CASE NO.: SA 3/2003

IN THE SUPREME COURT OF NAMIBIA

In the matter between

TRADE LINE NAMIBIA (PTY) LTD. — APPELLANT

versus

NAMBIB RESOURCES (PTY) LTD. — FIRST RESPONDENT

THE MINISTRY OF MINES AND ENERGY — SECOND RESPONDENT

CORAM: Mtambanengwe, A.C.J., O'Linn, A.J.A., et Maritz, A.J.A.

HEARD ON: 2003/06/06 and 2003/13/06

DELIVERED ON: 12/08/2003

APPEAL JUDGMENT

O'Linn, A.J.A.: This appeal is against part of a declaratory order issued by Hannah J in the High Court of Namibia on 5th February 2003, read with his reasons for judgment delivered on 21st February 2003 and an order of costs made on the same occasion.

The declaratory order dated 5th February reads as follows:

"1. That Annexure "A" as attached to the 2nd February 2003 pre-trial conference is made an order of Court.

2. That a declaration is made that licence 2696 remains valid and EPL 3028 and 3029 shall be of no force and effect in so far as they overlap licence 2696.

3. Judgment for costs is reserved."

As indicated *supra*, the reasons for the declaratory order above stated were delivered on 21/2/2003 when an order for costs, reserved on 5th February, was also made. The latter order reads as follows:

"1. The reserved costs of 12 November, 2002 are to be paid by first respondent;

2. The remaining costs are to be paid by the respondents."

On the 5th February 2003, and before receiving the reasons for judgment, Trade Line Namibia (PTY) Ltd. Lodged its appeal to the Supreme Court and cited NAMBIB Resources (PTY) Ltd. as first respondent and the Minister of Mines and Energy as second respondent.

It must be noted that NAMBIB Resources was the applicant in the Review application launched before the High Court and the Minister of Mines and

Energy cited as the "first respondent" and Trade Line Namibia (PTY) Ltd. cited as "second respondent."

In the circumstances the citation of the parties in the original proceedings before the High Court changed in the subsequent appeal proceedings and created some confusion. The confusion is compounded by the use of the terms in counsels' heads of argument and in their *viva voce* argument before this Court. In an effort to limit this confusion, I will henceforth in this judgment refer to the parties by their names and titles.

NAMBIB Resources, the "applicant" in the review proceedings and "first respondent" in the appeal will henceforth be referred to as "NAMBIB". The Minister of Mines and Energy, referred to as "first respondent" in the application proceedings and "second respondent" in the appeal proceedings will henceforth be referred to as "the Minister."

Trade Line Namibia (Pty) Ltd. referred to as "second respondent" in the application proceedings and "appellant" in the appeal proceedings will henceforth be referred to as "Trade Line Namibia".

The notice of appeal on behalf of Trade Line Namibia reads as follows:

> "Kindly take notice that the appellant herewith notes its appeal in terms of Rule 5(2) of the Rules of the Supreme Court of Namibia against that part only of the judgment/order made by his lordship Mr. Justice Hannah on 5th February 2003 in relation to the issue pertaining to the withdrawal

of the application for a mining licence and the consequences following upon such a withdrawal."

For a better understanding of the notice of appeal and the issues to be decided in the appeal, the following background facts are helpful.

1. Prior to 19th April 2002, NAMBIB was the uncontested holder of certain exclusive prospecting licences numbered 2564, 2565, 2566 and 2696.

2. The licences were issued by the Minister of Mines and Energy in terms of section 70 of the Minerals (Prospecting and Mining) Act of 1992.

3. On 27th July 2001, NAMBIB submitted an application for a mining licence in respect of a portion of the prospecting area of licence 2696.

4. On 19th April 2002, 10 Months after lodging the application, the application was still pending. NAMBIB then withdrew its application.

5. On the same date, i.e. 19th April 2002, the Minister notified NAMBIB of his intention, purportedly in terms of section 55 of the Act, to cancel inter alia, exclusive prospecting licence 2696 for alleged "non-compliance with the provisions of section 76 of the

Act, with reference to a report in duplicate pertaining to all prospecting activities carried out under the licence."

6. On 22 May 2002, the Minister further informed NAMBIB, purportedly in terms of section 44 and 54 of the Act, that the mineral rights in respect of licences 2564, 2565, 2566 and licence 2696, were cancelled with immediate effect.

7. NAMBIB disputed the legality of the cancellation of the said exclusive prospecting licences and on 15th July 2002, launched a review application in terms of Rule 53 of the Rules of Court, for the review and setting aside of the decision by the Minister to cancel the licences of which it was the holder.

8. The Minister opposed the application and even went one step further: On 17th July 2002, he granted to Trade Line Namibia, two exclusive prospecting licences, numbers 3028 and 3029, in respect of virtually the selfsame area in respect of which the licences were previously granted to NAMBIB.

9. In the initial proceedings before the High Court, several of the original points of dispute were settled by agreement between the parties which agreement was made an order of Court.

The original points on which the Minister and Trade Line Namibia relied for their opposition was as set out by Hannah J in his judgment namely:

"They intended that the first respondent's decision (i.e. that of the Minister) was properly made as was his decision to grant the two EPL's to second respondent (i.e. Trade Line Namibia).

Two further points were advanced in the answering affidavits. One was that the applicant had abandoned the prospecting area to which EPL 2696 related. The other was that EPL 2696 had lapsed by virtue of an application for a mining licence made by the applicant being withdrawn.

The matter came before Manyarara, A.J., on 27th August 2002 and by agreement between the parties an order was made.

They contested the review application solely on two further points, which I have mentioned. The material parts of the order read as follows:

‘It is ordered

1. That the cancellation of EPL's of the applicant with numbers 2564, 2565 and 2566 is hereby set aside.

2. That insofar as EPL's with numbers 3028 and 3029 granted to second respondent overlaps with any of the EPL's of applicant mentioned in paragraph 1 above is declared of no force and effect.

3. That the first respondent pay the costs consequent upon the setting aside of the EPL's mentioned in paragraph 1 above and such costs to include the costs of an instructing counsel and two instructed counsel.

4. That the application is referred for the hearing of oral evidence on the following questions:

4.1 Whether or not applicant abandoned its EPL 2696;

4.2 Whether or not the application filed for a mining licence for a portion of EPL 2696 area constituted an application in terms of the Act and, if so, whether applicant withdrew such application.

4A. Should above-mentioned issues be decided in favour of applicant licence 2696 remains valid and EPL's 3028 and 3029 shall be of no force and effect insofar as they overlap licence 2696.

8. That save for the costs mentioned in paragraph 3 above, the costs of this application incurred thus far

> are reserved for decision by the Court hearing oral evidence.'"

It follows from the above agreement and order that the validity of only one of NAMBIB's EPL's namely No 2696, was still in dispute and that the legality of the grant of EPL's 3028 and 3029 to Tradeline Namibia was still in dispute when the matter came before Hannah, J. in the Court *a quo* for the first time on 12th November 2002.

It is also clear that at that stage the only grounds on which the aforesaid legality were to be decided were those enumerated in par. 4 of the order of Manyarara, A.J. For that purpose the matter was referred to oral evidence in the said order.

A third issue was raised by counsel for the Minister and for Tradeline to the effect that NAMBIB had no further authority to litigate because allegedly its authority was withdrawn by one Subrammian. The matter was further postponed for that purpose. On 3rd February 2003 when the matter continued, the aforesaid third issue was withdrawn by counsel for the Minister and Tradeline. The parties were back in the position outlined in par. 4 of the order of Manyarara, A.J., as set out *supra*.

After a further postponement to 4th February, the parties once again changed their approach. By agreement the Court was now asked to determine two legal issues before hearing oral evidence. They had further agreed that should these legal issues be determined in favour of NAMBIB, the need to hear oral evidence

would be aborted. The court acceded to this request and proceeded to decide the said two legal issues.

The two legal issues formulated by the parties in a memorandum submitted to the Court and accepted by Hannah, J. for decision were as follows:

> "Issues for determination *in limine*
>
> By Agreement, the parties request the Court to determine the following questions of law separately, from any other questions and before any evidence is led, in terms of the provisions of Rule 33(4) of the Rules of the High Court of Namibia.
>
> 1. In respect of the first issue regarding the abandonment of EPL 2696 that was referred to oral evidence, whether, in the light of the provisions of the Minerals (Prospecting and Mining) Act, 1992, (the Act) and the fact that it is common cause between the parties that the Applicant did not abandon the prospecting area by notice, in writing, addressed and delivered to the Commissioner, as envisaged by section 54(1) of the Act, and, in the event of the Respondents establishing that the Applicant in law abandoned the prospecting area of EPL 2696 prior to 22 May 2002, which remains in dispute between the parties, such abandonment would *ex lege*, cause the

Applicant's mineral licence in respect of EPL 2696 to lapse, or, would entitle the Minister to cancel same without complying with the provisions of section 55(2) of the Act, as the Respondents contend, or not.

2. In respect of the second issue regarding the application for a mining licence for a portion of the EPL 2696 area, that was referred to oral evidence, in the event of the Respondents establishing that such application constituted an application for a mining licence in terms of the provisions of section 91 of the Act, <u>whether the withdrawal of such licence</u> were indeed wrongly stated. What was intended was the withdrawal of the application for such licence during the period in which the exclusive prospecting licence in relation to the area of land and in respect of the minerals to which such exclusive prospecting licence relates, is valid and prior to the expiry thereof, causes the EPL 2696 to lapse, as contended by the Respondents, or not."

(My emphasis added under the words, "the withdrawal of such licence". What was meant was the withdrawal of the application not of the licence.)

It becomes clear from the argument that the Court *a quo* decided both issues in favour of NAMBIB.

It appears from the notice of appeal filed on 6/2/2003, that the only issue left in contention between the parties after the filing of the aforesaid notice of appeal was whether or not the withdrawal by NAMBIB of its application for a mining licence in respect of EPL 2696, during the period in which the exclusive prospecting licence in relation to the area of land and in respect of the minerals to which such exclusive prospecting licence relates, remains valid prior to the expiry thereof, causes it to lapse, as contended by respondent, or not.

It seems clear that at the time of the application, as well as at the time of the argument before Court, it was common cause that NAMBIB had in fact applied for a mining licence in respect of part of the area of its EPL 2696 on 27th July 2001 and had withdrawn this application on 19th April 2002, before a decision by the Minister had been given.

At the time when the said cancellation of NAMBIB's application for a mining licence was made, the term of EPL 2696 had not yet expired by virtue of section 71(1) of the Act and at the time when the application for withdrawal of the application for a mining licence was made to the Minister, the EPL 2696 had also not yet expired in terms of section 71(1).

The crisp-question that had to be decided by Hannah, J. on the second issue was simply: Did the act of withdrawal of the application for a mining licence on part of the area of EPL 2696, cause NAMBIB's right to EPL 2696 to lapse.

This question the Court *a quo* decided in the negative as it did in regard to the first question.

The notice of appeal did not attack the decision on the first legal question. Consequently, I need only deal with the second question in this appeal. It must also be noted that the Minister did not note an appeal but was nevertheless joined by Tradeline Namibia as second respondent. The Minister was also not represented by counsel in the appeal. NAMBIB continued to be represented by the same counsel as in the Court *a quo,* namely Mr. Coetzee, assisted by Mr. Oosthuizen, whereas Tradeline Namibia was now represented by Mr. Strydom in place of Mr. Frank, SC, who appeared for both the Minister and Tradeline in the Court *a quo*, assisted by Mr. Strydom.

Both parties have added to the issues before us as follows:

Tradeline has filed a notice of motion on 28/5/2003 which applies for condonation for not having complied with the rules of court relating to security and for the late filing by it of a notice of appeal against the whole of the cost order given by Hannah J on 21st February 2003.

NAMBIB on the other hand argued *in limine* that condonation should not be granted to Trade Line Namibia on any of the two new issues and took the further point that the notice of appeal is materially defective in that it fails to appeal against the order - "that a declaration is made that licence 2696 remains valid..., but purports to do so only in respect of one of the rulings made by the learned judge *a quo* in terms of the provisions of Rule 33(4) of the Rules of the High Court of Namibia".

This court heard argument on both the points *in limine* aforesaid and the merits of the appeal. In my respectful view it will be less time consuming and more in the interest of justice if I first deal with the merits of appeal which consist in essence of one legal issue.

The argument on behalf of Trade Line in the Court *a quo*, remained in substance the same on appeal.

Hannah, J. dealt with this issue as follows in his judgment:

> "The second issue of law concerns the proper interpretation to be given to subsection (3) of section 71 of the Act when read with subsection (1) thereof. I have already set out subsection (1). Subsection (3) reads:
>
> > '3. Notwithstanding the provisions of subsection (1), but subject to the other provisions of this Act-
> >
> > (a) an exclusive prospecting licence shall not expire during a period during which an application for the renewal of such licence is being considered, until such application is refused or the application is withdrawn or has lapsed, whichever occurs first or, if such application is granted, until such time as the exclusive prospecting licence is renewed in consequence of such application; or
> >
> > (b) where an application is made by the holder of an exclusive prospecting licence for a mineral deposit retention licence or a mining licence in relation to an area of land which forms part of the prospecting area and in respect of any mineral or group of minerals to which such exclusive prospecting licence relates, such exclusive prospecting licence shall not expire in relation to such area of land and such mineral or group of minerals, until such application is refused or the

> application is withdrawn or has lapsed which ever occurs first or, if such application is granted, until such time as the mineral deposit retention licence is issued in consequence of such application.'

The respondent's contention was that by virtue of the provisions of subsection (3) the applicant's EPL 2696 expired upon the withdrawal of its application for a mining licence.

In presenting his argument on this aspect of the case Mr. Frank attached considerable significance to the use of the word 'Notwithstanding' at the commencement of subsection (3). He submitted, quite correctly, that that word has been construed to mean 'even if' or 'in spite of'. His submission, put shortly, was that the presence of the word 'Notwithstanding' has the effect that an EPL ceases to exist 'even if' or 'in spite of' the fact that it would have endured in terms of subsection (1) if the application for a mining licence is refused or withdrawn.

With all due respect to counsel, I read the provision differently. In my view, 'Notwithstanding' in the present context means that insofar as the provisions of subsection (3) are inconsistent with the provisions of subsection (1), the operation of the third subsection shall not be defeated by the provisions of

the first subsection. To my mind, subsection (3) is concerned solely with the situation where an EPL has expired at a time when an application for its renewal or an application for a mining licence is still pending. The effect of the subsection is that in such a situation the EPL does not expire until the application is refused or withdrawn or has lapsed. The subsection is not concerned with the situation where an application for the renewal of an EPL or for a mining licence is refused or withdrawn or has lapsed at a time when the EPL has not expired.

Mr. Frank submitted that such an interpretation would lead to an absurdity. He gave the following illustration. If an application for a mining licence is made six month after the grant of a three year EPL and a mining licence is granted within one month of the application being made then the licence holder would hold both an EPL and a mining licence for twenty nine months. This, in the submission of counsel, would be totally inconsistent.

The illustration given by Mr. Frank presupposes that the application for a mining licence is made for the whole area to which the EPL relates. However, there is nothing to prevent the holder of an EPL applying for a mining licence relating to only part of the

> prospecting area. Indeed, I should have thought that this would be the norm particularly as section 92 (2) (a) of the Act provides that the Minister shall not grant an application for a mining licence:
>
> ‘(a) in respect of an area larger than an area which in the opinion of the Minister would be required, having regard to the available minerals or groups of minerals in the area to which the application relates, to carry on such mining operations.’
>
> It is of some interest to note that a comparison of EPL 2696 with the applicant's application for a mining licence shows that the application was in respect of an area of land less than that to which the EPL relates.
>
> For the foregoing reasons I also ruled against the respondents second contention."

In argument before us, Mr. Strydom contended that the finding of Hannah J was wrong in this regard and contended that NAMBIB’s EPL 2696 terminated upon the withdrawal of its application for a mining licence in terms of section 91 of Act 33 of 1992.

Counsel for NAMBIB on the other hand contended that the judge *a quo* was correct in every respect.

Both sides relied for support of their respective contentions on the detailed provisions in the Minerals (Prospecting and Mining) Act, of 1992, its purpose and its context, read with the well known principles of interpretation of statutes as reiterated in many decided cases and enumerated in text books of authors such as Devinish, "Interpretation of Statutes" 288-289, LAWSA, Vol. 25, par. 276 from 222-227.

I agree with the argument and reasons of the learned judge *a quo* and counsel for NAMBIB and reject those advanced on behalf of Tradeline. Mr. Strydom is correct where he argues that subsection (3) applies notwithstanding the provisions of subsection (1).

Where he however further contends that the EPL ceases to exist even if, or in spite of the fact that it would have endured in terms of subsection (1) if such application is refused or withdrawn per subsection (3), he misconstrues the Act.

Obviously if an application for a mining licence is withdrawn when it is still pending at a time when the allocated term of the EPL has already expired under the provisions of subsection (1) of section 71, then the extended lease of life given to the EPL by the fact that an application for a mining licence over the whole or part of the area of the EPL remains pending, will no longer apply and the EPL will have expired because it's allocated period had expired in terms of subsection (1) of section 71 and is no longer kept alive by the fact that the application for a mining licence is pending as provided for by subsection(3).

However, if the application for a mining licence over part of the EPL area is withdrawn, the whole of the EPL licence will only continue as long as its allocated term had not expired in terms of section 71(1) or had not ceased to exist for some other reason such as provided for in sections 54 or 55 of the Act.

It is necessary to keep in mind throughout that we are not dealing with a purported,_"withdrawal" of a mining licence by an applicant (even if that was possible), but merely_with the withdrawal of <u>an application for a mining licence</u> which was still pending i.e. had neither been granted nor refused. The construction placed on the Act by appellant and his counsel will mean that the vested rights of the holder of an EPL will be unreasonably prejudiced without clear and express language to justify it.

The essence of subsection (3) is to provide a qualified extension of the period of validity of an EPL, where the allocated period of the EPL would have expired, was it not for the fact that the period is extended for so long as the application for renewal or for the granting of a mining licence or mineral retention licence is still pending before the Minister. The extension is however qualified in that the extension will lapse if the application for renewal is refused, or the application for a mineral retention licence or mining licence is refused or withdrawn.

If the allocated period as provided in subsection (1) of section 71 has however not expired by the time of such refusal withdrawal or lapsing, then the EPL will endure until the end of the allocated period.

This is in my respectful view, the only reasonable interpretation of the provisions of the Act.

It follows that the appeal on the merits must fail.

As far as the points *in limine* are concerned, NAMBIB will receive a more satisfactory result than a decision on the points *in limine* in its favour. Although Tradeline Namibia and their legal representatives were clearly at fault in not complying with the rules, the matter was however one of importance to decide on the merits and did not considerably prejudice NAMBIB. NAMBIB is at any event the successful party on the merits. In the circumstances I have decided that it is not necessary to consider the points *in limine* in any greater detail.

The appeal by Trade Line against costs has no merit. The order of the Court *a quo* should also stand in this regard as far as the costs in the Court *a quo* is concerned. The costs of the appeal should be borne by the appellant, Tradeline Namibia (Pty) Ltd.

In the result the order of the Court is as follows:

1. The appeal is dismissed.

2. The appellant, Tradeline Namibia (Pty) Ltd. must pay the costs of appeal, including the cost of one instructing legal practitioner and two instructed counsel.

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O'LINN, A.J.A.

I concur.

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MTAMBANENGWE, A.C.J.

I concur.

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MARITZ, A.J.A.

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