

PORTION 26 HISTORY AND DIARY OF EVENTS

1. THE WESTRAND DISTRICT MUNICIPALITY'S INTENDED USE OF PORTION 26:

1.1. The Westrand District Municipality acquired Portion 26 at or about the end of 2004 with the following stated objective .

“The executive Mayor of the West Rand District Municipality (WRDM) has approved the establishment of Multi Purpose Community Centres (MPCC's) in the District Management Area (DMA).

The MPCC's concerned, will provide government related services to the DMA community such as local government representation, social welfare, health, clinics etc. It is also envisaged that the MPCC's will be the catalyst for rural housing developments where displaced and new communities can find a secure residence with the necessary, essential services.

Taking the above into account certain areas were identified within the DMA which are development nodes. One of the remaining areas is the Remaining Extent of Portion 26 of the Farm Kromdraai 520 JQ. The farm is ideally suited for the development of both the MPCC and a housing development. The farms is very accessible for the local communities, has structures, that can with the necessary renovations, be fast-tracked to serve as the MPCC and has the necessary essential services to expedite a

housing development. There is also a small shop on the farm, serving the local community, which is also on offer as a going concern.”

1.2. When the Westrand District Municipality’s intended use of Portion 26, and a planned public meeting called by the Westrand District Municipality to announce the purchase of Portion 26, came to the attention of the Conservation group during February 2005, the Conservation group amongst others actions addressed a fax to the Executive Mayor of the Westrand District Municipality on 24 February 2005 a copy whereof is attached hereto marked **Annexure 'GP5'**

1.3. I summarise some of the issues raised in the fax as follows:

1.4. *“...we sincerely urge you to refrain from creating any impression that Portion 26 will be available for a housing development to new communities or even the larger local community, other than existing occupiers. Such a representation will be an intentional misleading of the COHWHS community specifically and the greater community in general, creating unrealistic expectations which the WRDM will be unable to deliver on. Clearly this will have severe practical, social and political implications.”*

“We therefore urge you not to create the impression at the public meeting that the establishment of a MPCC and a housing development (even on a limited scale) is a forgone conclusion. The community is entitled to be

informed of the nature and difficulties of the EIA process that has to take place before a decision can be made as to the suitability of Portion 26 for any proposed development. This process can take two years and longer and has great financial implications.”

The following fear was expressed:

“...in our view the acquisition of Portion 26 has been “fast tracked” without regards to due process including but not limited to proper investigation and full community participation. The result of this is that in the process further unrealistically high expectations (as is already recorded in the Integrated Report) may have been created amongst historically disadvantaged sections of the community in general. In turn this creates a real risk of uncontrolled land occupations (as have happened in numerous instances over the country) when such historically disadvantaged communities realise that the perceived benefits regarding a housing development may not materialise or may only partially materialise.”

.8 It was also put on record that a large number of land owners in principle supported the development of MPCC's and limited housing developments, subject to:

.8.1 each development being considered on its own merits in accordance with the principles contained in the Integrated Report and other relevant provisions;

.8.2 the EIA process duly taking place; and

the concerns about uncontrolled occupations resulting in further informal housing once ownership of land has been transferred by existing land owners, being addressed

1.9 On 29 September 2005 the Westrand District Municipality's Municipal Manager advised Mr Frank Wessels who represented the land owners on the Section 80 sub-committee of the Westrand District Municipality by fax that: *"It is the intention of the WRDM to build houses for the 43 families that are already residing on Portion 26, Kromdraai."* (A copy of this letter is attached as **Annexure 'GP8'**). (The increase in the number of families from 28 to 43 was later explained by the Westrand District Municipality by saying that the original census was wrong and that more than one family occupied dwellings which were previously attributed to only one family.) The assurance was also given therein that:

1.10 *"The WRDM pride itself to be a district authority that does not drive rough shot to reach its goals and ignores the wishes of the people residing within its area of jurisdiction. Above all, the track record of the WRDM shows that it always follows the proper legal processes in the execution of its mandate."*

1.11 In the light of these undertakings the Conservation group did not take any further steps in respect of Portion 26 because it was satisfied that the Westrand District Municipality would act in accordance with these undertakings.

2 WESTRAND DISTRICT MUNICIPALITY'S ENVIRONMENTAL IMPACT ASSESMENT (EIA) PROCESS

2.1 Sometime during 2007 the Westrand District Municipality commenced with the Environmental Impact Assessment (EIA) process as required before approval can be granted by the relevant authorities for any development on Portion 26.

2.2 Part of the proposed development, for which the EIA was conducted, was the provision of housing for 43 families residing on Portion 26 at the time.

2.3 One of the requirements of the EIA process, where a proposed development is situated in a dolomitic area, is an opinion from the Council for Geoscience ("Geoscience").

2.4 The Westrand District Municipality (through one of its district municipalities) on 5 October 2007, obtained an opinion from Geoscience regarding the suitability of Portion 26 for residential development. Geoscience brought out a damning report and categorically stated that the area is unsuitable for residential development. Relevant parts of the report as follows; (the report was addressed to the Deputy Manager Infrastructure Planning and

Management, Mogale City):

Dear Sir,

PORTION 26 KROMDRAAI 520 JQ

The Council for Geoscience has been approached by Africa Exposed on behalf of Mamphole Development to secure opinion on the suitability of this site for residential development and fulfil the requirements for township establishment approval. Africa Exposed's report, dated September 2007, submitted on 27 September 2007, as well a presentation on the same day, have reference.

The development is located within an area of relatively shallow dolomite bedrock, which is confirmed to be incised by grykes, the dimensions and localities of these being unknown. Various boreholes encounter poor conditions and a significant portion of the site is characterized by high risk conditions (Inherent Risk Classes 5, 6 and 7).

We submit that:

This office is in broad agreement with the risk classification and zonation.

The site is unsuitable for residential development, particularly medium/affordable housing. Development of this site as such may constitute fruitless expenditure on the part of government and expose home owners to an unacceptable development risk. The NHBRC and GFSH-2 (Department Housing Document) prohibit the development of such land and the NHBRC will not endorse and enrol the development under the Warranty Scheme."

2.5A copy of the report is attached as **Annexure 'GP10'**.

2.6 Mr Peter Mills, an employee of Blue IQ who is involved in the approval of the

EIA application for approval, advised that the first EIA application was then withdrawn by the Westrand District Municipality and that the current application is limited to the development of a Multi-purpose Community Centre and that no provision is made for any residential development.

2.7 Also according to the current Land Use Master Plan, Portion 26 is located in the “Low Intensity Use Zone”. This implies that the current rural character of Portion 26 has to be maintained and only an owner dwelling may be erected with limited staff dwellings.

2.8 The sensitivity of the area where Portion 26 is situated was classified as a “Low Intensity Use Zone”. A copy of the coversheet accompanying the documents distributed as well as the notes relating to the EIA Regulations and Land Use Planning with the maps used at the presentation are attached hereto marked **Annexures ‘GP11’ and ‘GP12.1’ to ‘GP12.4’**.

2.9 A bundle of documents was made available by the Westrand district municipality which included maps of the area. These maps indicate the sensitivity of the Cradle of Human Kind in respect of certain variables. With regard to **Annexure ‘GP12.1’ to GP12.4’** I respectfully point out as follows:

2.10 **Annexure ‘GP12.1’** indicates the World Heritage Site. The area indicated by the black circle represents the rough location of Portion 26 and clearly shows it falls within the protected area;

2.10.1 **Annexure ‘GP12.2’** indicates the sensitivity of the World Heritage Site in

respect of Palaeontological sites, Cave sites and Irreplaceable sites. Once again the area where portion 26 is situated is indicated by a black circle and it is clear that Portion 26 is amongst the most sensitive areas if measured against these variables;

2.11 **Annexure 'GP12.3'** indicates the sensitivity of the World Heritage Site in respect of habitat fragmentation. Once again the area where portion 26 is situated is indicated by a black circle and it is clear that Portion 26 is amongst the most sensitive areas if measured against these variables;

2.12 **Annexure 'GP12.4'** indicates the sensitivity of the World Heritage Site in respect of dolomite overlay. Once again the area where portion 26 is situated is indicated by a black circle and it is clear that Portion 26 borders between the sensitive and most sensitive.

3 THE LAND INVASION AND ESTABLISHMENT OF AN INFORMAL SETTLEMENT ON PORTION 26:

3.1 Since 2005, community members from time to time reported that councillors and employees of the Westrand District Municipality at meetings called by the Westrand District Municipality made promises that housing would be made available on Portion 26 to the broader community and not only to the 43 house holds mentioned before. Although this was worrying, the general feeling was that this was mere political opportunism on the part of some individuals at the Westrand District Municipality and that the official stance of

the Westrand District Municipality was contained in the correspondence, media statements and the EIA application referred to above.

3.2 However, on Wednesday 14 April 2010 a resident reported, that he had noticed a steady trickle of people walking to and from Portion 26. Almost all of the people were carrying spades, forks or stakes (wooden and iron). The member expressed a concern that the people might be staking out stands on Portion 26.

3.3 Other community members reported that their employees informed them on 11 April 2010 that they were staking out a stands on Portion 26 as the local community were told that “the municipality” was handing out stands on Portion 26 and that no money was charged for the stands. The employees said that “the municipality” indicated that they preferred handing the stands out to persons who were in a position to erect a structures immediately, but that they did in fact receive stands themselves.

3.4 Upon physical investigation of these allegations it was confirmed that stands had been demarcated by way of clearing of the land, putting up of stakes or partitioning off with tape. We spoke to one of the residents on Portion 26 who told us that the community was invited by the local councillor Phiri to occupy the land and that no money needs to be paid for the stands.

3.5 Another community member at that point also reported that she was told by one of her employees that the stands were going to be made available on a

large scale on Saturday 17 April 2010. Apparently no identity document would be required, it would be free and that this initiative was driven by the local councillor Phiri. The community member expressed concern that people were being transported in from Munsieville (a township approximately 10 km away) to occupy the stands.

3.6 An e-mail message was sent to the Westrand District Municipality's Municipal Manager, Mr T Mokhatla (the message was cc'd to a number of other persons also including a number of employees and councillors of the Westrand District Municipality including the Chief Whip, Mr Lipudi) and Mr Peter Mills (the employee of the Third Respondent), wherein I notified him as follows:

"Dear Mr Mokhatla,

I was advised to notify you in writing of the following:

You are hereby informed that Portion 26 Kromdraai is being illegally invaded (apparently since last Sunday) by tens of potential squatters. Currently the invasion consists of the staking off of stands. Some of these stands are clearly visible from the Kromdraai road with more not visible deeper in the property.

Unconfirmed information from a member from the local community indicates that this is taking place by invitation from the local councillor. No money is being paid for the stands.

Please address the problem as a matter of extreme urgency.

I am an affected party being a landowner in the immediate area of the said property. As such, I would appreciate feedback by email by your offices as to what is being done.

Should I not hear from you within 24 hours I will have to assume on the light of the urgency hereof that nothing is being done and the community will then have to take further steps deemed appropriate in the circumstances.

Regards.

3.7 In the light of the fact that no structures had been erected at the time, it was considered that it would be would be appropriate to give the Westrand District Municipality the opportunity to resolve the situation in accordance with its stated intention as per the EIA process.

3.8 On Sunday 18 April 2010 it was reported that:

3.8.1 More stands were being measured out on Portion 26. A new structure had been erected and the pole for a second structure that was in the process of being erected was also visible.

3.8.2 A meeting was conducted by two Councillors from the Westrand District Municipality and they indicated that they were in favour of the new occupation of Portion 26 but that 'the boere' were opposing the occupation.

3.9 On Monday 19 April 2010 areal photographs show that a number of stands

had been demarcated by clearing the land, inserting stakes or with the aid of white plastic strips. Attached is two of the aerial photos of Portion 26, marked **Annexure 'GP14'** where the demarcated stands are clearly visible. On one of the photographs individuals are visible erecting a new structure.

3.10 A Mr Kolozi of the Westrand District Municipality was asked what he is doing about the invasion. He responded that the final decision will have to be taken by the Westrand District Municipality's council and in particular, the Westrand District Municipality's chief whip, Mr Patrick Lipudi as any administrative/legal process he may be entitled to follow, is superseded by the political process to resolve the situation. As such the Westrand District Municipality had no pro-active plan in place to prevent an invasion.

3.11 I attach a copy of an email I addressed to Mr Kolozi following the conversation as **Annexure 'GP15'** In the email I expressly requested Mr Kolozi to immediately remove the structures which were erected on 18 April 2010 to demonstrate clearly that no illegal occupation of land will be allowed by the Westrand District Municipality. I received no answer to this email.

3.12 By then it became clear that the WRDM will have to take measures to prevent the situation from deteriorating. However, this meant that a meeting of the members had to be called in order to take a decision as to what the possible solutions were and especially to get commitments from members for financial contributions should legal action be necessary.

3.13 On Tuesday 20 April 2010 the Executive Mayor responded as follows:

“It is not the intention of the WRDM to support any individual or grouping to transgress the laws of the country.

It should therefore be mentioned that the moment when the situation was brought to the attention of the WRDM steps were taken to avoid conflict between the various interest groups and to ensure that the matter is solved amicably, through political intervention.

Engagements are currently taking place to peacefully solve the matter in a way that will be to the satisfaction of the potential invaders as well as the broader community.

I believe that this situation could be brought under control and all misunderstandings could be addressed before the end of April 2010.”

3.14 A copy of the letter is attached hereto as **Annexure 'GP17'**.

3.15 On Tuesday 20 April 2010, another a meeting was held at PTN 26 during which it was communicated that a great number of people would be given stands on Portion 26 during the weekend of 24 April 2010 for the erection of dwellings.

3.16 On Thursday 22 April 2010, it was reported that three more structures had been erected on Portion 26 and there was no reaction from the Westrand District Municipality to our requests for an urgent meeting. The fear existed that a large scale land invasion was imminent over the weekend and that the Westrand District Municipality was unable or unwilling to stop it.

3.17 On Thursday evening 22 April 2010 it was decided to commence with litigation whilst still engaging with the WRDM in an effort to find out what their version is and what action, if any, they intended taking.

3.18 On Friday the 23 April 2010 afternoon at 13h20 Mr Lipudi the Chief Whip at the Westrand District Municipality was asked to disclose what the Westrand District Municipality intended doing should an invasion take place. Mr Lipudi then replied that this was part of what the WRDM were busy discussing and that a meeting would be held with all the roll-players on Sunday 25 April 2010. The Westrand District Municipality would announce its plans to deal with the situation only at that meeting. He declined my request that I be notified of the outcome of their meeting immediately after the decision/s were taken.

3.19 It became clear during the discussion with Mr Lipudi that the Westrand District Municipality had no contingency plans in place to prevent a large scale invasion of Portion 26 from taking place over the weekend of Saturday 24 April 2010.

3.20 On Saturday 24 April 2010, it was reported that more structures were being erected on Portion 26 and by the end of the day 14 more were erected and 10 more were ready for cladding;

3.21 On Sunday 25 April 2010 the erection of further structures were reported and we and we were informed of a pending meeting by the WRDM later that day. Several of the Westrand District Municipality's councillors were present

at the meeting. The meeting was conducted exclusively in a black language and only a small number of the Applicant's members attended the meeting. It was then reported that at the meeting the following was conveyed to the attendees, by the Westrand District Municipality:

- 3.21.1 that only 14 hectares of Portion 26 were tested for the purpose of a housing development – the other 50 odd hectares were not tested at all;
- 3.21.2 that some areas were not suitable for any housing. (These areas were not identified);
- 3.21.3 that the other areas (the said 50 Hectares) may be utilised but that:
 - 3.21.3.1 a maximum of 10 structures per hectare (68 Hectares) may be erected
 - 3.21.3.2 only light building material (and no bricks) should be used;
- 3.21.4 that a Clinic shall be erected which shall similarly be of a temporary nature and not a fixture and will have to be removed;
- 3.21.5 that the shop (Kromdraai Cash Store) shall be re-opened and that the Westrand District Municipality shall build a community hall. The question was raised as to what amount would be spend on the hall and the answer was that no budget was allocated;
- 3.21.6 that the Westrand District Municipality would provide toilets and water to the 'new residents' as from Monday the 26th April 2010.

3.22 On Sunday 25 April 2010 it was verified that new structures were being erected and as proof thereof I attach copies of photos taken during my visit as **Annexure 'GP19'**.

3.23 Attached are photos taken on Wednesday 28 April 2010 as Annexure **GP20**. These photographs clearly show the extend of stands having been demarcated and also some of the structures that had been erected.

3.24 I can now categorically state that the Westrand District Municipality has reneged on its duties as the Controlling Local Authority as well as its duties as owner of Portion 26 to ensure the correct legal use of Portion 26. In fact, the First and Second Respondents are actively promoting the illegal occupation of Portion 26 by the provision of services to encourage the erection of structures.

3.25 On Wednesday 28 April 2010 a truck clearly marked "*WRDM Public Safety*" was witnessed with a trailer attached to it delivering one huge and one smaller water tanks to Portion 26.

3.26 I also attach a copy of "Addenda Items to the WRDM Agenda of 28 April 2010" marked Annexure **GP21** wherein the provision of 30 toilets for Section 26 is recommended. In the process it is clear that the Westrand District Municipality has no intention to follow legal process as far as Portion 26 was concerned.

3.27 On 13 May 2010 Justice Rabie Issued an interim order that all unoccupied structures were to be removed by the Municipality

3.28 On 14 May 2010 200 unoccupied structures were demolished by the Red Ants however they were apparently instructed by the WRDM not to remove the material from ptn 26.

3.29 On 15 May 2010 it was reported that the structures were being re-erected and the court was again approached for relief.

3.30 The court then ordered the Sherrif to remove all partially built structures and those erected subsequent to the first order.

3.31 On 16 May the Red Ants removed said structures.

3.32 The WRDM then brought an application claiming that 27 structures were removed which they claim were in fact occupied.

3.33 On 18 June the judge ordered that those 27 structures should be allowed to be re-erected pending final hearing of the matter on 26 July 2011

4 LEGISLATIVE FRAMEWORK: THE WHCA

4.1A World Heritage Site is an area that has exceptional universal value. It is protected and preserved against threats of changing social and economic

conditions and natural decay. It is protected by the World Heritage Committee, in terms of the World Heritage Convention, established in 1972 by UNESCO. South Africa is a signatory to the World Heritage Convention and its provisions are incorporated into National Law by virtue of the provisions of the WHCA. Article 7(3) of the Convention that is contained in the Schedule to the WHCA, places an obligation on participating states not to take deliberate measures which might damage directly or indirectly a world heritage site.

4.2 THE MEC RESPONSIBLE FOR THE FOSSIL HOMINID SITES OF STERKFRONTEIN, SWART-KRANS, KROMDRAAI AND ENVIRONS WORLD HERITAGE SITE (GAUTENG PROVINCE) has been declared as the authority for the site as contemplated in section 8 of the WHCA for a period of five years and is specifically authorised to exercise those powers set out in section 13(2) of the WHCA

4.3 The relevant provisions of Section 13(2) of the WHCA places a duty on the MEC (*inter alia*) to:

5.3.1 develop measures for the cultural and environmental protection and sustainable development of, and related activities within, World Heritage Sites and to ensure that the values of the Convention are given effect to;

promote, manage, oversee, market and facilitate tourism and related development in connection with World Heritage Sites in accordance with applicable law, the Convention and the Operational Guidelines in such a way that the cultural and ecological integrity are maintained;

5.3.2 ...

5.3.3 take effective and active measures for the protection, conservation and presentation of the cultural and natural heritage;

5.3.4...

5.3.5...

5.3.6...

5.3.7 establish and implement the Integrated Management Plan;

5.3.8...; and

5.3.9 liaise with, and be sensitive to, the needs of communities living in or near World Heritage Sites.

5 THE RIGHTS AND RESTRICTIONS THAT AFFECT THE PROPERTY.

6 The WRDM actions are in direct conflict with, *inter alia* the following legislative provisions

6.1 The zoning restrictions that have been imposed on Portion 26:

7 The current zoning of Portion 26 is determined with reference to the provisions of the Peri Urban Town Planning Scheme 1975 ('the Scheme'). I am advised that the current zoning of Portion 26 is "*undetermined*". The use that Portion 26 may legally be put to is the erection of one dwelling house with outbuildings. This is clear from the reading of the relevant provisions of the Scheme and the principles that the Westrand District Municipality applies internally and

externally in ascertaining the zoning rights of a property governed by the provisions of the scheme. In this regard I respectfully refer the Honourable Court to the confirmatory affidavit by Adv Petrus Steyn a practising private town planner, formerly in the employ of the Westrand District Municipality.

7.1 Township Establishment

- 8 The current use of Portion 26 by the Westrand District Municipality by allowing an informal settlement to be established thereon constitutes the *de facto* establishment of a township in contravention of the provisions of the Town-Planning and Townships Ordinance, Ordinance 15 of 1986. No township register in respect of Portion 26 has been opened by the Registrar of Deeds at Pretoria and the Westrand District Municipality has also not declared any township on the property. The opening of a township register by the Registrar of Deeds is a prerequisite for the declaration of a township. If a Township Register was opened in respect of Portion 26 the Registrar of Deeds would have endorsed the Westrand District Municipality's title deed of Portion 26 to that effect. No endorsement appears from the said title deed.

8.1 Unlawful Sub-division

- 9 The setting out of stands on Portion 26 further constitutes a *de facto* unlawful sub-division of agricultural land as defined in the Sub-Division of Land Act, Act 70 of 1970.

9.1 Environment Conservation Act, 1989 and the National Environmental

Management Act, 1998

10 The current use of Portion 26 further constitutes a change in the use of Portion 26 an alteration in the use of the land and was being carried out in contravention of the Environment Conservation Act, 1989 and the National Environmental Management Act, 1998

10.1 National Building Regulations and Building Standards Act, 1977

11 The buildings erected or to be erected do not meet the requirements of the National Building Regulations and Building Standards Act, 1977.

12 The nett result of the above, I respectfully submit is that Westrand District Municipality as a branch of government (albeit at local level) and the Third Respondent as the relevant Authority, is obliged to give effect to the provisions of the WHCA. It follows that First, Second and Third Respondents cannot sit by and countenance a situation whereby the provisions of the WHCA are simply ignored and a valuable asset is threatened with destruction in violation of the clear statutory imperatives that compel them to prevent such loss and/or destruction. To summarise:

13 In terms of the World Heritage Convention (“WHC”) read with the WHCA, there is a duty resting on the Management Authority to protect the Cradle of Humankind as a World Heritage Site.

14 The permissible use of Portion 26 (seen against this background) is (amongst others) set out in the Integrated Report and in particular in the Land Use Master Plan.

15 The only housing developments provided for in terms of the Integrated Report, are for small on-site residential developments for the existing occupiers of land.

16 Also, in terms of the National Environmental Management Act, Act 107 of 1998 ("NEMA"), the Spatial Development Plan of the Westrand District Municipality for the Cradle of Humankind, must be in accordance with the Integrated Report. Allowing a large scale informal housing project to be created on Portion 26, is not in accordance with the Integrated Report.

17 **CONCLUSION:**

18 As I have indicated, it is clear that Portion 26 is being invaded by the large scale demarcation of stands and the erection of structures in an uncontrolled manner. I respectfully submit that the matter is extremely urgent for the following reasons:

18.1 Portion 26 is 65,7450 hectares in extent. On the photographs, a large number of stands can be identified. With the sizes of these stands as point of

departure, conservatively calculated roughly 500 stands can be measured

18.2 Portion 26 is situated in a highly sensitive eco-system. The land invasion will endanger not only the environment and the eco-system in the area but, according to Geoscience, the inhabitants of Portion 26 also.

18.3 Whilst one certainly has sympathy with all concerned (the homeless people who long for adequate housing and the Westrand District Municipality who attempts to satisfy their needs), it is clear that an invasion of portion 26 will also have serious unintended consequences, on an environmental, economical and political (international) level.

19 I respectfully point out that the community is not averse to development and it will certainly accept any proposal regarding Portion 26 on condition that such proposal is compatible with the provisions of the WHCA and other applicable legislation. What cannot be tolerated, however, is a situation where an illegal invasion of Portion 26 takes place and Portion 26 is de facto changed into a high density informal settlement.