decision. The Department instead opted to amend the MPRDA in line with the 1st Ataqua decision as is evidenced from the proposed amendments[1]. The applicants in any event did not make out any case of exceptional circumstances justifying this Court to depart from the 1st Ataqua decision nor have they made out a case in which the interests of justice justify such a departure. Even if they did, which they did not, they would not have succeeded because their argument was not in relation to the *ratio decidendi* of the 1st Ataqua decision but the orders granted.

[22] The submission Mr Ellis made that the 1st Ataqua decision was one *in rem* and not binding on the applicants as they

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[1] The Mineral and Petroleum Resourcess Development Amendment Bill published in Government Gazette No.36523 of 31 May 2013

were not parties during those proceedings cannot be helpful to the applicants. The department was a party to those proceedings. The order consequently made was binding on it and virtually disempowered it to grant any rights to any other party to the tailing dumps in terms of the MPRDA.

[23] Neither can recent decisions of the Constitutional Court[2] and the Supreme Court of Appeal[3] dealing with the application and interpretation of the MPRDA be of any assistance to the applicants in retrospect because all the decisions did not deal with the crisp issue of the 1st Ataqua decision that is also central in this matter i.e. the tailings dumps; their identity and ownership. In none of these cases referred to did the 1st Ataqua decision even come up for discussion.

[24] The Court in the 2nd Ataqua decision ordered as follows:

> " 8.1 The decision to refuse to convert the applicant's old order prospecting permit in terms of item 6(1) of Schedule II to the MPRDA is hereby reviewed and set aside.
>
> 8.2 The 2nd and 3rd respondents are directed to convert the applicant's old order prospecting permit (No.45/2003) in respect of sub division 1 (Kings Paddock), Subdivision 16 and the Remaining Extent of the farm Jagersfontein, excluding tailings dumps and consisting of the rights to diamonds held by the applicants by virtue of Notarial Deed of Cession of Mineral Rights...into a prospecting

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[2] Minister of Minerals and Energy and Agri SA case no:458/2011

[3] Agri South Africa and Minister of Minerals and Energy Case CCT 51/12[2013]ZACC 9 ;Bengweyama Minerals (Pty) Ltd v Genorah Resources and Others [2010] 3 SA ALL SA 577 (SCA); Holcim v Prudent Investors and Others case no:641/09;Xstrata South Africa (Pty) Ltd and Others v SFF Association 2012 (5) SA 60 (SCA)

right of the said properties and do all things and take all steps necessary for the execution and registration of such converted right as envisaged in the MPRDA..."

[25] The same reasoning in respect of the 1st Ataqua decision as set out above is applicable to the 2nd Ataqua decision. The submission that De Beers had forgotten to apply for the conversion of its old order prospecting permit in respect of the tailings dumps cannot be correct considering that De Beers made its application within the 2 year grace provided for by the MPRDA. There was nothing that really revolved around the 2nd Ataqua decision. The interpretation given by the court then was logical, reasonable and justified because all the Court was required to rule on was whether the De Beers was out of time or not. The Court held that it was within the extended period given to all old order permit holders and consequently ordered the Department to convert De Beers' prospecting permit. The Department complied.

[26] What made the respondents' case more compelling on this leg was that the Department by converting De Beers' old order prospecting permit was acting and complying with a valid order of this Court, which like the 1st Ataqua decision was never appealed against. If the Department did not do as ordered it would have been in contempt of a court order and liable to punishment. See **Dengetenge Holdings (Pty) Ltd and Southern Sphere Mining and Development Company Limited and 7 Others** Case no 619/12 [2013] 2 All SA 251

(SCA) (11 March 2013) where the Supreme Court of Appeal stated at para [17]:

"... [E]ven though the Minister and State functionaries (who had been cited as respondents in that case) had chosen, in their wisdom not to oppose the grant of the interdict, they were free to simply disregard that order of court. Once again I cannot agree. As Froneman J observed in *Bezuidenhout v Patensie Sitrus Beherend BPK* 2001 (2) SA 224 (E) at 229B-C:' An order of court of law stands until set aside by a court of competent jurisdiction. Until that is done the court order must be obeyed even if it may be wrong (*Culverwell v Beira* 1992 (4) SA 490 (W) at 494A-C.A person may be even barred from approaching the court until he or she has obeyed an order of court that has not been properly set aside (*Hadkinson v Hadkinson* [1952] 2 All ER 567 (CA); *Bylieveldt v Redpath* 1982 (1) SA 702 (A) at 714.'

Moreover it bears re-iterating that respect for the authority of the courts, which is foundational to the rule of law, often serves as bulwark against anarchy and chaos."

[27] In order to succeed on the application for an interim order the applicants had to prove three requirements:

(a) Prima facie right to be protected.

The applicants submitted that the fact that they had lodged applications with the Department before De Beers, when the Department received and accepted De Beers' application for conversion of its old order prospecting permit it should have consulted them and even informed them as interested parties to give them an opportunity as the MPRDA provides, to make submissions. Once the Department accepted their

applications, regardless of the final decision to reject or dismiss such applications, they were interested parties.

The respondents, on the other hand, submitted that it was clear when this Court in the 1st Ataqua decision declared definitively that De Beers was the owner of subdivision 16 and the tailing dumps on it; that De Beers consequently had the right to even sell those prospecting rights to any successful bidder and in this instance JD Company. The Department made an error to accept the applicants' applications for prospecting rights over the same tailings dumps. In the absence of any contrary decision on this matter, correctly so as the respondents submitted, the Department was wrong because it was precluded from granting purported rights in terms of the MPRDA relating to tailing dumps in view of the 1st Ataqua decision.

(b) Prejudice and irreparable harm if such interim relief was not granted

It was common cause between the parties that JD Company started processing on the tailings dumps on subdivision 16 late 2011 or at least early 2012.It has been processing and even removing the diamonds found on subdivision 16 to a place somewhere in Wolmaranstad for safe keeping pending the responsible authority registering it as a diamond dealer to sell diamonds. As JD Company confirmed it did not have the right to mine and sell the diamonds until this matter is settled. What cannot be disputed by anyone is that as the applicants submitted, every day that JD Company continued to process on this piece of land, the resources in the tailings dumps

were getting depleted and by their very nature could not be replaced. Any interested party would on that basis suffer irreparable harm if the interim relief sought was not granted.

The respondents argued to the contrary. They submitted that, the fact that the applicants did not have any right to any of the relief sought on the basis that they were not interested parties as they were not parties in the 1st Ataqua decision, which was never taken on appeal the applicants had no right to stop any activities going on, on subdivision 16. Furthermore, they submitted that if there was any harm that any party would suffer it would be JD company and its subsidiaries and investors because of the large capital investment running up to millions already invested in the project and resources including human resource arising from the number of people who JD Company had employed since it started with this project based on a valid decision of this Court. All arranged their lives and plans on the basis that the matter was finally disposed of in 2007 and subsequently when the 1st Ataqua decision was never appealed against.

(c) That they had no other remedy available

The applicants submitted that they had no other alternative except this remedy considering that the diamonds would get depleted if JD Company was not stopped from prospecting and mining on subdivision 16.

The respondents submitted that there was no basis to consider alternative remedies in this case, as the applicants simply had no right and had not shown to have any.

[28] In my view, the applicants have not satisfied the requirements as set out above for the following reasons. The 1st Ataqua decision made it clear that De Beers was the owner of what was on Jagersfontein farm including the tailings dumps. From that moment whatever application the Department had accepted, including that of the Jagersfontein Community Trust and Wheatfields, could no longer be considered.

The applicants' interest in the matter was limited to an alleged expectation or right to obtain a prospecting permit in regard to the dumps only and not to the rest of the properties, since they never applied for such rights.

[29] The applicants submitted that they were not aware of the decision(s) of the Department not to consider their applications for prospecting rights on subdivision 16. This submission cannot be correct. On its own, the Wheatfields' application was refused by the Department in a letter dated January 2012, **S27**. As early as December 2012 the Jagersfontein Community Trust became aware of the Department's decision not to consider its application through correspondence that De Beers exchanged with the Department and forwarded to the applicants' attorneys of record, Voster *et al.* On 6 June 2013 the Department filed an affidavit in these proceedings entitled: **Written Reasons**. In this affidavit it stated at paragraph 3 that

> "after the original uncertainty, the Department considered it a mistake to entertain and process the two applications and they were refused. The reason for the refusal is the first Ataqua decision which found that the MPRDA did not apply to the tailing dumps on subdivision 16."

[30] What made it virtually impossible that the applicants could not have known about the Department's decision(s) on the two applications was that both were represented by the same firm of attorneys: Voster & Marx Attorneys, Paarl, Western Cape since October/November 2011as per James Higgo Voster's confirmatory affidavit, p. 352, Pleadings Bundle.

[31] What compounded the applicants' case further was that nowhere in the papers did the applicants state why they took over a year to bring the application to court until on 6 August 2013. What their counsel proffered from the side bar, that they were indigent could hardly be *justa causa.* It was in any event never their case on the papers; neither was there any application sought to supplement these papers to include this reason or any other reason for that matter. As indicated already they have been consistently represented by lawyers as early as 2011.

[32] Which also begs the question, why did the applicants not exhaust their internal remedies first including lodging an appeal in terms of Promotion of Administrative Justice Act,

Act 3 of 2000 ("PAJA"). Surely that would not have cost what it would to approach this Court on an urgent basis. As indicated the applicants have always had legal representation through Voster & Marx Attorneys and knew what was at stake. On that basis the applicants have failed to show any urgency. If there was any, then it was self-created. The application must fail on this leg too.

[33] As stated by **Holmes JA** in **Federated Employers Fire & General Insurance Co Ltd & Another v McKenzie** 1969 (3) SA 360 (A) at 362F-G :

> "Factors which usually weigh with courts in considering an application for condonation include the degree of non-compliance, the explanation therefor, the importance of the case, a respondent's interest in the finality of the judgment of the court below , the convenience of the court and the avoidance of unnecessary delay in the administration of justice."

[34] The applicants approached this Court on an urgent basis. They had to prove that there were prospects of success if the matter were to proceed further. Based on the conclusion reached in respect of the two Ataqua decisions in the above paragraphs of this judgment coupled with the failure to advance an acceptable explanation, we may have been entitled to refuse the indulgence of condonation, but for the respondents who have implored us to rather grant condonation because if condonation was refused it would leave it open for the applicants to renew their application in terms of the usual time prescripts of the rules of practice of

this Court. (See **Blumenthal & Another v Thomson NO & Another** 1994 (2) SA 118 (A) at 121 and cases cited therein). The respondents were not seriously opposed to the applicants' request which made us then to proceed to consider the application for interim relief as set out above.

[35] In conclusion, I think it is necessary and apposite to make some general remarks on the treatment of the Jagersfontein Community and Wheatfields but to a less extent Wheatfields by the Department. The applicants were not properly assisted in what was obviously an effort to acquire prospecting rights over the tailing dumps on a piece of land which belonged to De Beers but had lain vacant and unused for a decade or so. Although the MPRDA does not impose an agreement on the part of the landowner, De Beers in this case, it was incumbent on the Department to have facilitated such engagement in good faith to attempt to reach accommodation to the satisfaction of both parties. Surely if the applicants were kept abreast of developments and assisted through some form of mediation by the Department instead of being shunted from one door to another and be informed on the eve of the case as late as June 2013 in the case of the Jagersfontein Community Trust's application or the earliest December 2012 they would not have seen the court as a their only hope after such inordinate delay.

[36] Finally it must be stated unequivocally that the Department missed an opportunity to redress the imbalance the MPRDA recognised and intended to correct. Whatever it does in the

future including the proposed amendments to the MPRDA referred to above or any related legislation to cure this very defect, having failed to appeal the two decisions to the extent necessary or the extent the two were in conflict with the purport of the MPRDA as it and the broader community understood it; can never be of any comfort to anyone in Jagersfontein or anywhere else in South Africa in the same situation. The law does not apply retrospectively unless so decreed by the legislature which is in this case the Department but it chose overtly, ignorantly or otherwise not to do so.

ORDER

[37] In the result the following order is made.

1. **The application for condonation is granted.**
2. **The application for an interim order, PART A of the Notice of Motion, is dismissed.**
3. **The applicants are ordered to pay the costs of this application,including those incurred by the respondents in opposing the application on an urgent basis.**
4. **Costs to include costs of two counsel.**

B. C. MOCUMIE, J

I agree.

M. B. MOLEMELA, J

A. F. JORDAAN, J

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Instructed by:
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BLOEMFONTEIN

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