MARIPE J.

IN THE HIGH COURT OF THE REPUBLIC OF BOTSWANA

HELD AT MAUN

Case No: MAHMN-000075-22

In the dispute between

GCWIHABA RESOURCES (PTY) LTD — Applicant

And

MINISTER OF MINERALS AND ENERGY — First Respondent

ATTORNEY GENERAL — Second Respondent

FILING NOTICE

FILED HEREWITH:

1. Applicant's Heads of Argument.

DATED AT GABORONE ON THIS 24TH DAY OF MARCH 2023.

MAUN HIGH COURT
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24 MAR 2023
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TO: THE REGISTRAR

High Court
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AND TO: **ATTORNEY GENERAL**
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For Respondents
Government
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GABORONE

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APPLICANT'S HEADS OF ARGUMENT

INTRODUCTION

1. By Notice of Motion brought under the rubric of Order 61 of the Rules of this Court dated and filed with this Honourable Court on 31 October 2022, the Applicant has called upon the Respondents to show cause why their failure to renew its Prospecting License No. 020/2018 should not be declared to be illegal, unreasonable, irrational and arbitrary. In other words, the Applicant seeks a judicial review of the Respondents' failure to renew its Prospecting License No. 020/2018.

2. The Respondents have opposed these proceedings; however, they have failed to state the grounds upon which the Applicant's Notice of Motion is opposed. Such grounds, if at all present, must be assumed from the wording of the Respondents' Answering Affidavit.

3. At this stage of the proceedings, the factual background of this matter is common cause and the Applicant reiterates the contents of paragraph 8 to 13 of its Founding Affidavit.

4. In light of the above, these heads of argument are submitted in furtherance of the Applicant's case to the effect that the First Respondents' failure to renew its Prospecting License No. 020/2018 is illegal, unreasonable, irrational and arbitrary and therefore the Applicant's Prospecting License must forthwith be renewed.

ISSUES FOR DETERMINATION

5. This Honourable Court is called upon to determine:

5.1. whether or not the Applicant has made out a case for judicial review.

JUDICIAL REVIEW

6. As a starting point, it is necessary to quote the words of the Honourable Dr Justice Key Dingake in his book Administrative Law in Botswana Cases Materials and Commentaries ("*Dingake*"):

> "*Public bodies are not licensed to do as they please. They must make their decision within the broad parameters of the law; they must act in accordance with the minimum standards of fairness. When they derogate from the provisions of statute that created them, or act capriciously, maliciously or unreasonably and make decisions adversely affecting persons, such persons may challenge their decision before the High Court." [Our emphasis]*

7. It is further necessary to highlight the often quoted statement by Innes CJ in the case of *Johannesburg Consolidated Investment Co. v Johannesburg Council 1903 TS 111*:

"Whenever a public body has a duty imposed on it by statute and disregards important provisions of the statute or is guilty of gross irregularity or clear illegality in the performance of the duty, this court may be asked to review the proceedings complained of and set aside or correct them. This is no special machinery created by the Legislature; it is a right inherent in the Court..."

8. In *casu*, the Respondents, in particular the First Respondent, is a public body who in this case has duties imposed on him by the Mines and Minerals Act [Cap. 66:01] (*"M&MA"*). By its Notice of Motion, the Applicant alleges that the Respondents have disregarded the provisions of the M&MA and this has resulted in a gross irregularity and a clear illegality in the performance of the Respondents duties under the M&MA.

9. It is submitted on the Applicant's behalf that legality is at the heart of the review process and by its Notice of Motion, the Applicant has called upon this court to determine whether or not the Respondents actions are legal.

10. In the case of Council of Civil Service Unions and Others v Minister for the Civil Service [1984] 3 All ER 935, HL (E) at p 950, Lord Diplock noted the grounds for judicial review as follows:

"Judicial review has I think developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call "illegality", the second "irrationality" and the third "procedural impropriety". That is not to say that further development on a case by case basis may not in course of time add further grounds."

11. The above grounds have since been adopted in our Courts and are now trite. See *Raphethela v The Attorney-General [2003] 1 BLR 591 and in Panpharma (Pty) Ltd V Director of Health Services And Others 2007 (2) BLR 502 (HC)*. In particular, in the more recent case of *Chairman, Gambling Authority and Another v Moonlite Casino [2018] 1*

BLR 40, (CA), the court observed at paragraph 25 that a judicial review of administrative or executive action will be available where there is a successful challenge of such action on any one of three grounds, namely, illegality, irrationality, and procedural impropriety. At paragraph 26, the court added that:

> *"It is also well established that as a general rule the applicant must not only aver the conclusions of the alleged ground but must set out clearly the facts upon which each of the conclusions is based. Say for instance, where application is based on the ground of irrationality of the decision maker, sufficient averments must be made in the founding affidavit setting out those facts in sufficient detail which are alleged to amount to any alleged irrationality whether it be bias, mala fides, or failure to take into account relevant factors which had to be taken into account in making a decision or taking into account irrelevant factors. This is so for in motion proceedings affidavits constitute both pleadings and the evidence of the party filing them. They serve the dual purpose of defining the issues between the parties and placing the essential evidence before the court"*

12. For avoidance of doubt, and as gleaned from the Applicant's Founding Affidavit, all three grounds are taken up by the Applicant in these proceedings and the Applicant motivates same hereunder by underscoring the averments from the Founding, Supplementary and Replying Affidavit which speak to each ground.

ILLEGALITY: BREACH OF DUTY TO ACT IN ACCORDANCE WITH SECTION 17 OF THE MINES AND MINERALS ACT

13. A logical starting point is section 17 of the M&MA which provides as follows:

"(1) *Subject to this Act, a prospecting licence shall be valid for such period as the applicant has applied for, which period shall not exceed three years.*

(2) *The holder of a prospecting licence may, at any time not later than three months before the expiry of such licence, apply to the Minister by completing Form I set out in the First Schedule for renewal thereof stating the period for which the renewal is sought and submitting together with the application*

(a) *a report on prospecting operations so far carried out and the direct costs incurred thereby; and*

(b) *a proposed programme of prospecting operations to be carried out during the period of renewal and the estimated cost thereof.*

(3) *Subject to this Act, the applicant shall be entitled to the grant of no more than two renewals thereof, each for the period applied for, which periods shall not in either case exceed two years, provided that*

(a) *the applicant is not in default; and*

(b) *the proposed programme of prospecting operations is adequate.*

(4) *Before rejecting an application for renewal under subsection 3(a), the Minister shall give notice of the default to the applicant and shall call upon the applicant to remedy such default within a reasonable time.*

(5) *Before rejecting an application for renewal under (3)(b), the Minister shall give the applicant opportunity to make satisfactory amendments to the proposed programme of prospecting operations.*

(6) *Notwithstanding the provisions of subsection (3), the Minister may renew a prospecting licence for a period or periods in excess of the periods specified in that subsection where a discovery has been made and evaluation work has not, despite proper efforts, been completed.*"

14. Of relevance to these heads of argument is section 17 (2) and (3) above, the contents of which are clear and unambiguous.

15. With respect to section 17 (2) it is clear that the Applicant had to make a renewal application to the First Respondent, three months prior to the expiry of Prospecting Licence No. 020/2018. This said prospecting license is attached to the Applicant's Founding Affidavit and marked "**CCC 10**" and on its face, it is clear that it commenced on 01 October 2018, ran for a period of 3 years and was due to expire on 30 September 2021.

16. The Applicant has demonstrated that it duly filed its renewal application 3 months prior to the said expiry date of 30 September 2021. In this light, it is therefore submitted that the Applicant had complied with its pre-requisite for renewal in terms of the M&MA. The averment in this regard has been made at paragraph 14.4. and 33 of the Founding Affidavit as read with paragraph 33 of the Replying affidavit.

17. Following its renewal application, the burden then fell on the First Respondent to renew the Applicant's prospecting licence. It is necessary to point out that section 17(3) gives the Applicant a right of two renewals which shall not exceed a period of two years each. See this averment at paragraph 31 of the Founding Affidavit.

18. The above referred right of renewal is peremptory as evidenced by the use of the word shall. Per section 45 of the Interpretations Act, the word shall in statutes is to be

construed as imperative. This means that there is no room to argue that the Respondents have a discretion to renew or otherwise.

19. The only hindrance to the Applicant's renewal are the two factors listed by section 17 (3) (a) and (b), *viz* that the Applicant is in default or the proposed programme of prospecting is inadequate.

20. The Applicant has pleaded at paragraph 32 of its Founding Affidavit that it was not in default, and further that its proposed programme of prospecting was more than adequate. This is a fact that has not been denied by the Respondents.

21. It therefore follows that the fact that the Respondent has failed, refused and or neglected to give the Applicant its renewal (a renewal as of right) has resulted in an illegality.

22. It is therefore submitted that the action of the First Respondent to not renew the Applicant's Prospecting License No. 020/20 is unlawful and therefore an illegality.

IRRATIONALITY/ UNREASONABLENESS

23. On this ground, Dingake has noted as follows at page 261:

> *"Unreasonableness, as a ground for judicial review of administrative decisions is a comprehensive term which embraces a wide variety of defects including misdirections, improper purpose, disregard of relevant considerations and advertance to immaterial factors. . . ."*

Misdirections

24. It is submitted, as will be seen from paragraph 17 of the Supplementary Affidavit that the First Respondent has been and continues to operate (as will be seen from his Answering Affidavit) under the false impression that prospecting activities are prohibited in the buffer zone.

25. There is nothing both at international law or domestic law which prohibits prospecting or mining in the buffer zone. The UNESCO Operational Guidelines for the Implementation of the World Heritage Convention WHC. 13/01 July 2013 ("Operational Guidelines") as filed of record, which seek to facilitate the implementation of the Convention concerning the Protection of the World Cultural and Natural Heritage (hereinafter referred to as "the World Heritage Convention") ought to be guiding on this issue.

26. It will be seen that nowhere in Operation Guidelines is it stated that '*prospecting and mining activities are prohibited within the buffer zone of the Okavango Delta World Heritage Site, and if permitted, they are to be subjected to the stringent Environmental Impact Assessment Measures in accordance with the Environmental Assessment Act and Environmental Regulations*' [1]as has been misconstrued by the First Respondent.

27. In view of the above it is submitted that the First Respondent has misdirected himself with regards to prospecting in the buffer zone and such a misdirection has in turn, resulted in the Respondents' unreasonableness.

Improper purpose

28. As averred in the Applicant's Affidavits, it is submitted that the First Respondent's insistence that he has not rejected the Applicant's application is false. Rather such an act by the First Respondent has resulted in he exercising his duty to perform under the M&MA for an improper purpose.

29. This improper purpose, so it is submitted, is the First Respondent withholding the Applicant's renewal whilst actively strong arming the Applicant into vacating its rights and interest within the buffer zone. Such an act by the First Respondent is an abuse of power and this Court must swiftly move to protect the Applicant from such abuse of public power.

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[1] See Respondents Answering Affidavit.

Disregard of Relevant Considerations

30. It is not a secret that the Government coffers are dry and in turn the Government is struggling to create jobs; improve its health care; maintain its roads, schools and infrastructure. It is also not a secret that the Government, through the President of the day, is actively seeking ways in which the Government can generate more revenue. This are all relevant factors which the First Respondent did not consider with respect to the Applicant.

31. It has been pleaded at paragraph 9 of the Founding Affidavit that the Applicant in its prospecting has discovered a tonnage of 441 Mt of inferred iron resource within the prospecting area with a current in-situ value approximated to be worth $27 Billion USD, of which 164 Mt worth $6.8 Billion USD is located within the buffer zone. A further study indicates that the resource in the buffer zone has a Net Present Value of some $87M USD. It is yet again a relevant factor which the First Respondent has neglected to consider leading up to this cause.

32. It is submitted that the benefit of renewing the Applicant's prospecting license far outweighs the opposite decision not to renew. It therefore follows that in failing to consider these benefits, the First Respondent has acted irrationally.

PROCEDURAL IMPROPRIETY: BREACH OF THE PRINCIPLES OF NATURAL JUSTICE

33. According to H.W.R Wade and C.F. Forsyth, Administrative Law, 11th Ed, in its broadest sense, natural justice simply means 'the natural sense of what is right and wrong' and even in its technical sense it is equated with 'fairness'.

34. It is submitted that under this header, this Court must be guided by the time immemorial words of Lord Hewart in the case of Rex v. Sussex Justices, [1924] 1 KB 256 wherein he noted as follows:

"It is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done".[2]

35. The High Court and Court of Appeal have in numerous decisions emphasised the need for those in authority to always observe and comply with the rules of natural justice when making decisions that affect other persons.[3]

36. The Applicant has in its Founding Affidavit pleaded that it is a victim of a breach of both the principles of natural justice to wit, the right to be heard and bias. The succeeding paragraphs deal with both principles separately.

RIGHT TO BE HEARD

37. In case of *Masimolole v The Attorney-General and Another [1997] BLR 142, CA,* it was observed that:

"... what the audi alterem partem rule involves is to bring home to the affected party the substance of the complaint against him to afford him an opportunity of giving his explanation by way, for example, of representations, and genuinely taking the explanation into account in arriving at the decision."

38. In casu, the First Respondent has pleaded at paragraph 13.5 that:

"The Ministry's position currently is that continuation of encroachment of Gcwihaba Resources' Prospecting License has gone on for too long and it exposes Botswana to risks of adverse publicity from International Environmental Pressure Groups, possible sanctions or boycotts as a result of possible perception that Botswana Government is flouting guidelines for protection of World Heritage Sites by continuing to license prospecting

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[2] As restated in the case of Gaetsaloe v Debswana Diamond Co (Pty) Ltd (2) 2010 (1) BLR 110 (CA).
[3] See Udongo v University of Botswana 2002 (2) BLR 218 (HC).

activities within the buffer zone without an approved Environmental Assessment Statement."

39. The above is a position reached without affording the Applicant, a right holder directly affected by this position, a chance to make representations (to be heard). This act clearly runs afoul of this natural principle of justice. By this fact, the Respondents position is one which ought to be reviewed and set aside by this Court.

BIAS

40. In the case of *President of the Republic of South Africa and Others v South African Rugby Football Union and Others 1999 (4) SA 147 (CC)* the court applied the following test:

> *"the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal that test is 'what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude'."*

41. The above test has since been adopted and reiterated in our courts including in the case of Seokamo v Keaja and Another [2018] 1 BLR 55 (CA). The latter judgment states that the question for determination when an objection of bias has been raised is whether any apprehension of bias is reasonable and based on reasonable grounds.

42. Hereunder, the Applicant has pleaded at paragraphs 8.10 and 16 of its Founding Affidavit that '*the Reports sent to the WTC by the Government of Botswana were, as early as 2015, to the effect that prospecting and mining licenses, such as that of the Applicant, falling within the buffer zone would not be renewed.*'

43. By reason of the above referred Reports, the Respondents have since formed a notion, against the Applicant to the effect that its prospecting license will not be renewed. The Respondents with their preconceived notion are the same people who then exercise the

public power to renew the Applicant's prospecting license, this is a fact that reasonably leads one to concluded that the Respondents will be biased in their decision to renew the Applicant' prospecting license.

COMPENSATION

44. The Applicant is mindful of the fact that this Court ultimately has a discretion to not set aside the Respondents' decision not to renew its Prospecting License No. 020/2018 notwithstanding that it has found such a decision to be unlawful.

45. By reason of the above, the Applicant has pleaded that it has incurred a lot of expenses in prospecting in terms of its license in issue. Further, by virtue of the license and the discovery of the resource in the prospecting area, the Applicant has a vested financial interest that would be deprived. It follows that this court must then consider the issue of compensation and damages.

46. In the recent Court of Appeal judgement of Attorney General and Other v Kgosi Mosadi Seboko and other – CACGB – 153 – 21, Tau JP, noted as follows at paragraph 58 and 59:

> *"Section 3(c) of the Constitution entrenches the freedom from deprivation of property without compensation.*
>
> *Section 8 prohibits compulsory acquisition unless certain conditions are met i.e.*
>
> a) *Where the acquisition is necessary and expedient and cogent reason has been provided for doing so;*
>
> b) *Where payment or compensation for compulsory acquisition has been provided;*

c) *When the legislative scheme provides for a right of access to the High Court for determination of those rights and interest."*

47. For completeness, the Applicant submits that none of the above conditions have been met by the Respondents.

48. In *casu*, the Applicant has pleaded that it is currently being deprived of its right to the prospecting license and the prospecting area. It is submitted that this is a form of compulsory acquisition and the Applicant is entitled to compensation for such deprivation until the date that such deprivation ceases. The Applicant prays that such compensation be assessed by the Registrar of this Court.

49. In the event that this Court does not set aside the Respondents' unlawful acts, it is further submitted that compensation for the permanent deprivation of the Applicant's rights to the prospecting license and the prospecting area be assessed by the Registrar of this Court.

CONCLUSION

50. From the above submissions, it is clear that the Applicant has made out a case for review and as such it is entitled to having the Respondents' decision set aside, and compensated to the extent of compulsory deprivation of its rights to the prospecting license and prospecting area to date. Further, that in the event that this court does not set aside the unlawful actions, to be compensation.

51. The Applicant therefore prays for an order in terms of the draft order filed of record.

Respectfully submitted,

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24 March 2023