CASE NO.: SA 14/2002

IN THE SUPREME COURT OF NAMIBIA

In the matter between

NAMIBIA GRAPE GROWERS AND EXPORTERS ASSOCIATION	FIRST APPELLANT
NAMIBIA FARM WORKERS UNION	SECOND APPELLANT
FTK HOLLAND BV	
EXOTIC INTERNATIONAL (PTY) LTD	THIRD APPELLANT
AUSSENKEHR TOWN DEVELOPERS (PTY) LTD	
AUSSENKEHR FARMS (PTY) LTD	FOURTH APPELLANT
GRAPE VALLEY PACKERS (PTY) LTD	
NAMIBIA NURSERIES (PTY) LTD	FIFTH APPELLANT
NAGRAPEX (PTY) LTD	
	SIXTH APPELLANT
	SEVENTH APPELLANT
	EIGHTH APPELLANT
	NINTH APPELLANT

And

THE MINISTRY OF MINES AND ENERGY	FIRST RESPONDENT
MINERAL ANCILLARY RIGHTS COMMISSION	SECOND RESPONDENT
NORTHBANK DIAMONDS LIMITED	THIRD RESPONDENT

CORAM: STRYDOM, A.C.J., O'LINN, A.J.A., *et* SHIVUTE, A.J.A.

HEARD ON: 19 – 21/04/2004

DELIVERED ON: 25/11/2004

APPEAL JUDGMENT

STRYDOM, A.C.J.: This is an appeal from a judgment of a single Judge dismissing the application brought by the appellants on an urgent basis and discharging the rule *nisi* which was issued on the 5th May 2000. This matter concerns, more particularly, certain provisions of the Minerals (Prospecting and Mining) Act, Act No. 33 of 1992 (the Minerals Act). As the rule *nisi*, which was issued on this occasion, closely followed the prayers set out in the Notice of Motion, it is only necessary to set out such rule ordered by the Court, namely:

> "1. That a rule *nisi* be issued calling upon the Respondents to show cause, if any, why the following order should not be made on Friday 2 June 2000:
>
> 1.1 That First Respondent be interdicted and restrained from interfering with the due processes of law, and more specifically from giving any 'instructions' to Third Respondent which:
>
> (a) would have the effect of interfering with any of the Applicants' right and entitlement to have any dispute(s) between such Applicants and any of the Respondents adjudicated upon in terms of the due processes of law;
>
> (b) would have the effect of interfering with the Applicants' constitutional right and entitlement to fair administrative justice, as enshrined in clause 18 of the Constitution of the Republic of Namibia
>
> 1.2 Declaring:

(a) the provisions of Part XV of the Minerals (Prospecting and Mining) Act, No 33 of 1992 to be *ultra vires* the provisions of clause 16(2) of the Constitution of the Republic of Namibia, and null and void an of no effect:

(b) that Third Respondent has, for the above reasons, no rights and/or *locus standi* in the proceedings before the Second Respondent purportedly in terms of Part XV of the Minerals Act;

(c) that the convening and constitution of Second Respondent are declared to be nullities and of no force and effect;

1.3 Declaring the purported renewal(s) by Second Respondent of Exclusive Prospecting Licence ("EPL 2101") to be null and void, and by reason thereof, declaring Third Respondent not to have any *locus standi* before Second Respondent in its application in terms of section 109 of the Minerals Act;

1.4 Declaring the rights sought by Third Respondent to be an infringement of:

(a) Seventh Applicant's constitutional rights as entrenched by clauses 16(2) and 98(2)(b) of the Constitution of the Republic of Namibia; and/or

(b) Seventh Applicant's rights as entrenched by section 11 of the Foreign Investment Act, no 27 of 1990; and/or

(c) Seventh Applicant's interacting rights in terms of both the above Statutes; and/or

(d) The provisions of sections 52(1)(b)(i) and 52(1)(d)(i) of the Minerals Act;

and not capable of being granted to third Respondent in terms of any current authorizing legislative enactment or common law principle;

1.5 Interdicting and restraining Second Respondent from exercising any purported competencies, rights and/or duties, or from performing any acts in terms of the powers conferred by Part XV of the Minerals Act;

1.6 Declaring the Respondents, jointly an severally, to be liable to pay Applicants' costs;

1.7 Granting to Applicants such further and/or alternative relief as this Honourable Court deems fit.

2. That the rule *nisi* contained in paragraphs 1.1 operate as an interim interdict with immediate effect.

3. The costs of these proceedings are to stand over for argument and determination on the return date."

The only significant difference between the interim order granted and the prayers in the Notice of Motion was the fact that the Court did not order that prayer 2.5 (Order 1.5) should also operate as an interim interdict. Why this was so is of no relevance to the outcome of this case.

The Appellants were represented by Mr. Barnard. Mr. Chaskalson represented the first and second respondents whereas Mr. Smuts represented those respondents regarding the costs of the postponement of 3 April 2003. The third respondent was represented by Mr. Gauntlett assisted by Mr. Tötemeyer.

At the outset various matters ancillary to the appeal such as applications for condonation etc. were outstanding and opposed. However we were informed by Counsel that these issues were no longer contested. Because of the importance of the case the Court granted condonation where necessary and the matter proceeded on the merits of the appeal.

The application was supported by various affidavits. The main affidavit was made by the legal practitioner of the appellants who, in his affidavit, also dealt with the background to the application. It seems that an Exclusive Prospecting Licence with number 2101 (EPL 2101) was granted to a company with the name of Leotemp. Leotemp in turn transferred its rights to the third

respondent. This happened on 25 June 1997. Thereafter the licence was again renewed until 25th April 2000. It is alleged that this renewal took place without any notice to the landowner and it is alleged that the *audi alteram partem*-rule was not complied with. The concession area, known as "block 9", is situated on the Aussenkehr farm.

The farm Aussenkehr is extremely suitable for the growing and marketing of grapes and all of the applicants are in some way or another involved in this industry or represents workers so involved. It is further alleged that up to March 1998 prospecting was done by the third respondent in terms of a "surface owners' agreement" as required by the Minerals Act. It is alleged that in terms of this agreement the owner expressed its intention to expand its farming operations and to that extent demarcated certain areas for such further expansion. The prospector undertook to use its best endeavours to prospect all such areas as soon as possible in order that these areas would become available for further grape cultivation.

This, however, did not happen. Instead it became clear that third respondent intended to excavate 4 pits of which pits 3 and 4 were situated within the area demarcated for further grape cultivation. Pits 1 and 2 would effectively fall within an area designated for the development of a township for the workers of Aussenkehr. In fact Pit 1 would be situated in an already existing portion of the informal settlement, housing some of the inhabitants of the village. Hence the application for the relief set out in paragraph 1.4 of the order.

The result of this was that when the "surface owners'" agreement expired in 1998 the Sixth appellant was not without more prepared to enter into a new

agreement covering the renewal of EPL 2101. Attempts were made to solve the impasse but when this was unsuccessful, third respondent invoked the provisions of section 52(3) of the Minerals Act by an application to the second respondent to have the dispute resolved in terms of the provisions of section 110 (Part XV) of the Minerals Act. Third respondent thereupon launched an application to second respondent in terms of section 109(1) of the Minerals Act. The outcome of this application was in favour of the third respondent but was later, by agreement between the parties, set aside by the High Court because the Commission was, at one stage during the proceedings, not properly constituted. A fresh application was thereafter launched by the third respondent. It is this application that forms the subject matter for the relief claimed and set out in paragraph 1.5 of the interim order.

It was further alleged by the applicant that the activities by the third respondent were a breach of the applicant's constitutional rights in terms of Articles 16 and 98(2)(b) of the Constitution and the applicant consequently asked the Court to declare Part XV of the Minerals Act, which sanctions such activities, to be *ultra vires* the provisions of the Constitution.

One Kennedy Ndilipunye Hamutenya, the Director of Mines in the Ministry of Mines and Energy, deposed to an affidavit on behalf of the first respondent. This deponent set out some of the history in regard to the viability of finding diamonds on Aussenkehr. In May 1996 two diamonds, totaling 0.95 carats, were found in Block 9. Hamutenya further confirmed the history of EPL 2101, as set out by the sixth appellant, and confirmed the renewal thereof in 1998. He also challenged the sixth appellant to state whether he was, at the time, aware of the application for renewal of the licence, and if so, why he did not

seek an opportunity to make representations to the Minister, or protest the latter's failure to give it an opportunity to be heard. Hamutenya denied that the Minister was under any obligation to hear the sixth appellant on the application for renewal of the licence and further stated that the issue was moot because the period of the renewal had already expired.

Hamutenya also denied the allegations set out in paragraph 12.9 of the founding affidavit and denied that at any stage a village or town existed in the designated areas where pits 1 and 2 were supposed to be dug. He further submitted that this issue was in any event not properly before the Court as it was an issue which was in the first instance one for the second respondent to decide in the context of the third respondent's application in terms of section 109 of the Minerals Act.

The deponent also dealt with the sixth appellant's allegations that, what the third respondent now intended to do, amounted to mining operations and he assured the appellants that the Ministry would not allow breaches of the provisions of the Minerals Act. Hamutenya said that the Ministry's offer to arbitrate the dispute between the sixth appellant and the third respondent was a *bona fide* attempt to provide the parties with a speedier consensual resolution than a formal hearing before the second respondent.

In regard to the unconstitutionality of Chapter XV of the Minerals Act the deponent stated that on a proper interpretation of Article 16 of the Constitution the provisions of the Chapter did not limit property rights. In the alternative it was stated that the Chapter constituted a reasonable legislative scheme for the regulation of the rights of mineral licence holders and did

therefore not violate the Constitution. It was alleged that Article 16 had to be interpreted to allow reasonable regulation of property rights. Further in the alternative it was alleged that if Chapter XV went beyond reasonable regulation and authorizes expropriation then expropriation was accompanied by just compensation and accordingly permissible under Article 16(2) of the Constitution.

In regard to annexure "ND 20" the deponent admitted that the letter was sent by the Permanent Secretary of the first respondent and stated that there was no legal basis for the last sentence of the letter. He furthermore undertook that the first respondent would not bypass any procedures required by the Minerals Act in relation to the dispute between the parties. This undertaking affected the interdict applied for by the appellants against the first respondent. This undertaking came to the knowledge of the appellants on 5th June 2000.

Second respondent's answering affidavit was deposed to by its chairman Mr. Dirk Hendrik Conradie. The deponent stated that the second respondent opposed the relief sought in prayer 2.4(d) on the basis that it was sought prematurely and that the issues relating to this relief should actually be the subject of the second respondent's hearing in terms of section 109 of the Minerals Act. In all other respects the second respondent abided by the decision of the Court.

The answering affidavit by the third respondent was deposed to by one Peter Walker, at the time, a director of the third respondent. He set out that an amount of some N$ 7 million had already been spent in exploration activities and that a further N$ 30 million would be spent on bulk sampling. If the first

phase indicated viability a further N$ 15 million would be expended. He further stated that the reason why they agreed to have the ruling of the second respondent set aside was that it was established that for part of the hearing one of the members of the Commission was absent during the proceedings which fatally affected the outcome of the hearing. This deponent denied most of the allegations contained in the founding affidavit and also launched a counter application against the sixth appellant in which it was claimed that the Court declared that the written agreement, Annexure "15", was a valid and binding surface owners' agreement between the third respondent and the sixth appellant.

This counterclaim was later abandoned by the third respondent but not after some unnecessary time and energy was spent on it.

The replying affidavit of the legal practitioner of the appellants was described by him as provisional and preliminary due to the fact that some of the respondents did not comply with the time frame, laid down by the Court, in which they were to file their answering affidavits.

After the initial hearing, during which the rule *nisi* was issued, the matter was postponed and the respondents put on terms to deliver their answering affidavits on or before 19th of May and the appellants were ordered to reply on or before the 26th May. In terms of the Court order the matter was due for hearing on 2nd June 2000. Although the third respondent filed its answering affidavit and counterclaim on time the first and second respondents only did so on the 25th of May. This notwithstanding the third respondent insisted that its counterclaim be heard on 2nd of June. The background to all this was no

longer relevant, however the applicant was able to file a long affidavit by one Dusan Vasiljevic, the Managing Director of the sixth appellant, as well as an affidavit by the legal practitioner of the applicants in which they dealt fully with the third respondent's counterclaim.

Notwithstanding the insistence of the third respondent that the matter be heard on 2nd June the matter was not ripe for hearing and the parties agreed to a postponement and were placed on terms and given extended dates. These dates could also not be complied with and third respondent, in turn, launched an application for postponement and applied that its counterclaim be heard together with the main application. This application was opposed by the applicants. In the end the application was successful but was an example of the non-cooperation of the parties towards each other and was one of many side skirmishes which contributed to swelling the record to some 20 volumes. In the process the parties did not mince words and accusations of vexatious and other dishonest and fraudulent behaviour became part and parcel of the content of the various affidavits.

In an affidavit, which according to the legal practitioner of the appellants, was to replace his "preliminary and provisional" replying affidavit previously filed, and which only corrected some spelling mistakes, it was now conceded that one of the applicants, which was previously styled as the fifth applicant, namely Aussenkehr Small Business Association, had no *locus standi* to pursue the relief sought in the main application. However, according to the third respondent the affidavit went much further than correcting mistakes in the previous affidavit. This replying affidavit joined issue on most of the

allegations contained in the affidavits of the respondents and also foresaw the filing of a further affidavit by an expert in support of the appellants' case.

In a further affidavit Walker persisted that, as was set out in the counterclaim of the third respondent, the parties had reached a valid and binding agreement concerning the exercise of the right to prospect as set out in the claim.. This was supported by the legal representative of the third respondent, Ellis. In another affidavit dated 2nd August 2000 a Rule 14 application was attached in terms of which Ellis challenged the standing of a number of the appellants to bring the application. This affidavit was followed by a further application by Ellis requesting the Court to admit his affidavit of 2nd August 2000 with annexures. Notice was also given by the third respondent of an application to strike out matters contained in the founding and replying affidavits of the sixth appellant.

After leave was granted by the Court, the sixth appellant was allowed to file further affidavits in answer to the replying affidavits of the third respondent. The appellant was however placed on terms and because the affidavit was not filed within the dates set by the Court the sixth appellant also had to apply for condonation. This affidavit also dealt mainly with allegations relevant to the counter application which, as indicated above, were later not proceeded with. An affidavit was also filed by the legal practitioner of the appellants in answer to the challenge to the *locus standi* of certain of the appellants.

Another issue which drew fire from both sides was the Walmsley report, an environmental evaluation of the activities by the third respondent and which was obtained by the third respondent. When the appellants used this report to

show the effect “trial mining” would have on the environment, objection was taken by the third respondent on the basis that the report was hearsay evidence and application was made to strike it out. This was met by a long affidavit deposed to by the legal practitioner of the appellants setting out why the report should be allowed.

Again by Notice of Motion dated 12th October 2000, sixth appellant applied that the supporting affidavit to the application be admitted as a further and supplementary replying affidavit on behalf of the appellants. The purpose of this was to support the founding affidavit of Ndauendapo in which it was alleged that the third respondent was only a shell company and that all the indications were that there were no viable diamond finds to be made on Aussenkehr. It was further stated that what the third respondent intended to do could no longer be described as prospecting and in fact amounted to mining which it was not allowed to do in terms of its licence. In order to support the allegations, Ndauendapo attached a previous application for security of costs and annexures. This new material comprised, together with annexures, some 159 typewritten pages.

On 21st February 2001 an inspection *in loco* was held on the farm. I will deal with this more fully at a later stage when and if it becomes necessary. However, the appellants, through their legal representative, utilized the opportunity to file a further affidavit “to enlarge upon what has been revealed by the Respondents and to set up an additional ground for relief.” To this extent the affidavit of one Volkmann, a professional land surveyor, was filed with the Court. The purpose of this exercise was for Volkmann to demonstrate by means of a map “all activities to be exercised by Northbank Diamonds in

terms of their prospecting license, from any existing 'spring, well, borehole, reservoir, dam, dippingtank, waterworks, perennial stream or pan, artificially constructed watercourse, kraal, building or any structure of whatever nature.' Those being the structures envisaged by section 52(1)(d)(ii) of the Minerals Act. I will deal more fully with this affidavit if and when it becomes necessary.

This maneuver was met by the third respondent with strong opposition and an application was launched, in terms of Rule 30, to set aside the affidavits by Ndauendapo and Volkmann. The third respondent, through Walker, filed a long and voluminous affidavit containing *inter alia* extracts from the argument and evidence in proceedings which took place previously before the second respondent and what was said during the inspection *in loco*. This application was also a reply to the supplementary replying affidavit of Ndauendapo. A steady stream of further affidavits kept coming, seemingly by agreement between the parties and with the approval of the Court. In his affidavit Walker availed himself of strong language and accused Ndauendapo of advancing "a false, baseless and ever changing *mala fide* case."

The attack of Walker was strongly objected to by the legal practitioner of the appellants who seemed to hold the legal representatives of the third respondent responsible for the attack and threatened them with legal action. On the 29th June yet a further affidavit was filed by Ndauendapo which dealt, *inter alia*, also with issues pertaining to Walker's affidavit which the deponent did not deal with in his previous affidavits.

I have given a short overview of the chronological development of this case and one cannot help thinking that the Court *a quo* should have kept a firmer

hand on the reigns and should not have allowed the parties to roam almost at will. The matter became out of control when the applicants deponent, Ndauendapo, had to distinguish between his provisional and preliminary and additional and supplementary replying affidavits. When further affidavits were filed they were just called "affidavit" and the reader was warned not to be misled by the description of the document. Affidavits on both sides did not hesitate to accuse deponents on the other side of being *mala fide* or dishonest or of abusing the process of the Court. An extreme example of this was the replying affidavit of Walker. For the most part this affidavit as well as Ndauendapo's reply thereto had no relevance to the issues and the relief claimed. Most of this affidavit was then also struck out. Affidavits were repetitive and sometimes even contain legal argument with reference to decided cases. Another ludicrous situation arose when the third respondent insisted on having its counterclaim adjudicated separately from the main application. The counter-claim was then postponed to an earlier date. Thereafter the third respondent had second thoughts and decided to have the counterclaim heard together with the main claim but was then met with opposition with the result that the third respondent then had to bring a formal application for a postponement. All this for nothing because the counterclaim was withdrawn in the end but this illustrated the attitude of the parties

One factor which caused the note of enmity which soon crept into the proceedings was in my opinion the fact that all the main affidavits of the appellants were deposed by their legal practitioner with confirming affidavits by the clients. This Court has on a previous occasion warned against this practice and there is no doubt in my mind that this practice must be discouraged, if need be, by appropriate orders for costs. (See in this regard

Vaatz and Another v Klotzsch and Others, unreported judgment of this Court, delivered on 11 October 2002.) In the *Vaatz* case this Court also warned litigants not to make unfounded and unnecessary accusations of dishonest conduct against their opponents. The Court also warned legal practitioners not to allow their clients to act in this way. However allegations of some or other reprehensible conduct on the part of the other party appeared almost in every affidavit and, as previously stated, the affidavit of Walker went far beyond what is acceptable. It seems to me that the parties are equally to blame for this situation. Because of the conclusion to which I have come in this appeal I do not intend to make any special orders in this regard.

When the matter was argued Counsel on all sides were, notwithstanding the voluminous documentation and evidence placed before the Court, able to crystallize the main issues and to confine their arguments to those issues. Apart from an appeal against certain costs orders and the question of who was responsible for the costs of the postponement of the appeal in April 2003, the appeal turned on three main issues, namely the constitutionality of Part XV of the Minerals Act, the review application in regard to the renewal of EPL 2101 in 1998 and the application based on the provisions of section 52 of the same Act.

A. CONSTITUTIONALITY OF PART XV OF THE MINES AND MINERALS ACT

The heading of Part XV of the Act reads ‘Ancillary Rights’. In terms of sec. 108 a Minerals Ancillary Rights Commission (the Commission) is established consisting of a chairperson and two members It furthermore applies the

provisions of the Commissions Act, Act No. 8 of 1947, to the proceedings of the Commission. Sec. 109 is the *raison d'etre* of the Commission. It states that where it is reasonably necessary for the holder of a non-exclusive prospecting licence, a mineral licence or a mining claim to obtain a right:

> "(a) to enter upon land in order to carry on operations authorized by such licence or mining claim on such land;
>
> (b) to erect or construct accessory works on any land for purposes of such operations;
>
> (c) to obtain a supply of water or any other substance in connection with such operations;
>
> (d) to dispose of water or any other substance obtained during such operations;
>
> (e) to do anything else in order to exercise any right conferred upon him or her by such licence or mining claim;"

and such holder is prevented from carrying on such operations by, e.g. the owner of the land or any person competent to grant such right, then the holder of the licence can apply to the Commission to grant him such right. The section further provides for the procedure to be followed, the notices to be given to the owner or other interested party or parties and call upon them to make representations in opposition to such application. Sec. 110 provides for a hearing of the application and further states that the interested party or parties shall be heard either personally or through a legal representative and further provides for the cross-examination of any witnesses. If the Commission is on reasonable grounds satisfied that it is reasonably necessary for such holder to obtain such a right it may grant the right subject to such terms and conditions and for such period as the Commission may think fit. Under certain circumstances the chairperson may also, as an interim measure, and before a

hearing takes place, grant to the holder such right which shall lapse on the date that the application, made in terms of sub-sec. (1), is considered and decided upon by the Commission. Sec. 112 empowers the Commission to determine an amount for compensation in regard to any right granted by it which shall be payable before the exercise thereof if security therefore has not been given. Sec. 113 gives to any person aggrieved by an order of the Commission a right of appeal to the High Court of Namibia.

The Court was asked to draw certain inferences from the provisions of sec. 107 of Part XV and it is therefore necessary to set out this provision in full, namely –

> "107. The provisions of this Part, in so far as they provide for a limitation on the fundamental rights contemplated in subarticle (1) of Article 16 of the Namibian Constitution in order to authorize, subject to an obligation to pay just compensation, the holder of a non-exclusive prospecting licence, a mineral licence or a mining claim to enter upon any land of any person for purposes of carrying on operations authorized by such licence, are enacted upon the authority conferred by sub article (2) of that Article."

Article 16 of the Constitution, to which reference is made in sec. 107 of the Act, is part of the Bill of Rights contained in the Namibian Constitution and forms the basis of the attack launched by the appellants on the constitutionality of Part XV of the Minerals Act. This Article provides as follows:

> "Article 16 Property
>
> (1) All persons shall have the right in any part of Namibia to acquire, own and dispose of all forms of immovable and movable property individually or in association with others and to bequeath their property to their heirs or legatees: provided that Parliament may by legislation prohibit or

regulate as it deems expedient the right to acquire property by persons who are not Namibian citizens.

(2) The State or a competent body or organ authorized by law may expropriate property in the public interest subject to the payment of just compensation, in accordance with requirements and procedures to be determined by Act of Parliament."

Various other articles of the Constitution are also relevant to the question concerning constitutionality. These are articles 131, 22 and 25(1). These articles provide as follows:

"Article 131 Entrenchment of Fundamental Rights and Freedoms:

No repeal or amendment of any of the provisions of Chapter 3 hereof, in so far as such repeal or amendment diminishes or detracts from the fundamental rights and freedoms contained and defined in that Chapter, shall be permissible under this Constitution, and no such purported repeal or amendment shall be valid or have any force or effect."

"Article 22 Limitation upon Fundamental Rights and Freedoms

Whenever or wherever in terms of this Constitution the limitation of any fundamental rights or freedoms contemplated by this Chapter is authorized, any law providing for such limitation shall:

(a) be of general application, shall not negate the essential content thereof, and shall not be aimed at a particular individual;
(b) specify the ascertainable extent of such limitation and identify the Article or Articles hereof on which authority to enact such limitation is claimed to rest."

"Article 25 Enforcement of Fundamental Rights and Freedoms

(1) Save in so far as it may be authorized to do so by this Constitution, Parliament or any subordinate legislative authority shall not make any law, and the Executive and the agencies of Government shall not take any action which abolishes or abridges the fundamental rights and freedoms conferred by this Chapter, an any law or action in contravention thereof shall to the extent of the contravention be invalid provided that:…"

The above provisions of the Constitution stipulates, firstly that the Rights and Freedoms, set out in Chapter 3, cannot be repealed and can only be amended in so far as such amendment does not diminish or detract anything from the Rights and Freedoms so set out in that Chapter. Secondly the limitation of the Rights is only permissible where this is authorized by the Constitution and then only to the extent set out in Article 22. Thirdly any Act of Parliament which abolishes or abridges any of the Rights or Freedoms shall to that extent be invalid.

On behalf of the appellants it was submitted by Mr. Barnard that there could not be any question that the provisions of Part XV of the Act limits the property rights of a landowner and as the Minerals Act is an Act of Parliament it is subject to the above limitations. Referring to Article 22 Counsel submitted that the Legislator was aware of the effect of the provisions of Part XV and in order to find some authorization for the limitation of Article 16 it enacted the provisions of sec. 107 of the Minerals Act. Counsel however submitted that Part XV was not saved by sec. 107 as Article 16(2) deals with expropriation and sanctions the expropriation of land under certain circumstances. Part XV, so it was submitted, falls short of expropriation and only limits the use and enjoyment of his property by a landowner. Consequently Part XV, which limits the property rights of a Landowner without there being any authorization for such limitation, results in the provisions of Part XV being unconstitutional.

Counsel further submitted that the argument by the respondents that Article 16 only entrenched and safeguarded the framework within which property could be acquired, can be owned and disposed of and nothing more, was

flawed. Counsel submitted that Article 16 safeguarded the component rights of ownership and not only certain of those rights as argued by the respondents. Counsel further submitted that even if Part XV of the Minerals Act was a reasonable legislative act then the provisions thereof were not saved because, unlike the South African Constitution, the Namibian Constitution did not contain a general limitation clause based on the reasonableness of the legislation. (See sec. 36(1) of the South African Constitution, Act 108 of 1996).

Mr. Chaskalson, on behalf of the 1st and 2nd respondents , submitted that Article 16 had to be interpreted in harmony with Article 100 of the Constitution. In this regard it was firstly argued by Counsel that, seen in this way, the encroachment on the interests of a surface owner by the owner of the mineral rights did not impact on property within the contemplation of Article 16. Alternatively, and if the Court should find that the encroachment did impact on the property of the surface owner, then Counsel submitted that Article 16(2) expressly permitted the appropriation of property by a competent body authorized to act in terms of the law and on payment of just compensation. Article 16 tacitly permits the reasonable regulation of property rights in the public interest. To that extent the Article authorizes interference with property rights which falls short of expropriation and therefore provides for a reasonable regulation of competing interests of surface owner and mineral rights holder. Counsel confirmed that ownership protected by Article 16(1) was not limited to the instances mentioned in the Article or to some "sticks in the bundle" of property rights. However the Article did not exclude reasonable regulation by the State in regard to property rights.

Mr. Chaskalson further pointed out that on the argument of Mr. Barnard an intransigent surface owner would be able to render the right of a holder of mineral rights nugatory. If Part XV was unconstitutional, as submitted by Mr. Barnard, then there was no means whereby a holder of mineral rights might, e.g. enter on the property to exercise his rights, if permission to enter on the property was not granted by the surface owner. That meant that the right, which was regarded as property, and was protected similarly by Article 16, was unprotected. Mr. Chaskalson submitted that the contentions by the appellants were absurd and would bring about a result not intended by the Constitution.

Mr. Gauntlett associated himself with the argument of Mr. Chaskalson for the first respondent. He pointed out that the appellants sought three declaratory orders and he referred the Court to the applicable law. Referring to the argument by Counsel for the appellants Mr. Gauntlett said that what Counsel was contending for was that Article 16 established an absolute right of surface ownership incapable of regulation. What was protected by the article was, on the interpretations given by this Court in regard to purposive interpretation of the Constitution, the full ownership in property. Mr. Gauntlett pointed out that the history of Namibia showed that mineral rights always vested in the State which was then free to licence mining operations. Reading Articles 16, 100 and 140 together, what the Constitution is providing for in its scheme was that the existing dispensation on mining laws, as one form of property rights, was carried through. The right to mine carries with it the ancillary rights set out in Part XV of the Minerals Act and is, if sensibly interpreted, intended to alleviate the position of the surface landowner.

The interpretation of Article 16 of the Constitution read with Articles 22 and 131 leads, according to Counsel for the appellants, to the inevitable conclusion that the ownership in property, be it movable or immovable, is not capable of regulation where such regulation abolishes or abridges any of the rights comprising ownership in property. The only limitation on ownership provided for in Article 16 is expropriation by the State, or a body set up in terms of the law, for public purposes and against payment of just compensation. This, so it was submitted by Counsel, was due to an oversight by the founding fathers when they drafted the Constitution. On the one hand Mr. Barnard submitted that the Constitution was immutable and that Part XV of the Mines and Minerals Act infringed the rights of a landowner and was therefore unconstitutional. On the other hand the enormity of such a submission forced Counsel to further submit that the Constitution was not cut in stone and such an obvious *lacuna* would be capable of correction by the Legislature, although it was conceded that any subsequent drafting to provide for regulation would itself diminish or abridge Article 16.

Certain issues crystallized during argument and became common cause. One such issue concerned the content of ownership in property. It was submitted by Mr. Barnard that the protection given by Article 16 extended over all rights included in property ownership and not only in some of the rights. During argument both Counsel on behalf of the respondents explained their stance and only qualified the protection so granted to ownership being subject to reasonable regulation. I agree that the protection granted by the Article encompasses the totality of the rights in ownership of property. This Article, being part of Chapter III of the Constitution, must be interpreted in a purposive and liberal way so as to accord to subjects the full measure of the rights

inherent in ownership of property. (See in this regard *Minister of Defence v Mwandinghi,* 1993 NR 63 SC).

Another issue on which there was unanimity between the parties was the issue whether an exclusive prospecting licence was property. In my opinion the parties correctly agreed that such licence was property in the hands of the holder thereof. (See in this regard *Minister of Defence v Mwandinghi, supra,* p. 75.)

Thirdly the parties were *ad idem* that Article 100 of the Constitution vested mineral rights, for so far as they were not privately owned, in the State. In regard to Namibia mineral rights vested in the State since Colonial times. (See in this regard Imperial Mining Ordinance for German South West Africa, 8th August 1905 and Proc. 21 of 1919, Proc. 4 of 1940, Ord. 26 of 1954, Ord. 20 of 1968 and presently Act 33 of 1992).

I agree with Counsel, on behalf of the Respondents, that the question whether Part XV of the Minerals Act is constitutional must be determined on the provisions of the various Articles of the Constitution read with Article 100. The source for the enactment of the Minerals Act is to be found in Article 100 of the Constitution itself which vests those rights in the State. Constitutionally these rights never formed part of ownership in landed property and can therefore not be seen as *ex post facto* limiting the right of ownership of a landowner in regard of which the provisions of Article 22 of the Constitution must apply. The Minerals Act regulates the granting and the exercising of those rights and the relationship between the State and any holder on which such rights are conferred in terms of the Minerals Act. Because of a possible conflict between

the exercise of such rights and the rights of the owner of landed property, the Act provides for machinery by means of which it attempts to resolve any dispute by balancing the competing rights and thereby relieving the tension so created. It is in this regard that Part XV of the Act, and to a certain extent also sections 51 and 52, play a role.

The contention by the appellants' Counsel that Part XV of the Minerals Act is unconstitutional carries in its wake the logical result that all and any regulation in regard to property, in so far as such regulation may abridge, in the least, one or any of the "bundle" of rights, of which ownership in property consists, such regulation will be invalid as it conflicts with the provisions of Article 16 of the Constitution. This was conceded by Counsel for the appellants. According to Counsel no provision was made for regulating of property in this regard. This caused Mr. Gauntlett to remark that whenever the State wanted to impose some or other regulation in regard to property, e.g. to regulate the possession of arms and ammunition, they would not be able to do so except to expropriate all arms and ammunition.

Mr. Gauntlett, on the other hand, submitted that it was not the intention of the founding fathers to change the property regime in Namibia. The purpose of Article 16 was to protect the right of individuals and body corporates to acquire and possess property and did not intend this to change on the advent of Independence. Both Counsel for the respondents further pointed out that an interpretation of Article 16 as an absolute and rigid provision, incapable of accommodating reasonable regulation of property, was untenable. Counsel also pointed out that, because of the provisions of Article 131, there was no

way in which the situation could be corrected if the interpretation of Mr. Barnard was correct.

There is no doubt in my mind that if Mr. Barnard is correct we are facing a major crisis. His submission that the failure to provide for regulation, as far as property was concerned, as a mere oversight which could always be amended is all but reassuring, more particularly bearing in mind that such a correction itself would be, on his argument, an abridging of the provisions of Article 16 and would thus be in conflict with Article 131. No authority was cited by him in support of the proposition that amendment would be possible.

The owner of property has the right to possess, protect, use and to enjoy his property. This is inherent in the right to own property. It is however in the enjoyment and use of property that an owner may come into conflict with the rights and interests of others and it is in this sphere that regulation in regard to property is mostly needed and in many instances absolutely necessary. Such regulation may prohibit the use of the property in some specific way or limit one or other individual right without thereby confiscating the property and without thereby obliging the State to pay compensation. There are many such examples where, to a greater or lesser degree, the use or enjoyment of property, be it movable or immovable, is regulated by legislation and which would, on the argument of Mr. Barnard, constitute a limitation on the right of ownership which will then render such legislation unconstitutional and can be challenged by anyone against whom such legislation is enforced.

A search through the legislative publications of Namibia, as well as legislation taken over from the previous dispensation, support the above statement.

Examples of these are, Ordinance 19 of 1957 controlling the eradication of weeds on land; Act 59 of 1968, controlling the sale of agricultural products; Act 3 of 1973, controlling agricultural pests; Act 12 of 1981, controlling the meat industry and Act 24 of 1995 making it compulsory to brand cattle; Act 13 of 1956, controlling animal diseases; Act 76 of 1969, dealing with soil erosion and Act 70 of 1970, prohibiting the subdivision of land under certain circumstances. All the above legislation is aimed at the use of land and agricultural products.

Examples of control over other property are Act 6 0f 1998, the sale of alcohol; Act 7 of 1996, the control of arms and ammunition; Ord. 30 of 1967 and Act 22 of 1999, the control over the use of motor vehicles; Act 25 of 1964, control over the price of certain goods and Act 54 of 1956, control over the use of water under certain circumstances.

The above are only examples of the control by the State over the property of its subjects and inhabitants in Namibia. It is in my opinion inconceivable that the founding fathers of our Constitution were unaware of the vast body of legislation regulating the use and exercise of rights applicable to ownership or that it was their intention to do away with such regulation. Without the right to such control it seems to me that it would be impossible for the Legislature to fulfil its function to make laws for the peace, order and good government of the country in the best interest of the people of Namibia. (Art. 63(1) of the Constitution.) It therefore seems to me that, like the right to equality before the law (Art. 10(1) of the Constitution), the right to ownership in property is not absolute but is subject to certain constraints which, in order to be constitutional, must comply with certain requirements.

In Constitutional Law of India by H.M. Seervai, 3rd Edition, Vol. II, pa. 14.24, the Author, discussing Arts. 19(1)(f), and 31, before these articles were amended, of the Indian Constitution, dealing with the right of citizens to acquire, hold and dispose of property both movable and immovable, pointed out that the sovereignty of the State involves three elements, namely the power to tax, "police power" and "eminent domain". The author further stated that 'police power' was defined as "the inherent power of a government to exercise reasonable control over person and property within its jurisdiction in the interest of general security, health, safety, morals and welfare except where legally prohibited (as by constitutional provision)." The accepted definition for 'eminent domain' is "the power of the sovereign to take property for public use without the owner's consent upon making just compensation". The distinction between an exercise of the State's police power and its power of eminent domain is familiar to South African expropriation law. (See in this regard: Davis, Cheadle and Haysom: Fundamental Rights in the Constitution: p 243.)

It seems to me that in so far as a comparison can be drawn this distinction between the State's police power and its power of eminent domain is to a certain extent inspirational for Art. 16 of our Constitution and that Art. 16(1) can be compared to the State's police powers and Art. 16(2) its powers of eminent domain. If it is then accepted, as I do, that Article 16 protects ownership in property subject to its constraints as they existed prior to Independence and that Article 16 was not meant to introduce a new format free from any constraints then, on the strength of what is stated above, and bearing in mind the sentiments and values expressed in our Constitution, it seems to me that legislative constraints placed on the ownership of property

which are reasonable, which are in the public interest and for a legitimate object, would be constitutional. To this may be added that, bearing in mind the provisions of the Constitution, it follows in my opinion that legislation which is arbitrary would not stand scrutiny by the Constitution.

To the extent set out above I agree with the submissions by Counsel for the respondents. This case, as far as I know, is the first concerning the interpretation of Article 16. I therefore do not want to imply that the requirements in the previous paragraph are a closed list and the final interpretation of the Article. It should in my opinion be allowed to develop as the need arises, if any.

This brings me to Part XV of the Minerals Act. In my opinion the constitutionality of this legislation can be approached on two grounds. Firstly, and as was pointed out previously, mineral rights vested in the State by virtue of Article 100 of the Constitution. As such the inroad into the property right of the landowner is created and sanctioned by the Constitution. In so far as the mineral rights may be transferred by the State into private ownership, it is, as property, also protected by Article 16 of the Constitution.

However, because of the origin of the right, being the Constitution itself, it cannot be said that it is the Minerals Act, or for that matter Part XV thereof, which abolishes or abridges, (See Article 25), the fundamental right of ownership protected under Article 16. The Minerals Act does no more than give effect and content to the right so vested by the Constitution and Part XV contains reasonable provisions for the balancing of this right *vis-à-vis* any other interests or rights, e.g. that of the landowner. Providing, as it does, for a

proper hearing, the payment of compensation where necessary and control by the Courts of the land in regard to any order made by the Ancillary Rights Commission, there is no basis upon which the provisions of Part XV can be said to be unreasonable. I also do not understand Counsel for the Appellants submitting that the provisions are unreasonable.

Secondly, and bearing in mind the inherent power of the State over persons and property to exercise reasonable control, Part XV is enacted in the public interest and for a legitimate object and is a reasonable mechanism whereby similar contesting rights are balanced to ensure equal protection of those rights in terms of the Constitution. On this basis also it cannot be said that the provisions of Part XV of the Minerals Act are unconstitutional.

The interpretation of Counsel for the appellants will inevitably lead to the absurdity that it pre-supposes that any regulation in regard to ownership which controls to any extent one or other of the rights in ownership of property will be unconstitutional. In regard to the particular provisions of the Minerals Act the interpretation of Counsel is to the effect that a landowner could, *ad infinitum,* frustrate the rights of the holder of a mineral licence and that notwithstanding the fact that such right was property and was sanctioned by the Constitution itself. The owner, by refusing permission to a licence holder to enter upon his land, can effectively circumvent such right.

Reference was made to the provisions of sec. 107 of Part XV and it was submitted by Counsel for the appellants that the legislature itself was aware that the provisions of this Part of the Act would impact on the rights of ownership and that they therefore attempted to save the provisions by

referring to Article 16(2) of the Constitution as authority for the abridgement of ownership rights protected by sec. 16(1). It was however submitted that Article 16(2) could not save the situation as it dealt with expropriation proper and did not cover the instance where only one or other of the rights inherent in ownership of land was diminished. However, on the reasoning set out above it seems to me, as was also submitted by Counsel for the respondents, that the Legislator was perhaps over-cautious in enacting sec. 107. As was further pointed out by Counsel for the respondents the possibility of an expropriation was always present and that it was thought prudent to include reference to Article 16(2) of the Constitution. In my opinion the inference Counsel for the appellants wanted us to draw from the inclusion of sec. 107 is not justified. In any event it is for the Court, and not the Legislator, to interpret the provisions of the Constitution and the Minerals Act.

I am, for the above reasons, of the opinion that the appeal cannot succeed on this ground.

B. REVIEW OF THE RENEWAL OF THE LICENCE IN 1998

The second ground of appeal concerns the finding by the Court *a quo* that the review, brought by the appellants, was not within a reasonable time. The learned Judge further found that there were also no valid grounds on which the Court could relax the rule with the result that the Court dismissed the application for a review.

Because no specific time is prescribed for the institution of review proceedings, the Courts, as part of their inherent power to regulate their own

procedure, have laid down that a review must be brought within a reasonable time. The requirement of a reasonable time is necessary in order to obviate possible prejudice to the other party and because it is in the interest of the administration of justice and the parties that finality should be reached in litigation. Where the point is raised that there has been unreasonable delay the Court must first determine whether the delay was unreasonable. This is a factual enquiry depending on the circumstances of each case. Once it is satisfied that the delay was unreasonable the Court must determine whether it should condone the delay. In this regard the Court exercises a discretion. Because the circumstances in each particular case may differ from the next case, what is, or what is not, regarded in other cases to be an unreasonable delay is not of much help, except to see perhaps what weight was given to certain factors. (See *Schoultz v Voorsitter, Personeel-Advieskomitee van die Munisipale Raad van George, en 'n Ander,* 1983 (4) SA 689(KPA); *Setsoskosane Busdiens (Edms) Bpk. v Voorsitter, Nasionale Vervoerkommissie, en 'n Ander,* 1986 (2) SA 57(AD); *Radebe v Government of the Republic of South Africa and Others,* 1995 (3) SA 787(NPD); *Mnisi v Chauke and Others; Chauke v Provincial Secretary, Transvaal, and Others,* 1994 (4) SA 715(TPD); *Kruger v Transnamib Ltd (Air Namibia) and Others,* 1996 NR 168(SC); and *Lion Match Co. Ltd v Paper Printing Wood & Allied Workers Union and Others,* 2001 (4) SA 149(SCA).)

In the case of *Wolgroeiers Afslaers (Edms.) Bpk. v Munisipaliteit van Kaapstad,* 1978 (1) SA 13 (A.A.), the South African Appeal Court decided that prejudice to the other party was not a pre-requisite before an application can be dismissed on the ground of unreasonable delay. Prejudice is however a relevant consideration in such matters. It is further clear that the issue of unreasonable

delay may also be raised *mero motu* by the Court. (See *Radebe's case, supra,* 798 G-H and *Disposable Medical Products (Pty) Ltd v Tender Board of Namibia and Others,* 1997 NR 129(HC).)

The first factual finding to be made is the length of time since the applicant became aware of the renewal of the licence and when the review proceedings were launched. Mr. Barnard submitted that it was common cause that the appellant became aware of the renewal during August of 1998. As the present proceedings were instituted on the 2nd May 2000 it follows that the period it took the appellants to bring the application is three months short of two years. However Mr. Chaskalson is not in agreement with the appellant in regard to the length of time which it took to bring the proceedings. Counsel referred the Court to the affidavit of deponent Dusan Vasiljevic, on behalf of the sixth appellant, in which the history of negotiations concerning a further surface owner's agreement for the renewal of the licence was set out. Attached to this affidavit, as annexure "DV1.1", was a letter written by the deponent on behalf of the third respondent, Walker, addressed to the Permanent Secretary of Mines and Energy. According to the letter it was copied to Mr. H. Diekman, at that time the legal representative of the sixth appellant, as well as to Mr. Vaseljevic, the managing director of the sixth appellant. The fact that the letter was attached to an affidavit by Vaseljevic seems to me to confirm that the letter, or a copy thereof, reached its destination. This letter concerns the negotiations between the parties to attempt to reach a new surface owners' agreement in the place of the old agreement which had expired in March 1998. That was shortly before the expiration of EPL 2101 on the 25th April 2000. The further negotiations could therefore only have been relevant if EPL 2101 had been renewed and further extended. Apart from this logical conclusion it was

further explicitly set out in the letter that the prospecting licence of the third respondent was extended until 26th April 2000. This letter is dated 9th April 1998. On this evidence it seems to me reasonable to accept, as was indeed submitted by Mr. Chaskalson, that the sixth appellant was aware of the renewal of EPL 2101 during April 1998, and possibly even before the start of the renewal. The period of delay before institution of the review proceedings was therefore at least two years.

Mr. Barnard, although conceding that this was a long delay, submitted that it was not unreasonable. Counsel based this submission mainly on two factors. The first was a letter from the office of the President in terms of which certain undertakings were given and a clause in the old, as well as the new surface owners' agreement, still under negotiation, was set out concerning the Green River Project and the undertaking by the third respondent to, wherever possible, fully co-operate in this project. Counsel submitted that the sixth appellant, armed with these documents, could reasonably conclude that his agricultural activities were safeguarded from interference from prospecting activities planned by the third respondent.

The letter from the Permanent Secretary to the President was dated 9th March 1995 and the relevant part reads as follows:

> "The President said that contact shall be made with the relevant ministries to avoid co-existence of intensive agricultural and mining development on the same land. He further instructed me to assure you that the Orange River Irrigation Project will continue as planned and your plantings as well as your agricultural expansion will not be affected."

Although Mr. Barnard initially conceded that there was no way in which this undertaking could be enforced he later on changed his mind. Counsel referred the Court to Article 27 of the Constitution which vested the executive power of the Republic in the President and Cabinet and provided for the President to exercise his functions in consultation with the Cabinet unless otherwise provided by law. Reference was also made to Article 40 which sets out the functions of Cabinet. In my opinion neither of these Articles would enable the President or a Minister to act contrary to the law, in this case the provisions of the Minerals Act, in terms of which the third respondent was given certain rights to prospect in certain areas situated on the farm Aussenkehr. We were not told how a directive from the President would have solved the situation. In my opinion the undertaking could only be enforced by either limiting the rights granted to the third respondent or by taking away such rights. Neither proposition would have been lawful.

Both factors argued by Mr. Barnard were, on the documents, not directly linked to the question of the delay for instituting review proceedings. When challenged by the first respondent in connection with the delay, the sixth appellant explained that it was following cheaper avenues knowing that the third respondent could not come onto the property without permission granted in terms of sec. 52 and that it would eventually have to approach the second respondent for relief if by negotiation a surface owners' agreement did not materialized. During all this the option of a review remained open to the sixth appellant if all else should fail. No mention was made of the fact that it felt itself secure by the undertaking of the Office of the President. That reliance at this late stage on this factor was in all likelihood an afterthought seems to me to be supported by the chain of events that took place.

From the letter annexure “DV1.1” it must have been clear to the appellant that it was the intention of the third respondent to increase substantially their efforts to prospect for diamonds. It was mentioned in the letter that the third respondent would now start with bulk sampling and that it intended to spend a further N$ 23 million in this regard. As was stated by Mr. Barnard the situation became problematical early during 1998. All along during this time serious negotiations, at least as far as the third respondent was concerned, were underway in an attempt to break the impasse. When negotiations were not successful the third respondent applied to the Ancillary Rights Commission for relief and the parties went through a full fledged, albeit futile, hearing. At no stage did the sixth appellant rely on this undertaking or call upon those who gave the undertaking to come to his aid. When asked by the Court why that was so we were informed that Counsel had no instructions in this regard.

As far as reliance was placed on the clause in the surface owners’ contract the fact of the matter is of course that no such contract came into being and no assurance could therefore be placed on it. In this regard the third respondent alleged that the sixth appellant at least further contributed to the fact that no agreement could be reached between the parties by insisting on certain guarantees over which the third respondent had no control.

In deciding whether the delay was unreasonable it seems to me that the time during which the right of the third respondent endures, must also play a role. As previously pointed out the renewal was for a period of two years until 25th April 2000. The delay to take the matter on review spanned this whole period. This by itself puts a limit on the delay as an applicant may find that, once the

right has run its course, the application for review may have become academic.

In all the circumstances I am of the opinion that the finding of the Court *a quo* that the delay was unreasonable was correct. The question then is whether the Court should have condoned the delay. This, as previously pointed out, required the Court to exercise a discretion. In this regard the Court *a quo* came to the conclusion that there was no valid ground on which it should do so. I am not persuaded that this Court should hold differently.

In my opinion the third respondent was prejudiced by the delay to bring the matter on review. Mr. Barnard conceded that there was inherent prejudice in a situation where a company is prevented from prospecting but he countered that by saying that it was shown by the appellants that there were no viable deposits of diamonds. This is begging the question. The evidence in this regard was mostly theoretical and where there were previously unsuccessful attempts to find diamonds the scale on which these attempts were made, may not have been as intensive as that now intended by the third respondent. In any event by further prospecting third respondent would be able to determine this question. Its willingness to spend a further N$ 23 million seems to contradict the expectations of the appellants. Mr. Chaskalson also pointed out that the explanation given, namely that the sixth appellant kept the review in abeyance for use if the negotiations for a surface owners' contract were not to its liking, meant that the third respondent was led up the garden path without any idea that the respondent would still confront it with a major legal stumbling block. If the review was brought within a reasonable time and was successful third respondent could then go somewhere else instead of wasting

time in negotiations which were destined to lead nowhere or to embark on proceedings before the second respondent which, if in its favour, would trigger a review application. I think there is merit in this submission.

It further seems to me that the right granted to the third respondent has lapsed through the effluxion of time and that the whole issue may have become academic. If not then it constitutes further prejudice which should be considered in deciding whether condonation should be granted.

In the case of *Kruger v Transnamib Ltd (Air Namibia) And Others, supra,* p 173ff, this Court discussed the nature of the discretion exercised by the Judge *a quo* and came to the conclusion that the Court of Appeal would only interfere in circumstances where the discretion was not judicially exercised. For the reasons set out above it cannot be said that the Judge did not exercise his discretion judiciously or that he acted capriciously or on a wrong principle and this point of appeal must also be rejected.

C. THE DECLARATOR IN REGARD TO SECTIONS 52(1)(b)(i) AND 52(1)(d)(ii) OF THE MINERALS ACT.

In terms of their Notice of Motion (as amended) the appellants asked the following relief in pa. 2.4, namely –

"Declaring the rights sought by Third Respondent to be an infringement of:

(a) .....
(b) .....
(c) .....

(c) The provisions of sections 52(1)(b)(i) and 52(1)(d)(ii) of the Minerals Act;

and not capable of being granted to third Respondent in terms of any current authorizing legislative enactment or common law principle."

The two sections of the Minerals Act provide as follows:

"52(1) The holder of a mineral licence shall not exercise any rights conferred upon such holder by this Act or under any terms and conditions of such mineral licence –

(a) .....

(b) in, on or under any –

(i) town or village;

(ii) .....

(iii) .....

And otherwise in conflict with any law, if any, in terms of which such town, Village, road, aerodrome, harbour without the prior permission of the Minister granted upon an application to the Minister in such form as may be determined in writing by the Commissioner, by notice in writing and subject to such conditions as may be specified in such notice;

(c) .....

(d) In, on or under any private or State land -

(i) .....;

(ii) within a horizontal distance of 100 metres of any spring, well, borehole reservoir, dam, dipping-tank, waterworks, perennial stream or pan, artificially constructed watercourse, kraal, building or any structure of whatever nature;

(iii) .....;

(iv) .....;

> without the prior permission in writing of the owner of such land, and in the case of land referred to in subparagraph (iv), of the holder of a mineral licence who has erected or constructed such accessory works on which it is proposed to exercise such right;

The main thrust of Mr. Barnard's argument was based on the fact of a village that came into being on the farm Aussenkehr and according to Counsel has been in existence for the past 20 years. I think it was common cause that the village, as it presently exists, would come within the ambit of the two above quoted prohibitions, more particularly in relation to the third respondents intended activities in regard to pit no. 1. A substantial quantity of the affidavit evidence before the Court was devoted to this issue. See in this regard more particularly the evidence of one Volkmann, a surveyor, and the map prepared by him. It also resulted in an amendment, during the course of the proceedings, of the Notice of Motion to include the provisions of sec. 52(1)(d)(ii). Because of the conclusion to which I have come it is not necessary to deal with this evidence in detail.

Counsel for the respondents submitted that the appellants misconceived the relief claimed in pa. 2.4. It was submitted that the two above provisions did not grant any rights to the third respondent, it merely dealt with exercising certain rights which it held in terms of its licence. A reading of the two subsections in context with the other provisions of sec. 52 makes that clear in my opinion. The right to prospect in a particular area was granted to the third respondent when he was awarded EPL 2101. However in the instances mentioned in the two subsections the exercise of that right was restricted subject to permission, in the one instance, that of the owner, and in the other

instance, that of the Minister, being obtained. It was further submitted, correctly in my view, that in either instance the granting of permission or the refusal thereof was not subject to review by the Minerals Ancillary Rights Commission.

Before a licence holder can begin to exercise any of his rights he must enter into a written agreement with the owner of the land which must contain terms and conditions relating to the payment of compensation to the owner. So far this has not materialized. In this regard the third respondent can now invoke the provisions of sec. 110 of the Minerals Act and approach the Minerals Ancillary Rights Commission for certain relief. Only if the Commission is satisfied that on reasonable grounds a right of access to the land is reasonably necessary would it come to the relief of the licence holder and may grant any such right subject to such terms and conditions as it may think fit. (See sec. 109 and 10 of the Minerals Act.) This stage has also not yet been reached.

If the licence holder successfully overcomes this hurdle, and only if the prospecting activities fall within the prohibitions set out in sec 52(1)(b)(i) and or (d)(ii), he would only be able to exercise his rights within such areas once the permission of either the owner of the land or the Minister is obtained. I agree with Counsel for the respondents that to grant the order asked for by the appellants at this stage would be premature. The situation for which the Court is asked to grant relief might never arise. (See in this regard *Wahlhaus And Others v Additional Magistrate, Johannesburg and Another,* 1959 (3) SA 113 (AD) and *S v Strowitzki,* 1995 (2) SA 525(Nm HC) at 529G – 531). In the above two cases the Courts decided that although a Court of Appeal had the power to review or hear an appeal in the unterminated course of criminal proceedings

in a lower court it would only do so in rare cases where grave injustice might otherwise result or where justice might not be obtained by other means. These principles were also applied in other Courts. (See *Serole and Another v Pienaar,* 2000 (1) SA 328 (LCC); *Laggar v Shell Auto Care (Pty) Ltd and Another,* 2001 (2) SA 136(CPD) As previously pointed out the Minerals Act provides for a full hearing before the Minerals Ancillary Rights Commission with an appeal to the high Court for anybody aggrieved by the order of the commission. Only if such an order is made in favour of the third respondent will the issues in sec. 52(1)(b)(i) and (d)(ii) emerge and then only if the necessary permissions are refused.

In any event the factual position is all but clear. Mr. Chaskalson has argued that at the time when the licence was granted the village did not extend within the area of Pit No. 1 and if that was so then the later encroachment of buildings on the area was unlawful and the third respondent would be entitled to evict any person trespassing in this regard. Mr. Barnard was not able to direct the Court to any evidence contradicting the statement by Mr. Chaskalson. Furthermore as far as Pits Nos. 2, 3 and 4 were concerned there was no evidence that they were within any prohibited areas as envisaged by the Act.

I am therefore of the opinion that this ground of appeal should also not succeed.

D. COSTS.

This part of the appeal can be divided into four sections, namely:

(i) Costs orders made during the proceedings, mostly after interlocutory orders;

(ii) The Cross-appeal concerning some of those orders;

(iii) The costs of the postponement of 3 April 2003; and

(iv) Costs of the appeal proper.

(i) Costs orders made during the proceedings

During the long time that this matter ran in the Court *a quo* various interlocutory or interim applications were heard and costs orders made in relation to the outcome of such matters. Some of the matters were even finally disposed of, such as the third respondent's counterclaim. The appeals in these matters only concern the cost orders and not the merits of the particular applications. The one feature that these matters have in common, which is also shared with the cross-appeal, is that at no stage was an application for leave to appeal made to the learned Judge in the Court *a quo* concerning these costs orders. Relying on sec 18(3) of the High Court Act, Act No. 16 of 1990, the appellant argued that the present appeal was not only in regard to costs and that therefore no leave to appeal was necessary. This argument was based on the fact that there was an appeal in regard to the merits of the main application. Counsel for the respondents were of the opinion that in each of these instances it was necessary to obtain the leave of the Court *a quo* and they consequently submitted that the appeal against these orders were not properly before this Court and should be struck from the roll.

Sec. 18(3) of Act No. 16 of 1990 provides as follows:

> "No judgment or order where the judgment or order sought to be appealed from is an interlocutory order or an order as to costs only left by law to the discretion of the court shall be subject to appeal save with the leave of the court which has given the judgment or has made the order, or in the event of such leave to appeal being refused, leave to appeal being granted by the Supreme Court."

It seems to me that there are particular reasons why it is necessary to obtain leave to appeal where the appeal sought is only against an order of costs. Firstly the trial judge who is steeped in the atmosphere and nuances of the matter is in a better position to exercise a discretion than a Court on appeal. Secondly, in awarding an order of costs the Judge in first instance exercised a discretion and an appeal Court would only interfere with the exercise of that discretion where it was not judicially exercised. (See *W v S and Others(2),* 1988 (1) SA 499(NPD) and *Erf One Six Seven Orchards CC v Greater Johannesburg Metropolitan Council (Johannesburg Administration) and Another,* 1999 (1) SA 104(SCA).) Further factors which are also relevant in my opinion is that very often a cost order follows the result of the main action and an appeal only against the order of costs has the effect that the Court of appeal is called upon to review and consider the merits of the main action. If there is no appeal against the main action the whole exercise may, under certain circumstances, be futile and a waste of time. In the case of *W v S, supra,* reference was further made to the principle of finality in proceedings and that the Court would not easily grant leave to appeal in respect of what had become a dead issue merely for the purpose of determining the appropriate costs order.

Bearing these factors in mind it seems to me that the fact that there is an appeal against the main action or application will only justify a right of appeal in regard to the costs order in the main action or application. Different considerations will apply where, during the process of the application, costs orders are awarded in regard to interlocutory or other interim issues or issues which are finally dispensed with. Such costs orders relate to the issue in regard of which the Court has made the order and in each instance the factors and principles, set out above, are applicable. On appeal the considerations which must be given to the award of costs in an interim order has nothing to do with the main action or application and may, as was the case in this matter, depend on facts and issues not relevant to the main action or application, e.g. an application to strike out certain offending allegations or hearsay matter, and may go for or against the party who is eventually successful in the main application. It follows therefore that where an appellant wants to appeal against an award of costs only in any such matter leave to appeal is necessary and a right of appeal cannot be conferred upon an appellant by lodging an appeal in the main application.

In the result I am of the opinion that the appellants' appeal against the award of costs in various interim orders are not properly before this Court and should be struck from the roll.

(ii) The Cross Appeal

For the reasons set out above the third respondent's cross appeal against certain costs orders made by the Court *a quo* during the course of the proceedings are also not properly before the Court as no leave to appeal was

sought in those instances. Counsel for the respondent conceded also that the matters could not be heard by this Court and they are likewise struck from the roll.

(iii) The postponement of the appeal in April 2003

Although I was not a member of the Court when the application for a postponement was previously heard Counsel have kindly provided us with a full record of the argument which was raised on that occasion. When the matter came before the Court in April 2003 the appellants launched a substantive application for the postponement thereof pending a review which was to be heard in the High Court and which was related to the appeal before this Court. When the matter was called Mr. Henning, who then appeared for the third respondent, informed the Court of two points *in limine* he intended to argue. On enquiry by the Court, Counsel informed the Court that he did not give notice of these points to the appellants. Counsel was further of the opinion that if successful, that would be the end of the matter. Objection was raised by Mr. Barnard who insisted on proper notice and time to prepare. The Court was of the opinion that proper notice should have been given to the appellants and time to prepare argument in answer to the points. In the end the matter was postponed *sine die* and the costs of the postponement was reserved.

On that occasion it was pointed out by a member of the Bench that an endeavour should be made by the parties to complete the pending review proceedings in the High Court so that, if there was an appeal in that matter,

that it be set down and heard simultaneously with the present and now postponed appeal.

Counsel for the first and second respondents opposed the appellants' application for a postponement. However, because of certain allegations made against Mr. Chaskalson in the High Court, it was decided that Mr. Smuts would argue the issue of the postponement on behalf of first and second respondents.

From the above it is clear that the appellants applied for a postponement of the appeal. The third respondent took points *in limine* without any notice to the respondents. At the end of the day the matter was postponed *sine die*. On the one hand the appellants were requested to expedite the review proceedings so that, in the event of a further appeal in that regard, the matters could be heard together. The third respondent was ordered to give proper notice of the points it wished to argue *in limine.* Neither of these two events materialized. The review is still pending in the High Court but the appellants gave notice that they would not ask for a further postponement on the strength thereof. This abandonment only took place on 25th March 2004, shortly before the appeal was heard. This was set out in the affidavit of Mr. Ndauendapo. Mr. Smuts also pointed out that although the application was abandoned no tender for costs was made and further pointed out that there were some unexplained delays in bringing the review before the High Court. The third respondent has in the mean time replaced its legal representatives and the new legal team has not proceeded on the basis of any points *in limine*.

There can be no doubt that under the circumstances the first and second respondents are entitled to their wasted costs of the postponement. Under all the circumstances I am satisfied that it would be fair to order that the costs of first and second respondents wasted by the postponement of the 3rd April 2003 must be shared equally between the appellants and the third respondent. That also goes for the costs incurred when the matter was resumed during 19th to 20th April 2004.

Mr. Smuts was only instructed to argue the issue of the costs of postponement. Under the circumstances it seems fair to me to order that instructed Counsel's fees, as far as the appearance in Court is concerned during the period 19th to 21st April 2004, be limited to appearance for one day when such costs are taxed.

(vi) Costs of the appeal proper

The appellants were unsuccessful and they must in my opinion be ordered to pay the costs of appeal of the respondents. I am also of the opinion that the matter was of some complexity involving interpretation of the Constitution on a totally novel point of importance. I am therefore satisfied that the matter warranted the appointment of two Counsel by the third respondent. As far as the first and second respondents are concerned we were informed by Mr. Chaskalson that he was initially led by senior Counsel and he asked that any order of costs should include the costs of two Counsel where applicable. Because of my finding above I will order that costs of the first and second

respondents include the costs of two Counsel to the extent to which two Counsel have been engaged in the matter.

In the affidavit of Mr. Ndauendapo, dated 25th March 2004, the deponent stated that in the event that the present appeal, or any part thereof, be unsuccessful, the Court will be asked to let costs stand over for determination simultaneously with any appeal which may materialize in regard to the outstanding review matter, or if successful and no appeal results, appellants will then seek an order in this Court that they not be ordered to pay the costs of the present appeal if they were unsuccessful. Alternatively they would seek an order that the issue of costs be postponed and to be determined after the finalization of the pending review matter.

Although this was foreshadowed in the affidavit no further argument was addressed to us. In my opinion a judgment in the pending review matter will have no effect on the issues decided in the present appeal. It cannot affect the constitutional issue or the issues surrounding sec. 52 of the Minerals Act. The only possibility is the review of the granting of the licence for the period 1998 to 2000. However in this regard the Court came to the conclusion that the delay in bringing the review application was unreasonable and refused to condone it. The Court did not deal with the merits of the review which may be influenced by a finding in regard to the pending review. Consequently there is in my opinion no reason not to award the costs of this appeal at this stage. This is an instance where the Court should order that the appellants pay the costs of the appeal jointly and severally. See in this regard *Gemeeenskapsontwikkelingsraad v Williams and Others (2),* 1977 (3) SA 955 (WLD.).

In the result the following orders are made:

1. The appellants' appeal is dismissed and the appellants are ordered to pay the costs of the respondents jointly and severally, the one paying the other to be absolved. Such costs to be the costs incumbent upon the briefing of two instructed Counsel. As far as the first and second respondents are concerned such costs shall include the costs of two instructed Counsel only to the extent that two Counsel have been engaged in the matter.

2. The appellants' appeal concerning various costs orders and the cross-appeal by the third respondent, also concerning certain costs orders, are each struck from the roll with costs.

3. The wasted costs of the postponement of the appeal on the 3rd April 2003 and further argument on 19/20 April 2004 be paid by the appellants and the third respondent in equal shares. For the guidance of the taxing master it is ordered that the appearance of Counsel for first and second respondents on the 19/20 April 2004 be taxed for one day.

_____
STRYDOM. A.C.J.

I agree.

_____
O’LINN, A.J.A.

I agree.

_____
SHIVUTE, A.J.A.

COUNSEL ON BEHALF OF THE APPELLANTS:	MR. T.A. BARNARD
INSTRUCTED BY:	NATE NDAUENDAPO & ASS.
COUNSEL ON BEHALF OF THE FIRST AND SECOND RESPONDENTS:	MR. M. CHASKALSON
ASSISTED BY:	MR. D.F. SMUTS, S.C.
INSTRUCTED BY:	GOVERNMENT ATTORNEYS
COUNSEL ON BEHALF OF THE THIRD RESPONDENT	MR. J.J. GAUNTLETT, S.C.
ASSISTED BY:	MR. R. TöTEMEYER
INSTRUCTED BY:	ELLIS & PARTNERS