REPORTABLE

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: A236/2011

In the matter between:

SAMICOR DIAMOND MINING (PTY) LTD	**APPLICANT**

and

THE MINISTER OF MINES AND ENERGY	**FIRST RESPONDENT**
THE MINING COMMISSIONER	**SECOND RESPONDENT**
BAOBAB EQUITY MANAGEMENT (PTY) LTD	**THIRD RESPONDENT**

Neutral citation: Samicor Diamond Mining (Pty) Ltd v Minister of Mines and Energy and others (A 236-2011) [2013] NAHCMD 41 (19 February 2013)

Coram: VAN NIEKERK J

Heard: 16 November 2012

Delivered: 19 February 2013

Flynote: Review – Time delay - Applicant seeking review of decisions relating to exclusive prospecting licences under Minerals (Prospecting and Mining) Act, 33 of 1992 – Twenty-seven months after applicant gained knowledge of decisions – Held on the facts that delay unreasonable – discretion exercised not to condone unreasonable delay

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ORDER

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1. The third respondent's point *in limine* is upheld.

2. The application is dismissed with costs.

JUDGMENT

VAN NIEKERK J:

Introduction

[1] This is a review application which concerns the handling and consideration of two applications for an exclusive prospecting licence ('EPL') in terms of Part X of the Minerals (Prospecting and Mining) Act, 1992 (Act 33 of 1992), ('the Minerals Act') as amended.

[2] The applicant does business as a mining company and holds several mineral licences. The first respondent is the Minister of Mines and Energy ('the Minister') who may in terms of the Minerals Act, *inter alia*, grant or refuse new applications for EPLs and grant or refuse applications for renewal of EPLs. The second respondent is the Mining Commissioner ('the MC') appointed in terms of section 4 of the Minerals Act. The third respondent is Baobab Equity Management (Pty) Ltd ('Baobab') and is the only respondent who opposes the application.

[3] The applicant seeks an order in the following terms:

> '1. Calling upon Respondents to show cause why:
>
> 1.1 The decision taken by the First Respondent on or about the 23rd of April 2009 to refuse the application by the Applicant for Exclusive Prospecting Licence 3947 in respect of industrial minerals and under the Minerals (Prospecting and Mining) Act, No 33 of 1992, as amended ("the Act"), should not be

1.1.1 declared unfair and in conflict with the Constitution of Namibia;

1.1.2 declared *ultra vires* the powers of the First Respondent and accordingly null and void, and

reviewed and set aside in terms of Rule 53(1);

1.2 The abovementioned application for the Exclusive Prospecting Licence should not be granted to the Applicant by this Honourable Court in terms of the Act; alternatively referred back to the First Respondent for reconsideration in terms of the Act;

1.3 The Exclusive Prospecting Licence 4264 purportedly granted by the First Respondent to Third Respondent under the Act on or about the 8th of June 2009 should not be

1.3.1 Declared unfair and in conflict with the Constitution of Namibia;

1.3.2 Declared *ultra vires* the powers of the First Respondent and accordingly null and void, and

1.3.3 reviewed and set aside in terms of Rule 53(1).

1.4 The decision by the First Respondent to neglect or delay the processing of the application by the Applicant for Exclusive Prospecting Licence 3947 from November 2007 to April 2009 should not be:

1.4.1 Declared unfair and in conflict with the Constitution of Namibia;

1.4.2 Declared *ultra vires* the powers of First Respondent and accordingly null and void, and

1.4.3 reviewed and set aside in terms of Rule 53(1);

1.5 The failure and/or refusal by the First Respondent and/or the Second Respondent to consider applications for Exclusive Prospecting Licence[s] in the order in which they are received over the period November 2007 to April 2009, as required by Section125 of the Act, should not be

1.5.1 Declared unfair and in conflict with the Constitution of Namibia;

1.5.2 Declared in conflict with the Act;

1.5.3 Declared *ultra vires* the powers of the First Respondent and/or Second Respondent and accordingly null and void, and

1.5.4 reviewed and set aside in terms of Rule 53(1)

1.6 The refusal by the Second Respondent on or about the 3rd of July 2009 to allow representatives of the Applicant to inspect the register of Mineral Licences at the Second Respondent, as well as Exclusive Prospecting Licence 4264, should not be

1.6.1 Declared unfair and in conflict with the Constitution of Namibia;

1.6.2 Declared in conflict with the Act;

1.6.3 Declared *ultra vires* the powers of Second Respondent [and] accordingly null and void, and

1.6.4 reviewed and set aside in terms of Rule 53(1).

3. With immediate effect ordering the Second Respondent to allow access to the representatives of the Applicant to inspect the register of Mineral Licences at the Second Respondent's office in respect of Exclusive Prospecting Licences 4264 and 3947.

4. Ordering the Respondents to pay the costs of this application jointly and severally, the one paying the other to be absolved, which Order shall not apply to the Third Respondent, should the Third Respondent not oppose this application.

5. Further or alternative relief.'

Summary of factual allegations by the applicant

[4] The applicant has been involved in exploration in a certain offshore area between Lüderitz and Walvis Bay and is the holder of EPL 3776 and EPL 3777 in this area. The results of this exploration indicated the possible existence of a viable phosphate mining area deeper into the sea. This area is covered by EPL 3946 and EPL 3947. The applicant lodged applications for these two EPLs in November 2007. EPL 3946 was granted in July 2008, but EPL 3947 remained pending.

[5] The managing director and deponent to the applicant's founding affidavit, Mr Kombadayedu Kapwanga, made enquiries at the office of the second respondent, the Mining Commissioner ('the MC'), about the reason for the delay and was informed that the work load had caused a backlog in the processing of applications.

[6] During June 2009 Mr Kapwanga noticed that the EPL map displayed on the website of the Ministry of Mines and Energy ('the Ministry') no longer reflected EPL 3947 as pending, but indicated instead that another application by the third respondent ('Baobab'), namely for EPL 4264, was pending. This was in respect of an area with exactly the same coordinates and for the same class of minerals as in the case of EPL 3947.

[7] On 8 June 2009 the applicant forwarded a letter ('KK5') to the MC requesting clarification on the overlapping of EPL 3947 and EPL 4264. In the letter the applicant expresses concern because of the fact that Baobab allegedly obtained confidential information, more specifically, the coordinates of EPL 3947, which were allegedly known only to the applicant and the Ministry. Baobab disputes that this information is confidential. The applicant also noticed that certain applications lodged after the application for EPL 3947 had already been processed and licences granted and questioned this procedure. This, the applicant explained in its affidavit, would be irregular and unlawful, as section 125 of the Minerals Act provides that all applications in terms of the Act shall be considered by the Minister or the MC, as the case may be, in the same order as such applications have been made and received in the office of the MC. This letter elicited no reply.

[8] On 11 June 2009 the applicant sent a written motivation to the MC to speedily process the application for EPL 3947 ('KK15').

[9] On 22 June 2009 Mr Hückstedt, an employee of the applicant spoke to Mr Abraham Iilende, the deputy director in the Mineral Rights and Resources Division of

the Ministry. Mr Iilende confirmed that he had received 'KK5'. He stated that the application for EPL 3947 must still be tabled and had not yet been considered. He referred Mr Hückstedt to Ms Meroro, the principal geologist at the Ministry, to ascertain from her what the status of the application was.

[10] On 30 June 2009 Ms Meroro informed Mr Hückstedt that Mr Iilende himself had refused the application for EPL 3947 on 23 April 2009 already and that he had personally deleted this application from the system. In the founding affidavit Mr Kapwanga states that until the date he deposed to the affidavit (i.e. on 17 August 2011) the applicant had not yet been officially informed that the application for EPL 3947 had been rejected.

[11] Upon being informed of these developments, Mr Kapwanga spoke to the MC by telephone. The latter stated that he was not aware that the application for EPL 3947 had been refused and referred Mr Kapwanga back to Mr Iilende.

[12] On 1 July 2009 the applicant received confirmation that the application for EPL 3947 had been deleted from the Minister's list of EPLs and that EPL 4264 had been granted to Baobab. On the same date the applicant addressed a letter to the Minister, the relevant part of which reads:

> 'There are unclear circumstances around the handling of Samicor application *(sic)* for a new EPL 3947 which all of a sudden was replaced by another application for a new EPL 4264 by Baobab .....On enquiry we were told verbally by a Ministry official that the Samicor application was refused on 23 April 2009. Samicor did not get any notification of such refusal so far. The whole issue, if true, points either to pure corruption/collusion between Ministry officials and outside entities.
>
> Samicor is still in the process of getting the true facts from the office of the Mining Commissioner, who promised to investigate and notify us of the outcome.

> We are kindly requesting the Honourable Minister not to sign the refusal of the granting of EPL 3947, if not already done, until Samicor received clarity on the matter from the office of the Mining Commissioner in writing.
>
> We shall revert back to the Honourable Minister once we get the reply from the Mining Commissioner.'

[13] This letter was followed by another the very next day in the following terms:

> 'The Ministry July 2009 EPL list shows that Samicor EPL 3947 no longer exists. This confirms what the official at the Ministry told us by phone on enquiry that the Samicor application was refused.
>
> The list also shows that an application for EPL 4264 for the same area was granted on 8 June 2009 **three month** *(sic)* after it was applied for in unclear circumstances which points either to pure corruption/collusion between Ministry officials and the applicants Baobab ..... up to now Samicor did not get any communication from the office of the Mining Commissioner regarding the matter.
>
> Samicor is aware of the request by the Honourable Minister to the industry not to revert to litigation before having failed to reach an amicable agreement with the Ministry. It is for this reason that Samicor is **seeking urgent audience** with the Honourable Minister to discuss the matter. At the same time Samicor is also going ahead to seek legal advice on the matter about the way forward if the matter is not solved amicably.'

[14] The applicant instructed its lawyers, the legal practitioners of record, to obtain access to the files relating to EPL 3947 and EPL 4264 kept at the offices of the Ministry in order to ascertain whether the Minerals Act and the Constitution had been taken into consideration in the handling and consideration of the applications. The MC however refused access to the files. This led to correspondence by the

applicant's lawyers on 3 and 6 July 2009 culminating in a threat to bring a mandamus to compel access.

[15] There is some confusion in the applicant's affidavit and correspondence addressed by the applicant's lawyers about whether it insisted upon access to the 'files' or only to a copy of EPL 4264 and to the register of mineral licences. Although they relied on section 51(2) of the Minerals Act which provides that any person is entitled to inspect a copy of any mineral licence and the register of mineral licences, they at times insisted on having access to the 'files' of the EPLs in issue. The Act does not state that the 'file' relating to an application shall be open for inspection by any person.

[16] On 6 July 2009 the MC in writing responded to the flurry of letters by reminding the applicant that it had promised to revert to him on the explanation given by Mr Iilende, which it had not done. He further reminded the applicant that his office would not respond to lawyers' letters and referred the applicant to the Government Attorney.

[17] On the same day the applicant replied, setting out what explanations had been given by Mr Iilende and Ms Meroro. It further stated that 'the situation went out of control as it seems that everybody was trying to avoid telling us what exactly happened. For example, why do we not get the refusal letter of those who were granted received theirs?' The applicant stated that it was still waiting for an official explanation and that, in the absence of an 'official satisfactory response we are going ahead to seek protection through our legal advisors.' It repeated its desire to have the matter resolved speedily without resorting to unnecessary litigation.

[18] There was apparently no response to the latest letter to the MC. The Minister also did not reply to the two letters directed to him on 1 and 2 July 2009.

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[19] Papers were then drawn in July 2009 for this application to be launched. However, as it was the applicant's desire to resolve the matter without approaching this Court, it did not do so. The applicant sets out the reasons for this decision. I shall revert to these in greater detail at a later stage.

The point *in limine* of unreasonable delay

[20] Mr *Tjombe* on behalf of Baobab raised a point *in limine,* submitting that the delay from July 2009 to October 2011 in bringing the review application is unreasonable; that Baobab is prejudiced thereby and that the delay should not be condoned. The applicant, anticipating that this point would be taken, already in its founding affidavit acknowledges that there has been a delay, but denies that it is unreasonable. It also denies that Baobab is prejudiced.

The applicable law

[21] It is trite that at common law no specific time limit applies within which review proceedings must be brought. The procedure to be followed is set out in rule 53 of the rules of the High Court. This rule also does not fix any time limit for bringing such an application. The courts require that such applications be brought within a reasonable time (*Harnaker v Minister of the Interior* 1965 (1) SA 372 (C) 380C-E; *Wolgroeiers Afslaers (Edms) Bpk V Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) 39A-B).

[22] In *Disposable Medical Products (Pty) Ltd v Tender Board of Namibia and Others* 1997 NR 129 (HC) Strydom JP (Teek J concurring)(as they then were) stated the following (at 132D-I):

> 'In deciding whether there was an unreasonable delay before review proceedings were instituted, each case must be judged on its own facts and circumstances. What may be unreasonable in one case may not be so in another instance and vice versa. In deciding whether a delay was

unreasonable two main principles seem to apply. Firstly whether the delay caused prejudice to the other parties and secondly, the principle applies that there must be finality to proceedings.

Although the Court has a discretion to condone such a delay it is seldom, if ever, prepared to do so where the delay caused prejudice.

The principles applicable and how a Court should approach such a question were conveniently set out by Booysen J in the case of *Radebe v Government of the Republic of South Africa and Others* 1995 (3) SA 787 (N) at 798G-799E as follows:

> '. . . the Court has first to determine whether a reasonable time has elapsed prior to the institution of the proceedings, or to put it differently, whether there has been an unreasonable delay on the part of the applicant. (*Wolgroeiers Afslaers (Edms) Bpk v Municipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 42A; *Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie en 'n Ander* 1986 (2) SA 57 (A) at 86B-D).
>
> In deciding whether a reasonable time has elapsed, a Court does not exercise a discretion. The enquiry is a factual one, that is, whether the period which has elapsed was, in the light of all the relevant circumstances, reasonable or unreasonable. (*Wolgroeiers Afslaers case*, *supra*, at 42C-D; *Setsokosane's case*, *supra*, at 86E).
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> If the Court were to arrive at the conclusion that there has been an unreasonable delay, the Court exercises a discretion as to whether the unreasonable delay should be condoned. What a reasonable time is, is of course dependent upon the circumstances of each case. . . .
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> When considering what a reasonable time is to launch proceedings, one has to have regard to the reasonable time required to take all reasonable steps prior to and in order to initiate those review proceedings.'

(The above excerpt was referred to with approval in the case of *Krüger v Transnamib Ltd (Air Namibia) and Others* 1996 NR 168 (SC).)'

(See also *Namibia Grape Growers and Exporters Association and Others v The Minister of Mines and Energy and Others* 2002 NR 328 (HC) at 341F - I; *Christine Paulus and Three Others v The SWAPO Party and Seven Others*, an unreported judgment, delivered by Swanepoel AJ on 13 November 2008 in Case No A114/2007 at para 30 on 17).

[23] Mr *Tjombe* referred me to the unreported judgment in *Ebson Keya v Chief of Defence Force and 3 Others* (High Court Case No. A29/2007), where the case law applicable in these circumstances was restated. In paragraph [16] of this judgment Judge-President Damaseb states:

> 'It is settled that when unreasonable delay in bringing a review application is raised in the pleadings, the Court is required, firstly, to determine whether on the facts of the case the applicant's inaction since the cause of action arose, was unreasonable. That is a question of law and not of discretion.' [my underlining]

[24] The same view was expressed in *Kleynhans v Chairperson of the Council for the Municipality of Walvis Bay and Others* 2011 (2) NR 437 (HC) at 450B-C where the Court said:

> 'The first issue to consider is whether on the facts of the case the applicant's inaction was unreasonable: That is a question of law.' [my underlining]

This *dictum* was approved by Geier, J in two other unreported cases which Mr *Tjombe* brought to my attention, namely *Ogbokor v The Immigration Selection Board* (A 223/2011) [2012] NAHCMD 33 (17 October 2012) at [15], p8; and *Simana v The Commissioner General Correctional Services* (A129/2011) [2012] NAHCMD 57 (09 November 2012) at [65]).

[25] I regrettably find myself unable to agree with the views expressed that the question whether the delay was unreasonable is a question of law. It is clearly a

question of fact to be determined objectively based on the particular facts and circumstances of each case (*Radebe, supra*; *Black Range Mining (Pty) Ltd v Minister of Mines and Energy and Another* 2009 (1) NR 140 (HC) at 144H-I).

[26] In the flynotes of the *Ogbokor* and *Simana* judgments I note the statement that the question whether the delay is unreasonable is within the court's discretion. It seems to me that this statement is not supported by the judgments themselves. Nevertheless, in case I am misinterpreting the judgments, I state for sake of clarity that I respectfully disagree with the statement. The applicable authorities are clear that the determination of the unreasonableness or otherwise of the delay does not entail the exercise of a discretion although it does imply the making of a value judgment. In *Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie en 'n Ander* 1986 (2) SA 57 (A) it was held (I quote from the English headnote which accurately reflects the Afrikaans judgment) at p59H-J:

> 'The test which a Court has to apply to ascertain whether a common law application for review in the absence of a specific time limit, was brought within a reasonable time, is of a dual nature. The Court namely has to ascertain (a) whether the proceedings were instituted after expiration of a reasonable time and (b) if so, whether the unreasonable delay should be condoned. As regards (b), the Court exercises a discretion but the enquiry as far as (a) is concerned does not involve the exercise of the Court's discretion; it involves a mere examination of the facts in order to determine whether the period that has elapsed was, in the light of all the circumstances, reasonable or unreasonable. Naturally, the finding of the Court in this regard does imply that the Court has made a value judgment in the sense of the Court's view of the reasonableness of the period that has elapsed in the light of all the circumstances. To equate such a value judgment with a discretion is, however, not justifiable legally or logically.'

(See also the *Wolgroeiers Afslaers case, supra* at 42C - D; *Schoultz v Voorsitter, Personeel-Advieskomitee van die Munisipale Raad van George, en 'n Ander* 1983 (4) SA 689 (K) at 697 - 8.)

Was the delay unreasonable?

[27] I now turn to the first leg of the dual enquiry, i.e. the question whether the delay was unreasonable or not. In *Radebe v Government of the Republic of South Africa and Others* 1995 (3) SA 787 (N) at 799B-G gave a useful overview of relevant factors to consider:

> 'When considering what a reasonable time is to launch proceedings, one has to have regard to the reasonable time required to take all reasonable steps prior to and in order to initiate those review proceedings. Such steps include steps taken to ascertain the terms and effect of the decision sought to be reviewed; to ascertain the reasons for the decision; to consider and take advice from lawyers and other experts where it is reasonable to do so; to make representations where it is reasonable to do so; to attempt to negotiate an acceptable compromise before resorting to litigation (*Scott and Others v Hanekom and Others* 1980 (3) SA 1182 (C) at 1192); to obtain copies of relevant documents; to consult with possible deponents and to obtain affidavits from them; to obtain real evidence where applicable; to obtain and place the attorney in funds; to prepare the necessary papers and to lodge and serve those papers.
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> When considering whether the time taken to prepare the necessary papers was reasonable or unreasonable, allowances have to be made for the differences in skill and ability between various attorneys and advocates.
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> It must furthermore be borne in mind that no time has in fact been laid down for the institution of such proceedings and it cannot be expected of a litigant or his legal representatives that they should act in an overhasty manner, particularly where the opposing party or parties have been notified timeously of the fact that review proceedings were in the offing. (*Setsokosane's case supra* at 87G-H.)

> Whilst circumstances differ, it is nevertheless instructive to have regard to the periods which have been found to be either reasonable or unreasonable in prior cases in order to place the delay in this case in some perspective.'

(Quoted with approval in *Krügerv Transnamib, supra,* 171B-D; see also the *Ebson Keya case, supra,* at [17]; the *Kleynhans* case at [41]).

[28] In my view it is not necessary to consider the full range of factors mentioned above because the applicant gives only one reason for the delay and that is that it deliberately did not come to Court in July 2009 because it attempted to resolve the matter without litigation. The motivation for this decision is set out as follows in paragraph 38 of the founding affidavit:

> '38.1 The Government of the Republic of Namibia generally and the Minister of Mines and Energy, and more specifically the previous First Respondent, being the Honourable Erkki Nghimtina, made it quite clear, publicly and privately, that should the holders or Mineral Licences have any complaints and/or objections regarding the behaviour of officials employed by the first Respondent, then such holders should do what is possible in order to resolve these disputes internally without having to resort to a Court of Law.
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> 38.2 Any holder of a Mineral Licence granted by the First and/or Second Respondents is cognisant of the fact that in many cases it lies within the discretion of the First and/or Second Respondent to grant and/or renew a Mineral Licence. As such it is incumbent upon any Mineral Licence holder to do what is possible in order to resolve these issues internally.
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> 38.3 I submit that one of the reasons that the First Respondent has made this request to Licence holders is that the non-adherence and/or non-observance of the Minerals Act is a source of embarrassment to the first and Second Respondents and in many

cases mistakes are made which may not be made intentionally, whereas others may be made because of ignorance.

38.4 I am aware that under normal circumstances this application and the prayers as set out in the notice of motion would be considered as being out of time. However, I urge this honourable Court to take into consideration that within especially the mining industry it is in the interest of Licence holders to ensure that all steps are taken to resolve matters internally before proceeding to ask for the intervention of this Honourable Court.'

[29] The stance taken by Baobab on this issue is that the applicant's efforts were all aimed at influencing the Minister to do an illegal act, namely to reverse the decision to grant the EPL to Baobab, while the applicant knew, or should have known, that the Minister was *functus officio* and as such the delay caused was unreasonable. This aspect was not fully argued as the emphasis during the hearing of the application fell on other issues. Although the applicant did not make direct allegations of fraud against Mr Iilende and/or Baobab, (except it seems, at the meeting of 25 August 2009), it did on various occasions make allegations of corruption and/or connivance in what appears to a *bona fide* belief that these allegations were true. If this were indeed the case, there might be room for an argument that the Minister was not *functus officio*. (See *Bronkhorstspruit Liquor Licensing Board v Rayton Bottle Store (Pty) Ltd* 1950 (3) SA 598 (T) and the discussion in Hoexter, *Administrative Law in South Africa*, p246-250). However, on the view I take of the matter, it is not necessary to decide the matter on the basis of the *functus officio* doctrine.

[30] Instead of approaching the Court, the applicant approached the President of the Chamber of Mines who arranged a meeting on 25 August 2009 with the Minister to discuss the applicant's concerns. At the meeting it allegedly became evident that Mr Iilende was the official responsible for the conduct about which the applicant

complained. The Minister thereupon directed Mr Iilende to meet with the applicant and Baobab to resolve the matter.

[31] This meeting occurred on the same day. In its answering affidavit Baobab disputes the accuracy of the minutes ('KK17') drawn up by the applicant. It is not necessary at this stage to go into the details of the minutes. Suffice it to say that it was recorded that the applicant's understanding was that the Minister had asked Mr Iilende to arrange the meeting to discuss two options, namely (i) the applicant agreeing to enter into a joint venture with Baobab on EPL 4264; or (ii) the Minister revoking EPL 4264 and granting it to the applicant. At the end of the meeting it was recorded that the applicant would forward a letter to the Minister in which it would indicate that it was not willing to enter into a joint venture with Baobab on EPL 4264 and requiring a certain response from the Minister by 14 September 2009. It is not clear what the response was that it required. The applicant merely states in the minutes that it forwarded this letter the same day, but does not attach a copy of the letter to the founding affidavit, nor does it inform the Court of the precise contents. There is also no indication that the applicant ever received a response to the letter. The applicant gives no further details of whether the deadline was met. It is reasonable to assume in the circumstances that nothing of significance to the knowledge of the applicant occurred, otherwise the applicant would have mentioned it in its affidavit.

[32] According to the applicant, Mr Iilende gave detailed reasons for his actions and explained the motivation behind his thinking. The applicant concluded that Mr Iilende had acted illegally by acting contrary to section 125 of the Mineral Act and by taking it upon himself to grant EPL 4264 to Baobab, thereby exercising a power he did not have under the Act. With this knowledge in hand the applicant was in an ideal position to push ahead with the review application. In my view it was

unreasonable not to do so after the deadline of 14 September 2009 had passed and when the attempt at amicably settling the matter between all the parties had failed.

[33] Instead the applicant, being a member of the Chamber of Mines, continued to involve the Chamber in trying to resolve the issue. As a result the Chamber addressed a letter dated 19 February 2010 to the Minister in which letter it raised several issues, including the unresolved complaint of the applicant, and appealed to the Minister to 'return to compliance with the correct legal process'. No response was received.

[34] The applicant states that subsequently it was being kept informed by the general manager of the Chamber about further efforts to resolve the issue. As I understand the 'supporting' affidavit filed by Mr Malango, the general manager of the Chamber, the issue of non-compliance with section 125 of the Minerals Act was discussed 'generally' at exploration committee meetings held four times a year. Both the applicant and the MC are members of this committee. Mr Malango also discussed this matter personally with the Minister and tried to find a solution. He does not give any details of when these discussions took place and what the reasons were which impeded the resolution of the applicant's complaints. In my view the vagueness around this point does not assist the applicant's case.

[35] The applicant states that, as it was not receiving positive replies from the Chamber or from the Minister, it instructed its lawyers to address a letter to the Minister. In this letter, dated 24 June 2014 ('KK20'), the history of the matter is again set out. The applicant again enquires whether the matter can be resolved 'in house' and sets a 30 day deadline for a response. Hereafter the Government Attorney promptly responded on 14 and 18 July 2011, indicating that an application to set aside the Minster's decision to grant EPL 4264 to Baobab would not be opposed.

[36] In my view the applicant took unreasonably long to reach this point. While it may not have been the case if the dispute only concerned it and the first two respondents (I express no firm view about it), it certainly was unreasonable in a situation where the rights of another party, namely Baobab, were also affected. The applicant did not give the third respondent notice of the application contemplated in July 2009. There is no evidence that it ever did, until the current application was served. To continue in the circumstances with endless attempts at resolving the matter internally with the first two respondents is unreasonable.

[37] In this regard I note what was stated in *Purity Manganese (Pty) Ltd v Minister of Mines and Energy and Others; Global Industrial Development (Pty) Ltd v Minister of Mines and Energy and Another* 2009 (1) Nr 277 (HC) at p287H-J:

> 'It is further evident that the scope and object of the Act is to provide for regulated prospecting and mining of minerals within Namibia and the rights provided to applicants under the Act have to be complied with. Specific time periods are provided for the validity of such licences which may be renewed. The Minister maintains strict control, not only in respect of the granting of exclusive prospecting licences, but also in respect of the renewal thereof. He must of course act reasonably within the scheme of the Act and the object thereof. In the relative short periods that such licences are valid, it would be unreasonable to wait several months before a decision of the Minister is taken on review in this court. An EPL is valid for three years when it is granted for the first time (s 71(1)(a)) and for two years upon renewal (s 71(1)(b)). A period of anything more than three months before instituting review proceedings would in my opinion be an unreasonably long delay. (*Otjozondu Mining (Pty) Ltd v Minister of Mines and Energy and Another* 2007 (2) NR 469 (HC) where Heathcote AJ dealt with the object of the Act in para 10 at 472E/F.)'

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I respectfully agree with the extract quoted, with the reservation that it would, in my respectful view, depend on the facts and circumstances of each case whether a period of more than three months would constitute an unreasonably long delay.

[38] In fairness to the applicant I must mention that its attempts had some results during 2009. Firstly, the Minister ordered Mr Iilende to discuss the matter with the applicant and Baobab. Secondly, as is apparent from Baobab's application to compel the furnishing of the complete review record, and the record supplied by the first two respondents, read with the applicant's supplementary affidavit, the Minister did on 17 November 2009 write a letter to Baobab giving it notice of the withdrawal and cancellation of EPL 4264. The reason provided was that an administrative oversight occurred during the consideration of the application for EPL 4264 because section 125 of the Minerals Act was not followed.

[39] This prompted reaction by Baobab's lawyers at the time, objecting to the cancellation as being contrary to the provisions of section 55 of the Minerals Act and giving the Minister 4 days not to proceed with the cancellation, failing which Baobab would approach this court for relief. On 30 November 2009 the Minister referred this matter to the Attorney-General for advice. In his letter he stated, *inter alia*, that, contrary to section 125 of the Minerals Act, the application for EPL 3947 was never considered and remained pending at the time the application for EPL 4264 was granted. The Minster also instructed the MC to assess the applicant's application for EPL 3947. The MC did so and recommended that the application be granted. However, pending the Attorney General's advice, the granting of the application was halted. There is also a letter dated 21 January 2010 by Baobab's lawyers addressed to the Attorney General in which they ask for a reply to their earlier correspondence.

[40] On the papers before me there has been no outcome on the matter of the cancellation. What is clear, though, is that Baobab has continued with their activities in terms of EPL 4264 and has applied for a renewal of the licence, which would have

expired on 7 June 2012. By virtue of the provisions of section 71(3) of the Minerals Act, the licence remains valid during the period in which the renewal application is being considered.

[41] There is no express indication that the applicant had knowledge of these developments, as no mention is made thereof in its founding affidavit. However, from the letter by its lawyers dated 24 June 2011 it is evident that the applicant knew that 'the issue of Baobab has been referred to the Attorney General for a decision and that this decision has been outstanding for several months'.

[42] To sum up, even though the applicant's efforts have yielded some results, it is clear that an impasse had been reached towards the end of 2009 and that no real progress was made towards a resolution of the matter since then. The further steps taken by the applicant via the Chamber became more and more unreasonable as time went on. Even when the Government Attorney indicated in July 2011 that no opposition would be given to the relief contemplated, the applicant only launched this application on 12 October 2011 without any prior warning to Baobab.

Should the unreasonable delay be condoned?

[43] I now proceed with a consideration of the second leg of the inquiry, namely whether the unreasonable delay should be condoned. At this stage the issues of prejudice to any party and the public interest in finality comes to the fore (*Disposable Medical Products v Tender Board, supra,* at 132D)

[44] Baobab alleges that it is prejudiced by the delay as it has expended considerable financial and other resources in respect of its activities under the licence and will suffer damages and losses if the granting of the licence is set aside. The sum already expended is in excess of N$1,875,000.00 and is expected to be in the order of N$4.6million during 2012 and N$10 million during 2013. Details given by the respondent relate to:

(i) The contracting of an expert geologist who completed a data analysis study and desktop review of the licence area at significant cost to the shareholders and directors of Baobab and based on the outcome of the study Baobab commenced an extensive sampling program in January 2012 and intends embarking on additional exploration work.

(ii) The contracting of a South African based mining consultancy firm to conduct a geological review of the area and to provide a valuation statement which will be used by Baobab to raise the necessary financial capital for the remaining stages of the project. This review was completed in 2011.

(iii) An environmental impact assessment scoping study which was commissioned by Baobab. The purpose of the study was to identify the primary environmental and social considerations in accordance with international best practice for seabed mining to ensure operational aspects of the project are based on principles of sustainability.

(iv) Marketing of the project to investors in Canada and the United Kingdom and pre-marketing work in relation to this aspect.

[45] Counsel for the applicant submitted that, whilst the onus is on the applicant to show the absence of prejudice, the information supplied by Baobab lacks sufficient detail and supporting affidavits. In my view the details are sufficient. I further take into regard that in terms of section 69(2)(c) of the Mineral Act the EPL could only have been granted if the Minister was satisfied on reasonable grounds with the proposed programme of prospecting operations or the proposed expenditure to be expended in respect of such operations. Baobab has applied for renewal of the EPL. In terms of section 72(3) of the Minerals Act such an application may not be granted unless the Minister is on reasonable grounds satisfied with the manner in which the

programme of prospecting operations have been carried on or the expenditure expended in respect of such operations. The requirements of the Act and the EPL are such that the holder of the EPL will have to undertake the activities that Baobab says it has done. The probabilities are that it did indeed undertake at least some of some these activities and expended money in the course of doing so in order to be eligible for renewal of the EPL in spite of any dispute it may still have regarding the cancellation of the EPL. I also take into consideration that potential prejudice to a party is sufficient to refuse condonation.

[46] Apart from this, although Baobab took part in the meeting with Mr Iilende on 25 August 2009, and may have been aware of the possibility of a review application, the long delay between that meeting and the actual launching of the application without any notice in all probability worked towards its prejudice. A party cannot be expected to sit around and wait for more than two years for another party to make up its mind whether it would be following through on an earlier intention to approach the court.

[47] On all the facts it is probable that Baobab indeed is prejudiced or at least potentially prejudiced. In these circumstances I decline to condone the unreasonable delay.

[48] Furthermore, it is also in the interest of the administration of justice and in the public interest that finality in relation to the granting or refusal of mineral licences be reached within a reasonable time (*Purity Manganese*, *supra,*). As such the long unreasonable delay in this case militates against granting condonation.

Order

[49] The result is therefore that:

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6. The third respondent's point *in limine* is upheld.

7. The application is dismissed with costs.

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K van Niekerk

Judge

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APPEARANCE

For the applicant: Adv N Bassingthwaighte

Instructed by Koep & Partners

For the third respondent: Mr N Tjombe

of Tjombe-Elago Law Firm Inc.