



## WEAVIND & WEAVIND

ATTORNEYS, NOTARIES AND CONVEYANCERS

— EST. 1905 —

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### CONTACT

**T** (012) 346 3098

**F**

**W** [www.weavind.co.za](http://www.weavind.co.za)

**D** Docex 8 Pretoria

**E** [louisvb@weavind.co.za](mailto:louisvb@weavind.co.za)

**P** PO Box 34 Pretoria, 0001

### ADDRESS

**A** Block E, Glenfield Office Park,  
361 Oberon Street, Faerie Glen,  
Pretoria, 0081

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YOUR REF:  
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OUR REF:  
Louis van Bergen/J40001

DATE:  
17 May 2018

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Greenmined Environmental

[yolandie.c@greenmined.co.za](mailto:yolandie.c@greenmined.co.za)

Dear Sir/ Madam

### **PORTION 4 OF THE FARM WOODLANDS 407 NGWATHE LOCAL MUNICIPALITY**

1. We act on behalf of Tja Naledi Beafase Investment Holdings.
2. Mining activities are currently being conducted on the abovementioned land in accordance with our client's mining right issued under FS 30/5/1/1/2/10020.
3. It is our instruction the community members situate in close proximity to the property has recently voiced their concern insofar as they are of the view that the property has to be re-zoned for mining purposes.
4. Our client is practising well within the confines of the applicable legislation and it is accordingly unnecessary for the owners to rezone the property.

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COMPANY PARTICULARS:  
Weavind & Weavind Inc:  
Reg. No. 1976/002814/21  
VAT NO. 4900106073

BEE CERTIFICATION:  
Level 2 Contributor: BBBEE  
Sworn affidavit  
Practice number: F186

DIRECTORS:  
E R Johnson (Chairman)  
J E le Roux  
J T J van Rensburg  
H van Rooy  
S van der Merwe  
N J Viviers  
B C M Ngcobo  
C R Dormehl (Managing)  
E J van Heerden  
A L Kally

ASSOCIATES:  
Y Viviers  
E van der Merwe  
M T Mathulwe  
D J Cloete  
T K Lepinka  
L G van Biljon  
S Oberholzer  
M J Uys  
D de Bruyn  
J C van Zyl  
L van Bergen

BUSINESS MANAGER  
J J Erasmus

5. It is our instruction that silica sand mining has been conducted on the property since the 1970's and was accordingly not subject to a land use scheme at its commencement.
6. You will appreciate that the Ngwathe Local Municipality has yet to adopt a land use scheme as contemplated in Section 24(1) of The Spatial Planning and Land Use Management Act of 2013 ("SPLUMA") nor does its current Land Use Scheme make provision for the zoning of farmland.
7. Consequently the property in question falls squarely within the ambit of Section 26(3) of SPLUMA which is quoted hereunder for your ease of reference:

*"Where no town planning or land use scheme applies to a piece of land before a land use scheme is approved in terms of this Act, such land may be used only for the purposes listed in Schedule 2 of this Act and for which such land was lawfully used or could lawfully have been used immediately prior to the commencement of the Act."*

8. Schedule 2 of the Act in turn includes "mining purposes".
9. In the premises the mining activities conducted on the property in question is not in contravention of any Law and we reiterate that the owners are under no obligation to rezone the property as alleged by the members of the community.
10. Our client is mindful of the value the community adds to its operations and it is accordingly committed to supporting them through the creation of jobs and infrastructure.



11. In order to maintain the longstanding relationship between our client and the community it insists that any grievance must be dealt with on the merits and is committed to settle same amicably.
12. Our client has great commercial interest in the aforesaid property and will oppose any application threatening its activities, we do however believe that this will not be necessary.
13. Please be advised accordingly.

Yours faithfully,

Weavind & Weavind  
Louis van Bergen



**FROM: ADV CARIKE JACOBS**

**IN RE: REZONING OF LAND FOR MINING PURPOSES**

**MATTER: PORTION 4 OF FARM WOODLANDS**

**DATE: 24 OCTOBER 2018**

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**MEMO**

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**1. INTRODUCTION:**

- 1.1 The client is Tja Naledi Beafase Investment Holdings (Pty) Ltd with Reg no. 2001/009357/07 (hereinafter "Tja Naledi").
- 1.2 Tja Naledi is the holder of mining right FS 30/5/1/1/2/10020.
- 1.3 The mining area where this right is to be exercised comprises of Portion 4 of the farm Woodlands 407, which property is situated in the Free State under the Ngwathe Local Municipality (Parys). The property is registered in the Jacobs Family Trust.

- 1.4 The purpose of this advice is to establish if it is necessary for the rezoning of Farm Woodlands for mining purposes.

## **2. BACKGROUND:**

- 2.1 The property referred to above has been used for Silica Sand mining since 1976 by the previous owners of the property. In 2014 Tja Naledi was granted prospecting rights, which rights were conformed into a mining right on 19 August 2016.
- 2.2 Since granting of the mining right, Tja Naledi entered into an agreement with a third party, in terms whereof the third party would conduct a due diligence on the property and subsequent to the outcome of the due diligence would mine on the property and purchase the property. The duration of the due diligence is from November 2017 to July 2018.
- 2.3 The due diligence consists of various mining activities, such as exhuming sand and transporting samples thereof to laboratories for various tests. Subsequently trucks move to and fro the property, which creates dust in the area. The relevant dust-tests have been performed and duly complied with throughout the entire process.
- 2.4 As a result of the dust, the “Home Owners Association” of Parys has lodged a complaint with the Municipality, complaining about the dust and upon legal

advice, informed client that the property needs to be rezoned for mining activities, and that they intend on bringing an application to cease mining activities until such rezoning has taken place.

### **3. APPLICABLE LAW:**

#### **3.1 Spatial Planning and Land Use Management Act 2013 (SPLUMA)**

##### **3.1.1 The following definitions in the Act are of importance to the matter at hand:**

“Land”:...includes Agricultural holding or farm portion;

“zone”:Means a defined category of land use which is shown on the zoning map of a land use scheme;

“land use”: Lawful use in terms of a land use scheme;

“land use scheme”: The documents referred to in Chapter 5 of the Act relating to the regulation of land use.

##### **3.1.2 Section 24 deals with the obligations of a Municipality to establish a Land Use Scheme and provides as follows:**

*“(1) A municipality must, after public consultation, adopt and approve a single land use scheme for its’ area within 5 years from the commencement of this Act. (2) Land Use Scheme in terms of Section (1) must include appropriate categories of land use zoning for the entire*

*municipal area, including areas not previously subject to a land use scheme;”*

3.1.3 Section 26(3) deals with the legal effect of land that wasn't regulated in terms of a land use scheme and provides that:

*“Where no town planning or land use scheme applies to a piece of land before a land use scheme is approved in terms of this Act, such land may be used only for the purposes listed in Schedule 2 of this Act and for which such land was lawfully used or could lawfully have been used immediately prior to the commencement of the Act.”*

3.1.4 Schedule 2 of the Act contains a list of land use purposes under which are included “mining purposes.”

## **3.2 CASE LAW:**

### **3.3 Maccsand (Pty) Ltd v City of Cape Town and Others (CCT103/11) (CC) [2012] ZACC 7; 2012 (4) SA 181 (CC); 2012 (7) BCLR 690 (CC)**

3.3.1 This matter concerned the question whether it is necessary to rezone property when a mining right has already been granted in terms of the Mineral and Petroleum Resources Development Act (MPDRA), however has been zoned for a different purpose in terms of other legislation.

3.3.2 The mining area (land where mining took place), was zoned as “public space” in terms of the Land Use Planning Ordinance (LUPO). LUPO is only applicable to certain provinces.

3.3.3 The Appellant argued that their mining right, which was granted in terms of the Mineral and Petroleum Resources Development Act (MPDRA), trumps LUPO and that they therefore don't have to rezone the property.

3.3.4 However, it was held that the exercise of a mining right is subject to LUPO in this regard and therefore the Appellant was ordered to cease mining activities until the property has been rezoned.

#### **3.4 Ngwathe Local Municipality – Municipal Land Use Planning Draft By-Law**

3.4.1 The abovementioned by-law has not been promulgated at the time of drafting this opinion.

3.4.2 However, it is of relevance to consider same, should it become of force and effect.

3.4.3 Section 14(1) of the By-Law provides that an owner or his agent may apply with the Municipality for the determination of zoning for land.

3.4.4 Section 14(2) provides that when such application is made, the Municipality must consider the following factors:



- The lawful use of the land or which the land could've been used prior to commencement of this by- law;
- Zoning must be compatible with the purpose for which the land is used;
- Any temporary use or consent use that may be required in conjunction with the land use scheme;
- If the land use, immediately prior to commencement of the by-law cannot be established, the zoning which is most desirable and compatible with the title deed condition should be considered.

3.4.5 Section 14(3) provides that if zoning cannot be determined in terms of Section 14(1), then the Municipality must determine a zoning in terms of section 50.

3.4.6 Section 18 provides that the Municipality may rezone for public service, recreational use or substitute the zoning or a part thereof for a zoning for which the land is not necessarily zoned, in accordance with the use thereof or existing rights.

#### **4. APPLICATION OF LAW TO THE FACTS**

##### **4.1 SPLUMA:**

4.1.1 SPLUMA places an obligation on municipalities to establish a Land Use Scheme as provided in Section 24. However, upon consulting representatives from the Ngwathe Local Municipality, it was confirmed that their Land Use Scheme doesn't contain any zoning for Agricultural, or Farmland. Effectively, Farm Woodlands was never zoned for any purposes.

4.1.2 Furthermore, it was confirmed by representatives from the Ngwathe municipality that a By-Law in terms whereof Farmland is to be zoned, has been drafted, but that same hasn't been promulgated yet.

4.1.3 Further confirmation was given to the effect that the existing Land Use Scheme doesn't make provision for the zoning of farmland, as stated above.

4.1.4 Accordingly the mining area, (Farm Woodlands), falls into the category of Section 26(3) read with Schedule 2. This has the effect that the land may be used for the purposes that it was lawfully used or may have been used, prior to the commencement of the Act.

4.1.5 The farm was used for mining purposes since 1976 and accordingly is classified as such in terms of Schedule 2 of SPLUMA.

4.1.6 Therefore in terms of SPLUMA, the farm may be lawfully used for mining purposes.

4.2 MACCSAND-CASE:

4.2.1 The implication of this matter is that if land is zoned in terms of any Municipal Regulations (including a Land Use Scheme in terms of SPLUMA) for a purpose other than what it is being used for, then that property must be rezoned.

4.2.2 The difference between Maccsand and the matter at hand is, however, that in Maccsand the property had already been zoned as “public area” in terms of LUPO. In contrast thereto, in the matter under hand, the property (Farm Woodlands) hasn’t been zoned at all and is by default lawfully used for “mining purposes” in terms of Schedule 2 of SPLUMA.

4.2.3 Furthermore, LUPO isn’t applicable to the Free State and therefore not to Farm Woodlands and there currently doesn’t exist any similar Regulation applicable to the Free State.

#### 4.3 NGWATHE MUNICIPALITY LAND USE BY-LAW

4.3.1 As indicated above, the by-law hasn’t been promulgated and subsequently hasn’t come into operation yet, however for purposes of this opinion, the effect of the by-law should be considered, should it be promulgated.

4.3.2 Section 14 makes it clear that only the owner of the land or his agent may apply for the determination of the zoning of land. This implies that the owner of farm Woodlands or his representative may apply to determine the zoning.

- 4.3.3 The use of the word “may” indicated that there is no obligation on the owner to make such application.
- 4.3.4 Furthermore, if the owner decides to make application in order to determine the zoning the factors to be considered is clearly indicative that the result will be that the land is indeed zoned for mining purposes, as one has to consider what the land was used for prior to this by-law, which is for mining.
- 4.3.5 If the owner or his agent brought an application and there cannot be determined what the zoning is, then the Municipality must determine the zoning of the land, and first cause a notice to be delivered to the owner that made such application.
- 4.3.6 In the matter at hand, the owner of farm Woodlands is under no obligation to apply for the determination of the zoning of farm woodlands as the farm is by default zoned for mining purposes in terms of SPLUMA as stated above.
- 4.3.7 Subsequently, the Municipality has no authority to determine the zoning if the owner does not bring an application for the determination of zoning in terms of Section 14.
- 4.3.8 The by-law makes it clear that the lodging of such application by the owner is a pre-requisite for the municipality to determine the zoning of land.

4.3.9 The only instance in terms whereof the Municipality may, on its own initiative, rezone land that it is not the owner of, is for a public service recreational area or to substitute the zoning for a zoning that is in accordance with what the land is used for or existing rights.

4.3.10 As the farm is already used for mining, (historically since 1976), and a valid mining right is being used therefore, the land is already being used for the purpose that it is zoned for, being mining.

## **5. CONCLUSION:**

5.1 Based on the above, Farm Woodlands may be lawfully used for mining purposes as this is what the property was used for prior to the commencement of SPLUMA.

5.2 The property hasn't been zoned for a different purpose in terms of any Municipal Regulations, than what it is being used for at the moment.

5.3 A legal mining right exists, all the other requirement in terms of the DMR have been met and therefore any and all mining activities currently taking place on the property is lawful and in accordance with the MPDRA.

- 5.4 Should the Ngwathe Local Municipality's draft By-Law be promulgated, the sections above are clearly indicative thereof that the owner is not obliged to determine the zoning, as the land is already by default zoned for mining purposes and even if the Municipality wishes to zone the land, it has to take into account that the land has been used for mining purposes since 1976.
- 5.5 Therefore, for the reasons as stated above, there is no legal basis upon which the farm has to be rezoned.

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**ADV C JACOBS**

## Yolandie Coetzee

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**From:** Carike Jacobs <carikej88@gmail.com>  
**Sent:** Thursday, 25 October 2018 12:51 PM  
**To:** Yolandie Coetzee  
**Subject:** Fwd: REZONING

**Follow Up Flag:** Follow up  
**Flag Status:** Flagged

Hi Yolandi,

Ek forward ook die korrespondensie aan jou.



Adv C Jacobs

**Advocate** | Pretoria Society of Advocates

mobile: [0833750651](tel:0833750651)

site: [www.pretoriabar.co.za](http://www.pretoriabar.co.za)

email: [Carikej88@gmail.com](mailto:Carikej88@gmail.com)

address: Groenkloof Chambers, 205 Florence Ribeiro Ave, Groenkloof, Pretoria

----- Forwarded message -----

From: **Carike Jacobs** <[carikej88@gmail.com](mailto:carikej88@gmail.com)>  
Date: Thu, Oct 25, 2018 at 12:48 PM  
Subject: REZONING  
To: <[ppnhlapo53@gmail.com](mailto:ppnhlapo53@gmail.com)>  
Cc: <[graeme@sphgroup.co.za](mailto:graeme@sphgroup.co.za)>, Joy Rabotapi <[joy.rabotapi@gmail.com](mailto:joy.rabotapi@gmail.com)>

Dear Phumzile,

With reference to your previous correspondence with Graeme Campbell, kindly confirm the following:

When was the Ngwathe Municipality's SPLUMA BY-Law promulgated?

Is it correct, that should such formal application be made, the mining activities will not be suspended, pending the application?

Furthermore, the farm should be zoned for mining activities and therefore no formal application has been, or in our opinion should have been made.

Mining activities are lawfully, and have always been, lawfully conducted on the farm.

This is clearly stated in the opinion that was sent to you.

Kindly let us have your advice herein as a matter of urgency.

Regards,



Adv C Jacobs

**Advocate** | Pretoria Society of Advocates

mobile: [0833750651](tel:0833750651)

site: [www.pretoriabar.co.za](http://www.pretoriabar.co.za)

email: [Carikej88@gmail.com](mailto:Carikej88@gmail.com)

address: Groenkloof Chambers, 205 Florence Ribeiro Ave, Groenkloof, Pretoria