REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 257/2011

In the matter between:

TUMAS GRANITE CLOSE CORPORATION **APPLICANT**

and

THE MINISTER OF MINES AND ENERGY **FIRST RESPONDENT**

THE MINING COMMISSIONER, WINDHOEK **SECOND RESPONDENT**

Neutral citation: *Tumas Granite Close Corporation v The Minister of Mines and Energy* (A 257/2011) [2012] NAHCMD 99 (December 2012)

Coram: PARKER AJ

Heard: **26 November 2012**

Delivered: **6 December 2012**

Flynote: Applications and motions – Mandamus – Application to compel the first respondent (Minister) to exercise his discretionary power under the Minerals (Prospecting and Mining Act 33 of 1992, s 59(1).

Flynote: Mandamus – Purpose of – Mandamus lies to serve two purposes.

Summary: Applications and motions – Mandamus – Application to compel the first respondent (Minister) to exercise his discretionary power under the Minerals

(Prospecting and Mining) Act 33 of 1992, s 59(1) by taking a decision on applicant's application for reconnaissance licence made to him – Court finding that first respondent has refused or failed to exercise his discretionary power under s 59(1) of that Act – Court holding that in application for mandamus court is generally not concerned with reasons why an administrative body or administrative official has failed or refused to exercise a statutory discretionary power but is rather concerned with the fact of such failure or refusal which has aggrieved the applicant – In instant case court not concerned with Government Notice No. 41 of 2007 relied on by first respondent's for his refusal or failure to act on the applicant's application – Mandamus shall therefore issue as redress to compel the first respondent to exercise his statutory discretionary power performing a specific duty under s 59(1) of the Act.

Summary: Mandamus – Purpose of – Mandamus lies to serve two purposes – Mandamus lies (a) to compel the performance of a specific duty by an administrative body or administrative official and (b) to remedy the effects of unlawful action already taken.

ORDER

(a) The first respondent must not later than 31 January 2013 take a decision on the applicant's application for a reconnaissance licence, dated 10 March 2011 and lodged with the first respondent on 11 March 2011.

(b) The respondents shall jointly and severally pay to the applicant the costs of this application; the one paying, the other to be absolved, and the costs include costs of one instructing counsel and one instructed counsel.

JUDGMENT

PARKER AJ:

[1] This application comes before the court by way of a notice of motion in which the applicant prays for an order in terms of paras 1, 2, 3 and 4 of the notice of motion. The respondents have moved to reject the application. As respects para 3; initially costs of two instructed counsel was prayed for, but this has been amended to read costs of one instructing counsel and one instructed counsel.

[2] The application is basically for mandamus. The matter is set around Namibia's minerals; and concerns an application lodged on 11 March 2011 with the first respondent for a reconnaissance licence. The application was made in terms of s 59(1)(a) of the Minerals (Prospecting and Mining) Act 33 of 1992 (the Act). Having received no response from the first respondent the applicant made enquiries to the second respondent about the status of the application. There was no response; hence the present application. In his answering affidavit the second respondent admits that, indeed, no reply was furnished to the applicant on his application for a reconnaissance licence until the current court application was launched. What is contained in the answering affidavit is instructive and holds the key to determination of this application, which, as I have said previously, is that the first respondent has been brought on mandamus. The second respondent states in his affidavit:

'5.It is admitted that indeed no reply was furnished to the applicant on his application for a reconnaissance licence until the current court application was launched. There is a moratorium on new applications for nuclear fuel group of minerals as per Government Notice, 41 of 2007, a copy of which is attached and marked **"EIS1"**. The Respondents were not, and still are not, in any position to consider the application for a reconnaissance license applied for by the applicant as doing so will be in contravention of the moratorium in place. It will not serve any purpose to consider an application in respect of which a moratorium exists.'

[3] The following crucial and relevant factual finding is made from the statement by the second respondent: The first respondent has not considered, let alone taken a decision on, the applicant's reconnaissance licence application. In a few words; the

first respondent has not decided, that is, he has not done any ‘act’ (in the language of Article 18 of the Namibian Constitution) in respect of the reconnaissance licence application. But as an administrative official, the first respondent must carry out a specific statutory duty, that is to ‘act’ on the reconnaissance licence application, and not merely to ‘consider’ it, that is, bring his mind to bear on the application without taking the necessary action on the application. It would seem, as Ms Schneider, counsel for the applicant, put it with witticism but also with great thoughtfulness, the first respondent has decided by not considering the application. But the specific statutory duty that the first respondent must perform is to take action in respect of the reconnaissance licence application; but not to decide by not considering the application.

[4] If this consideration and conclusion are extrapolated to the interpretation and application of s 59(1) of the Act, read with Article 18 of the Namibian Constitution, the following conclusions emerge inexorably. The word ‘grant’ in s 59(1) of the Act (which presupposes ‘refuse’ since the Minister’s (the first respondent’s) power is discretionary) denotes ‘act’ in Article 18 of the Namibian Constitution. It follows that in the instant case – in the second respondent’s own statement in the respondents’ answering affidavit (quoted above), it is indisputed that the first respondent has not done any ‘act’; he has not exercised his statutory discretion which is to perform the specific statutory duty to either grant or refuse the applicant’s reconnaissance licence application within the meaning of s 59(1) of the Act, and that has resulted in the bringing of this application by an aggrieved party, the applicant.

[5] For all the aforegoing and with the greatest deference to Ms Koita, counsel for the respondents, I should say that there is no merit in counsel’s argument that the first respondent has taken action as respects the applicant’s reconnaissance licence application and the applicant cannot complain as he has not taken the so-called decision on review. The evidence on the papers does not account for counsel’s contention that a decision has been taken on the application. Counsel’s argument appears to be predicated on Government Notice No. 41 of 2007, entitled ‘Reservation of Area from Prospecting Operations and Mining Operations in Respect of Nuclear Fuel Minerals: Minerals (Prospecting and Mining) Act, 1992’; and

counsel's argument take up the refrain from the above-quoted statement in the respondents' answering affidavit, namely, 'There is a moratorium on new applications for nuclear fuel group of minerals as per Government Notice, 41 of 2007 ….'

[6] I have said more than once that the indisputable fact is that the first respondent has failed or refused to carry out his statutory duty under the Act in respect of the applicant's reconnaissance licence application. In an application for mandamus, the court is generally not concerned with the reason why the administrative body or administrative official has not carried out its or his or her statutory duty: it is concerned with the allegation that it or he or she has failed or refused to exercise a statutory power and the applicant has been aggrieved by such failure or refusal. And mandamus lies to serve two purposes: (a) to compel the performance of a specific duty; and (b) to remedy the effects of unlawful action already taken. See Lawrence Baxter, *Administrative Law* (1991) pp 690–691, and the cases there cited. For the enquiry I have made previously, it follows that purpose (b) of the Baxter proposition, which I accept as good law, does not apply on the facts of the present case since the first respondent has not taken any action on the applicant's reconnaissance application. Thus, with respect, I should say in parentheses that item (b) debunks Ms Koita's argument that mandamus does not lie to undo what has already been done. In any case, as I have said more than once, the first respondent has not done anything; he has not decided; he has not exercised his discretionary power under the Act; he has failed or refused to perform a specific statutory duty, which, as have said previously, is to grant or refuse the applicant's reconnaissance application. In this regard, the point must be signalized that the source of the first respondent's power is s 59(1) of the Act and not any delegated legislation, including Government Notice No. 41 of 2007.

[7] In view of what I have stated in para 5 about what the court is concerned with in an application for mandamus and in para 6 about the purpose of mandamus, coupled with the fact that I have determined this application on the basis of purpose (a) in Baxter's exposition, what I have said above in relation to Government Notice No. 41 of 2007 is all that I wish to say about that Government Notice. It is my firm view that any opinion I express on the interpretation of Government Notice No. 41 of

2007 (which appears to be the reason why, according to the respondents, the first respondent has not taken any action in terms of s 59(1) of the Act) will be *obiter dicta*. I have therefore restraint myself from expressing any such opinion. An exercise in the interpretation and application of Government Notice No. 41 of 2007 has, accordingly, not become necessary in this proceeding on account of – as I say – the reasoning and conclusions that I have put forth previously. It follows that *Black Range Mining (Pty) Ltd v The Minister of Mines and Energy NO and the Mining Commissioner of Namibia NO and Jonas Nakale* Case No. A 305/2009 (Unreported), referred to me by Ms Koita and *Otjozondu Mining (Pty) Ltd v Minister of Mines and Energy and Another* 2007 (2) NR 469 (HC) referred to me by Ms Schneider are of no assistance on issue under consideration in the present application.

[8] For all these reasons, mandamus should issue, and in terms of para 1 of the notice of motion. For completeness, I should say that the alternative in para 2 (which is an alternative to para (1)) is not available in virtue of the principle of *delegatus non potest delegere*: the Act does not give the first respondent the power to delegate his power under s 59(1) of the Act to any administrative body or any other administrative official. Whereupon; I make the following order:

(a) The first respondent must not later than 31 January 2013 take a decision on the applicant's application for a reconnaissance licence, dated 10 March 2011 and lodged with the first respondent on 11 March 2011.

(b) The respondents shall jointly and severally pay to the applicant the costs of this application; the one paying, the other to be absolved, and the costs include costs of one instructing counsel and one instructed counsel.

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C Parker

Acting Judge

APPEARANCES

APPLICANT: H Schneider
Instructed by Dr Weder, Kauta & Hoveka Inc., Windhoek

FIRST AND SECOND RESPONDENTS: T Koita
Of Government Attorney, Windhoek