

REPUBLIC OF NAMIBIA

HIGH COURT OF
WINDHOEK
JUDGMENT



NAMIBIA, MAIN DIVISION,

HC-MD-CIV-MOT-REV-

2018/00438

In the matter between:

RONNEY HANGULA

APPLICANT

and

MINISTER OF MINES AND ENERGY

1ST RESPONDENT

PLUCZENIK DIAMOND NAMIBIA (PTY) LTD

2ND RESPONDENT

Neutral Citation: *Hangula v Minister of Mines and Energy* (HC-MD-CIV-MOT-REV-2018/00438) [2020] NAHCMD 462 (8 October 2020)

CORAM: MASUKU J

Heard: 25 June 2020

Delivered: 8 October 2020

Flynote: Administrative Law – Review proceedings – Rule 76 (3) - Requirements thereof – What constitutes a decision and proceedings in terms of the said Rule – Unreasonable delay in launching review proceedings and the effect thereof.

Summary: This is an application for review launched by the applicant. In essence, he prays for an order calling upon the Minister for Mines and Energy to show cause why the decisions by him, dated 2 November, 2018 and the proceedings culminating in the said decision, should not be set aside as being null and void and contrary to the provisions of Article 18 of the Namibian Constitution.

The Minister raised a point of law *in limine*, namely, the applicant's failure to comply with the provisions of rule 76(3). It was contended by the Minister that the applicant's failure to comply with the said provision is fatal. The Minister also states that there is no evidence that he carried out an enquiry as alleged by the applicant in terms of s 61 of the Diamonds Act, and that any enquiry in terms of s 61 is an enquiry and not a decision amenable to being reviewed in terms of rule 76 of the court's rules. The second respondent raised the point that the applicant is guilty of an unreasonable delay in launching the review and should as such be non-suited therefor.

Held: In an application for review, the applicant is enjoined by the rule to include certain specifics in the affidavit that accompanies the application for review, namely, a decision or proceedings; facts, grounds and circumstances which give rise to the application for review.

Held that: the Minister's letter does not, from any position, suggested or apparent, indicate that there is any decision that he made and which could conceivably be a proper basis for moving review proceedings.

Held further: It is accordingly clear that where there is no decision, there can be no question of a review. A decision appears to be the *sine quo non*, for an application for review. Absent a decision and then there is no proper case for review that can be mounted.

Held that: Proceedings constitute the process adopted and by which a decision is finally reached.

Held: In this case, there are simply no proceedings to talk about, as much as there is no decision properly speaking, made by the Minister that would be subject to the remedy of judicial review.

Held further: that the applicant is guilty of violating the requirements of rule 76(3) in that the affidavit does not contain any facts, circumstances or grounds upon which an application for review can properly be predicated.

Held: that non-compliance with rule 76(3) is fatal to the current application as there is no proper application for review as envisaged in the rules.

Held that: persons entitled to approach the court in terms of Art 18 are those who are regarded as aggrieved by the unfair or unreasonable conduct complained of. The applicant failed to show that he is an aggrieved person in that regard.

Held: that the delay in launching the application, namely 7 years, is egregious. Held that: the question whether a delay is unreasonable is a question of fact to be decided by the court and in respect of which it exercises a value judgment.

Held further that: the court can only exercise its discretion in favour of the dilatory party in circumstances where that party has fully explained the delay in its affidavits in support of the application and seeks condonation therefor. In the instant case, the applicant did neither.

The court accordingly dismissing the review with an order as to costs.

ORDER

1. The Applicant's application for review is dismissed.
2. The Applicant is ordered to pay the costs of the application.
3. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

MASUKU J:

Introduction

[1] Submitted for determination by this court is an application for review launched by the applicant, Mr. Ronny Hangula. In essence, he prays for an order calling upon the Minister for Mines and Energy to show cause why the decisions by him, dated 2 November, 2018 and the proceedings culminating in the said decision, should not be set aside as being null and void and contrary to the provisions of Article 18 of the Namibian Constitution. Predictably, the applicant also prays for costs of the application.

The parties

[2] It is perhaps necessary to mention, before embarking on this judgment to any meaningful degree, to point out that the applicant is a Namibian male adult and that he acts in person. Although he appeared at some point to enlist counsel to stand in his corner, that relationship did not last resulting in the matter being dealt with by him in person. This fact did not, unfortunately redound to the production of papers that can be described as the model of clarity. The court will, that notwithstanding, do its utmost best to ventilate as accurately as possible, what appears to be the dispute among the parties. I will refer to Mr. Hangula, in this judgment, as 'the applicant'.

[3] The 1st respondent is the Minister of Mines and Energy, duly appointed in terms of Art 32(3)(i)(dd) of the Constitution of Namibia. He is represented by the Government Attorney in these proceedings. I will refer to the Minister as such in this judgment. The 2nd respondent is Pluczenik Diamond Namibia (Pty) Ltd, a company incorporated and registered in terms of the Company Laws of this Republic, with its place of business situate in Windhoek. I will refer to the Pluczenik as the 2nd respondent.

Background

[4] From a reading of the applicant's founding affidavit, it would appear that at the heart of this application is a letter written by the Minister and it is dated 2 November 2018. It is this letter, that according to the applicant, that constitutes a decision, which the applicant intends to have this court review and set aside.

[5] Because of the centrality of this letter to the proceedings, it is perhaps necessary for the contents of the said letter to be reproduced in full as I do below. The letter signed by Minister Tom Alweendo, is directed to a Mr. Andrew Martin of KwaZulu Natal, South Africa and it reads as follows:

'Dear Mr. Martin,

COMPLAINT BY RONNEY HANGULA AGAINST PLUCZENIC DIAMONDS

Reference is made to your letter dated 22nd October 2018 with regards to the above captioned subject matter.

The dispute between your client and Pluczenik Diamonds started some time back and on various occasions the Ministry of Mines and Energy has been requested to intervene on behalf of your client. Over the past few years attempt (*sic*) were made to mediate between the parties to no avail. It must also be understood that the license awarded to Pluczenik was not awarded on the strength of any partnership agreement between the parties.

Upon further reflection on the matter, I hereby wish to inform you that the Ministry is not in a position to intervene.' (Emphasis added).

[6] A question might justifiably arise as to why the above portions of the letter above, are underlined. The answer lies in the applicant's founding affidavit at para 5 where the applicant alleges that the underlined portions of the said letter constitute the decision that he moves this court to set aside.

[7] The applicant states on oath that he is on the context of the facts, an aggrieved person within the meaning of Art 18. He, as such, has the right to

seek redress from this court. The applicant states that the decision by the Minister, was taken in terms of s 61 of the Diamond Act, Act 13 of 1999 and that the findings thereof were handed to him vide the letter quoted above.

[8] In further substantiation of his case, the applicant quoted from the oft-cited judgment of Innes CJ in *Johannesburg Consolidated Investment Co Ltd v Johannesburg Town Council*.¹ The applicant contended that the 'Diamond Commissioner committed vitiating irregularities by disregarding factors of facts which were relevant and necessary for its consideration and by giving ruling on 2 November 2018.'

[9] I have, in the foregoing paragraphs attempted to encapsulate as much of the applicant's case as possible. The respondents in response, filed answering affidavits whose main contents, as are relevant to the case at hand, will be considered in turn below.

[10] In his answering affidavit, the Minister raised points of law *in limine*, namely, the applicant's failure to comply with the provisions of rule 76(3). It was contended by the Minister that the applicant's failure to comply with the said provision is fatal. The Minister also states that there is no evidence that he carried out an enquiry as alleged by the applicant in terms of s 61 of the Diamond Act. In any event, he further points out, any enquiry in terms of s 61 aforesaid, is an enquiry and not a decision amenable to being reviewed as that the applicant purports to in these proceedings.

[11] It was the Minister's further contention in his answering papers that he and the Diamond Commissioner did not commit any vitiating irregularities as alleged by the applicant. It is his further case that the applicant does not, in his papers, state the grounds upon which he alleges that the 'decision' complained of, if it was decision at all, was unfair and unreasonable. He flatly denied that the alleged decision is an administrative action amenable to the provisions of Art 18 of the Constitution.

¹ 1903 TS 111 at 115.

[12] On the merits, the Minister referred to a letter authored by the applicant, dated 16 April 2018 and in which the applicant, amongst other things, requested the Ministry 'by written enquiry to the license holder, enquire the extent to which, if at all, the undertaking to your Ministry complied with to ensure participation of Namibians in the rights granted under the license.' It was the Minister's case that he was not requested to act in terms of s 61 of the Act. There are further issues that the Minister raised which on account of the papers as they stand, would not require further rendition.

[13] The 2nd respondent also took issue with the applicant's application, contending that it is devoid of merit and must be dismissed with costs. In particular, the 2nd respondent raised the issue of the applicant's unreasonable delay in launching the proceedings. I will not, for purposes of this judgment traverse more of the contentions of the 2nd respondent, considering the centrality of the issues that were raised by the Minister and which it would appear the 2nd respondent made common cause with.

[14] There are few questions that need to be answered in this matter and depending on the answers returned, may spell an end to the applicant's case. These questions revolve around the compliance with rule 76(3) and whether the Minister did make a 'decision' that can be said to be amenable to judicial review. Another question that falls for determination, is whether the applicant can be properly classified as a person who is aggrieved as envisaged by Art 18.

Rule 76(3)

[15] Rule 76(3) reads as follows regarding applications for review:

'The application must set out the decision or proceedings sought to be reviewed and must be supported by affidavit setting out the grounds and the facts and circumstances on which the applicant relies to have the decision or proceedings set aside.'

[16] I have read the founding affidavit filed by the applicant in support of the application and I can state without diffidence that the applicant has dismally failed to comply with the requirements of the above subrule. In an application for review, the applicant is enjoined by the rule to include certain specifics in the affidavit that accompanies the application for review. In this regard, there must be a decision or proceedings sought to be reviewed and set aside.

[17] I will begin with the former. The Oxford Advanced learner's Dictionary defines the word 'decision' as 'a choice or judgment that you make after thinking and talking about what is the best thing to do'. The Black's Law Dictionary, on the other hand, defines a decision as 'A judicial or agency determination or consideration of the facts and the law, esp an order, or judgment pronounced by a court considering or disposing of a case'. I will consider these definitions in determining whether the actions by the Minister that are contended to have been a decision do amount to a decision in law.

[18] A reading of the Minister's letter, which is set out in full above, does not, in any way, shape or form, suggest that the Minister was faced with some alternative propositions and brought his judgment to bear by choosing one or more of open avenues, which would result in a decision as contemplated by the rule-maker.

[19] A reading of the Minister's letter does not, from any position suggested or apparent, indicate that there is any decision that he made and which could conceivably be a proper basis for moving review proceedings. In *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works*,² the Supreme Court of South Africa reasoned that, 'At the core of the definition of administrative action is the idea of action (a decision) of an administrative nature taken by a public body or functionary.'

[20] In *Gamevest (Pty) Ltd v Regional Land Claims Commissioner, Northern Province and Mpumalanga*,³ the same court as referred to

² 2005 (6) SA 313, (SC), para 22.

³ 2003 (1) SA 373 (SC) para 11.

immediately above, stated that, 'the very first and ineluctable requirement for judicial review, viz, a decision by the respondent/defendant.' It is accordingly clear that where there is no decision, there can be no question of a review. A decision appears to be the *sine quo non*, for an application for review. Absent a decision and then there is no proper case for review that can be mounted.

[21] In terms of rule 76(3), quoted above, the application for review may also be made in cases where there are proceedings that took place and which may be said to be liable to be set aside. The question to ask in this matter is: were there any proceedings conducted before the Minister? The Black's Law Dictionary defines the word proceeding(s) as 'The regular and orderly progression of a law suit, including all acts and events between the time of commencement and the entry of judgment'.

[22] In this regard, it would appear that proceedings entail there being placed before a decision-maker for determination a complaint accompanied by various contesting positions placed before him or her. It would only be after considering the various but competing positions that the person or body entitled to make a decision, will make its decision. It is the process of eliciting the various contesting positions, weighing them in the scales, culminating in a decision eventually that constitutes proceedings. A decision may be end the result of the proceedings. In other words, proceedings constitute the process adopted and by which the decision is finally reached.

[23] A look, even a cursory one, at the Minister's actions does not suggest that there were any proceedings, as defined above, before him. There does not appear to have been a complaint that he had to decide, requiring that he hears the different positions of the parties to the alleged dispute. There are simply no proceedings to talk about, as much as there is no decision properly speaking, made by the Minister that would be subject to the remedy of judicial review.

[24] Furthermore, when one considers the above subrule, it is stated clearly what the applicant's affidavit must contain in order to trigger what may be

called proceedings for review. In terms of the latter parts of the provision, the affidavit supporting the application must set out the 'grounds, facts and the circumstances' on which the applicant relies for the review of the decision or proceedings. In this regard, the applicant's founding affidavit is as bare as can be and contains nothing that can match the triumvirate of requirements mentioned immediately above.

[25] I accordingly agree totally with the respondents that the applicant is guilty of violating the requirements of the subrule. The affidavit does not contain any facts, circumstances or grounds upon which an application for review can properly be predicated. The allegations in the founding affidavit filed in terms of rule 76(3) are important for they set out in clear terms what the factual basis of the application for review is.

[26] This factual basis is important for the respondents and the court to know as it enables the latter in particular, to appreciate exactly what case they have to meet. In this connection, the proper marshalling of the grounds, facts and circumstances giving rise to the application for review, play a very significant and decisive role in assisting the parties determine what documents, tape recordings or other material may be made available as part of the review record.

[27] In the instant case, the respondents have been placed in a position where they needed to surmise as to what the basis of the application is. This is wholly unfair, particularly in the present circumstances where the applicant has not shown that there is even a decision or proceedings to be set aside. I would therefor agree with the respondents that the non-compliance with rule 76(3), as discussed above, is fatal to the current application. There is simply no proper application for review as envisaged in the rules to talk about.

Does the Minister's letter dated 2 November 2018 constitute an administrative decision?

[28] The next question is whether the letter authored by the Minister complained of amount to an administrative decision? As recorded earlier, the letter is not a decision at all and it is for that reason not susceptible to the court's powers of judicial review. As such, it appears to me that the alleged decision does not qualify to be attacked and set aside in terms of Art 18. For that reason, the applicant cannot be properly regarded as 'an aggrieved person' within the meaning of Art 18.

[29] Whether a person qualifies to be regarded as an aggrieved person does not merely depend on that person's classification of his case as falling within the rubric of Art 18 or his or her mere disgruntlement. He or she must lay out a proper basis for contending that there was a decision made and in which decision or proceedings, the administrative body or official did not act fairly and reasonably and thus caused a grievance to him or her. Persons entitled to approach the court in terms of Art 18 are those who are regarded as aggrieved by the unfair or unreasonable conduct complained of.

[30] Although writing in respect of the alleged violation of Art 25(2), this court in *The Prosecutor-General v The Ombudsman*⁴ per Angula DJP, reasoned that the entitlement of a person to approach the court is that the said person is an aggrieved person, in a sense that his or her human rights guaranteed by the Constitution have been violated.

[31] The applicant has not, in my considered view, made out a case that he is aggrieved as envisaged in the Constitution and therefore entitled to the remedy provided in Art 18. No case, in my considered view, has been made out by the applicant that there is any action, proceedings or decision by an administrative official that has served to violate his Art 18 rights, thus properly rendering him an aggrieved person in this context. The application is liable to be set aside on this ground as well.

Unreasonable delay

⁴ (CA 66-2017) [2020] NAHCMD 119 (26 March 2020).

[32] This is a ground that was raised by the 2nd respondent. The 2nd respondent alleges that there has been unreasonable delay on the part of the applicant in launching the present application. It is the 2nd respondent's case that the transfer of the licence in question was concluded in 2011, from which time the 2nd respondent has operated without demur. This, it was stated, was with the assistance of the applicant, for which assistance, he was remunerated.

[33] The 2nd respondent, in the circumstances, contends that the applicant has taken a period of 7 years to bring this application. It accordingly contends that the said period of time constitutes an unreasonable delay on the applicant's part and that he should be non-suited therefor. To add salt to injury, continues the 2nd respondent, there is no explanation, even a perfunctory one by the applicant for this delay.

[34] The question of whether there is a delay that is unreasonable, is a factual one. In this regard Damaseb DCJ stated as follows in *China State Engineering Construction Corporation v Namibia Airports Company*⁵:

'Whether or not there was an unreasonable delay is a question of fact not involving the exercise of a discretion. The inquiry is a factual one upon which a value judgment is made. If the delay is found to be unreasonable, the court exercises a discretion (as the High Court did) whether or not to condone the unreasonable delay.'

[35] In the instant case, it is clear that there is a delay of 7 years. I am of the considered view that this delay is on any account, egregious. I hold this for a fact and Mr. Hangula did not have any answer, convincing or otherwise, to this legal position. Having found for a fact that the delay in the instant case is unreasonable, the court may, in exercise of its discretion, proceed to condone the delay.

[36] Although the Supreme Court does not say so in so many words in the excerpt quoted above, it stands to reason, once a court has found for a fact, as I have done, that the delay is egregious, the court can only exercise its

⁵ (SA 28-2019) [2020] NASC (20 May 2020), para 21.

discretion in favour of the dilatory party in circumstances where that party has fully explained the delay in its affidavits in support of the application and seeks condonation therefor.

[37] There is no gainsaying the fact that in the instant case, the applicant never adverted to the issue of delay. As such, there is no application for condonation as much as there is no explanation for such a lengthy period of delay. The delay is clearly inexcusable in the circumstances. In the absence, both of any explanation for the delay, reasonable or otherwise and an application for condonation on the applicant's part, there can be no question of the court exercising any discretion in the applicant's favour. There is simply nothing placed before the court to deal with the condonation of the delay, which is objectionably long, by even the most benevolent of standards.

[38] I am of the considered view that this application should fail on this score as well. It is an accepted principle that people, including legal persons, need to be able to move on with their lives after some reasonable period has elapsed after a decision has been made. They should be able to make choices taking their lives or businesses forward. The bringing of an application for review after such a lengthy period militates against parties having closure in their affairs. A point should come where they know that their conduct is accepted as valid in law and may not be easily set aside by persons who succumbed to paralysis and thus inaction for a prolonged period of time.

[39] The consideration against bringing applications for review after an inordinate delay was dealt with in the following terms by O'Regan AJA in *Keya v Chief of the Defence Force*:⁶

[22] The reason for requiring applicants not to delay unreasonably in instituting judicial review can be succinctly stated. It is in the public interest that both citizens and government may act on the basis that administrative decisions are lawful and final in effect. It undermines that public interest if a litigant is permitted to delay unreasonably in challenging a decision upon which both government and other

⁶ 2013 NR (3) 770 (SC), para 22.

citizens may have acted. If a litigant delays unreasonably in challenging administrative action, that delay will often cause prejudice to the administrative official or agency concerned, and also to other members of the public. But it is not necessary to establish prejudice for a court to find the delay to be unreasonable. Although of course the existence of prejudice will be material if established. There may, of course, be circumstances when the public interest in finality and certainty should be given weight to other countervailing considerations. That is why once a court has determined that there has been an unreasonable delay, it will decide whether the delay should nevertheless be condoned. In deciding to condone an unreasonable delay, the Court will consider whether the public interest in the finality of administrative decisions is outweighed in a particular case by other considerations.'

[40] The prejudice suffered by the respondents in this case, is manifest. The respondents are entitled, after 7 years of inaction, to go on with their lives on the basis that the 'decision' (if it indeed was one) stands and cannot be impeached at this late stage. Parties who have made decisions 7 years ago should not be required to go into the archives to see if the documents on which the decision in question was made are still in existence.

[41] It is a matter of fortune that the Minister is still in office and is able to remember and have regard to the relevant documents and institutional memory to answer the applicant's case pound for pound. This is a proper case in which closure and finality must carry the day. This must be so regardless of the applicant's discontentment.

Conclusion

[42] Having regard to all the foregoing considerations, I can come to no other decision than to find that this application is wholly unmeritorious. To hold otherwise would certainly be perverse. The applicant has failed to establish that there was a decision, properly so-called, that was made by the Minister that is amenable to review by this court. He has not complied with the mandatory provisions of rule 76(3) and took an unreasonably long period of time and without any explanation, to bring the review proceedings.

Order

[43] Having regard to all the insuperable difficulties faced by the applicant, as pointed out above, the order that commends itself as being the appropriate one to grant in the circumstances, is the following:

1. The Applicant's application for review is dismissed.
2. The Applicant is ordered to pay the costs of the application.
3. The matter is removed from the roll and is regarded as finalised.

T. S. Masuku
Judge

APPEARANCES:

APPLICANT: R. Hangula (the applicant in person)
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