



REPORTABLE

CASE NO: SA 1/2007

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

AUAS DIAMOND COMPANY (PROPRIETARY) LIMITED

Appellant

and

MINISTER OF MINES AND ENERGY

Respondent

Coram: SHIVUTE CJ, MARITZ JA and STRYDOM AJA

Heard: 12 July 2007

Delivered: 19 April 2017

Summary: Appellant, Auas Diamond Company (Pty) Ltd, had been a holder of an Exclusive Prospecting Licence (EPL) issued under the Minerals (Prospecting and Mining) Act 33 of 1992 (the Act) for a 3-year period from 1997 to 2000.

Before the expiry period, the appellant applied for a renewal of the EPL to run from 2000 to 2002. The respondent, the Minister of Mines and Energy (the Minister), who is responsible for the administration of the Act was prepared to renew the EPL for the first time.

In terms of the applicable legislation, the Minister may impose terms and conditions to the application of an EPL. Such terms and conditions once imposed must be accepted by an applicant, failing which the application lapses. The Minister imposed terms and conditions on the appellant's renewal application. The renewal, including the terms and conditions had been accepted by a Mr Prins Shiimi, claiming to be a representative of the appellant. However, the appellant subsequently contended that Mr Shiimi had no authority to act on its behalf at the time he purported to accept the terms and conditions.

The appellant consequently applied for a second renewal of the EPL to the Minister, which application was refused.

Aggrieved by the refusal of its second renewal application, the appellant launched an application in the High Court to review and set aside the Minister's decision. The Minister opposed the application. In his opposition, the Minister raised two points *in limine*, namely that the appellant had failed to disclose a right or cause of action and that the appellant delayed in instituting the review proceedings.

After hearing argument, the review application was dismissed with costs. The court found that as the first renewal had not been accepted by the appellant, it lapsed by operation of law and there was nothing to renew when the appellant applied for a second renewal. In relation to the second point *in limine*, the court declined to decide the question whether or not the review application was unreasonable delayed.

On appeal, the issues for determination remained unchanged. The first issue relates to the finding of the court below that the appellant failed to disclose a valid cause of action. The second relates to the finding of the appellant's alleged unreasonable delay in instituting the review proceedings.

The Supreme Court agreed with the findings of the court below that as the first renewal had not been accepted by the appellant, it lapsed by operation of law and that there was nothing to renew when the appellant had applied for a second renewal. The court concluded that the second renewal application would have been granted on the basis of the validity of the first renewal. The effect of the lapsing of

the first renewal is that no second renewal could occur. The first renewal application having had lapsed, the appellant thus retained no residual rights to apply for the second renewal.

In upholding the reasoning of the court below, the Supreme Court further found that as the High Court had correctly held that there was nothing to review in the absence of a valid first renewal of the EPL, the question whether or not the review application was unreasonably delayed had become immaterial.

As the appeal has failed, there were no good reasons why the costs should not follow the result. The Minister was accordingly granted the costs of the appeal.

APPEAL JUDGMENT

SHIVUTE CJ (STRYDOM AJA concurring):

Introduction

[1] This is an appeal against the judgment and order of the High Court dismissing a review application by the appellant. The appeal was heard on 13 July 2007 by me, Maritz JA (who has since retired) and Strydom AJA. The responsibility of preparing the court's judgment was given to Maritz JA. Regrettably, he has not presented a draft judgment for consideration despite undertakings to do so. I have since been advised that for medical reasons, Maritz JA has become unavailable to perform further judicial work. Due to these deeply regrettable circumstances, being one of the three judges who had sat on the appeal, I have decided to write the judgment. In terms of s 13(4) of the Supreme Court Act 15 of 1990, two judges, forming the majority, can still give a valid judgment, provided that they agree on the outcome¹.

¹ See, for example, *Wirtz v Orford & another* 2015 NR 175 (SC).

Provided that Strydom AJA and I agree on the judgment in this matter, the appeal may validly be finalised. I now proceed to consider and decide the appeal.

Background of the case

[2] The dispute between the parties concerns an Exclusive Prospecting Licence (EPL) number 2495 in respect of the area known as EPL 2495 (Block F) on the west coast of Namibia, north of the town of Lüderitz in respect of the exploration of off-shore diamond deposits. The material aspects of the dispute may be summarised as follows.

[3] The appellant, a company duly incorporated in terms of the laws of Namibia, applied for an EPL which was granted for a 3-year period from 3 November 1997 to 2 November 2000. It then applied for a renewal of the EPL to run from 2 November 2000 to 1 November 2002. The respondent, the Minister of Mines and Energy (the Minister), who is responsible for the administration of the Minerals (Prospecting and Mining) Act 33 of 1992 (the Act) in terms of which the EPL had been applied for, expressed his preparedness to grant the renewal subject to the terms and conditions that he saw fit to impose. In terms of the applicable legislation, such terms and conditions had to be accepted by the appellant. The renewal, including the terms and conditions imposed on it, had been accepted by a person who purported to be doing so on behalf of the appellant. However, the appellant subsequently contended that such person had no authority to act on its behalf at the time he purported to accept the terms and conditions.

[4] An application was made by the appellant to the Minister for a second renewal of the EPL on 16 October 2002. On 28 June 2003 the Minister decided not to renew the EPL and the appellant was informed accordingly. The appellant (as applicant) launched an application in the High Court for the review of the Minister's decision not to renew the EPL for the second time. The Minister raised two preliminary points in the review application. The first was that the appellant had failed to disclose a right or cause of action. This contention was based on the argument that on the appellant's version that the person who sought to accept the terms and conditions imposed by the Minister on the first renewal of the EPL had no authority to act on the appellant's behalf, the first renewal of the licence never validly occurred. As such, there was nothing to renew for the second time. The Minister was therefore entitled to refuse the application for the second renewal. The second preliminary point was that the appellant unreasonably delayed the institution of the review proceedings.

[5] It also emerged during the review proceedings that the appellant had earlier made an application in the High Court against the person who purported to accept the terms and conditions imposed by the Minister in the first renewal application, one Prins Shiimi and six others regarding a shareholding dispute. The application against Prins Shiimi and six others was not opposed. Consequently, on 15 August 2005 the High Court made an order, amongst others, declaring Prins Shiimi and six others not to have had acquired shares nor to have been entitled to shareholding in the appellant.

[6] It is to be noted that the application against Prins Shiimi and others concerned the shareholding dispute and had no material bearing on the review proceedings.

Issues before the High Court

[7] In the proceedings for the review of the Minister's refusal to grant the second renewal application, the High Court was called upon to consider and decide the two preliminary points mentioned in para [4] above.

Reasoning of the High Court in the review application

The first preliminary point

[8] In deciding the first preliminary point, the High Court dealt with the provisions of the Act relating to the renewal and lapsing of EPLs. The court reasoned, rightly, that as the appellant was a company, it was required by the relevant provisions of the law to act only through an authorised representative. Furthermore, the court held that the peremptory provisions of the Act meant that the application for renewal lapsed when not accepted by the 'concerned person'. The court found that the denial by the appellant of Prins Shiimi's authority to represent the company has the effect that the appellant did not accept the renewal of the EPL and the terms as well as conditions attached to such renewal. This, so the court below reasoned, was the case because it was Prins Shiimi who purported to accept the terms and conditions on behalf of the appellant. As the first renewal seemingly had not been accepted, it lapsed by operation of law and there was nothing to renew when the appellant applied for a second renewal.

[9] After dealing with the provisions relating to applications for EPL, renewals and the peremptory nature of the language used in the relevant provisions of the Act, the court went on to consider the principles relating to irregular and unauthorised administrative acts. The court pointed out that in deciding whether a renewal had

taken place in accordance with the relevant provisions of the Act, it is not only the Minister's consideration that is relevant. It is also the subsequent action by the applicant after being notified of the intention to grant the application that determined whether the application had lapsed or not. The court considered the South African High Court decision in *Oudekraal Estates (Pty) Ltd v City of Cape Town & others*² where Davis J agreed with the respondents in that case that the approval of the plans by the Administrator, 'which did not comply with the prescribed time-periods, was a nullity. No rights could be validly obtained by the applicant as a result of the non-compliance with the legislation'.³ On the basis of this reasoning by Davis J, the court below found that the application had lapsed; the EPL had expired and the second renewal could never have been granted or refused, because the EPL had already expired and was never legally renewed. The respondent's refusal to grant the second renewal is immaterial and not reviewable.

[10] On that basis, the court concluded that the first point *in limine* ought to succeed. In the result, the court ruled that the applicant had failed to disclose a valid cause of action.

The second preliminary point

[11] The High Court found it unnecessary to consider the second point *in limine*. It nevertheless noted in passing that the delay in lodging the review was unreasonable given the time limits prescribed in the Act. It observed that due to the delay, even if the appellant were to succeed with its review application, it would have been difficult to give effect to the order. The court noted that such a delay would have meant

² 2002 (6) SA 573 (C) which went on appeal and was reported as 2004 (6) SA 222 (SCA).

³ At 587E-F.

turning the time clock backwards to 2004 to allow for a renewal that would have lasted only until the end of 2006.

Issues on appeal

[12] The appeal is premised on two grounds. The first ground relates to the findings of the court below that the appellant failed to disclose a valid cause of action. The second relates to the finding of alleged unreasonable delay by the appellant in instituting the review proceedings.

Disclosing a valid cause of action

[13] As already noted, the first preliminary point raised by the Minister in the review application relates to the contention that the appellant failed to disclose any right or cause of action. Trollip JA in *Evins v Shield Insurance Co Ltd*⁴ described 'cause of action' as follows:

“Cause of action” is ordinarily used to describe the factual basis, the set of material facts, that begets the plaintiff's legal right of action. . . .’

[14] In the present matter the Minister's case is that, by its own admission, the appellant failed to disclose the legal standing to review the decision refusing the renewal of the EPL. In considering this contention, an examination of the applicable legal framework in the issuing of EPLs and their renewal is warranted.

Legal framework regulating applications for EPLs and their renewal

⁴ 1980 (2) SA 814 (A) at 825G.

[15] The Minerals (Prospecting) and Mining Act 33 of 1992 regulates the granting of an Exclusive Prospecting License (EPL). In what follows, I present the salient provisions under the Act relevant to the consideration of an application for an EPL and its renewal.

[16] 'Exclusive prospecting licence' is defined as follows:

"exclusive prospecting licence" means an exclusive prospecting licence issued under section 70 and includes the renewal of any such licence.'

[17] The phrase 'mineral licence' is defined in s 1 of the Act as meaning:

'a reconnaissance licence, an exclusive prospecting licence, a mining licence or a mineral deposit retention licence and includes the renewal of any such licence.'

[18] The provisions of s 47 relevant to the enquiry read as follows:

'(1) Subject to the provisions of this Act, an application for –

- (a) a mineral licence or the renewal thereof;
- (b) . . .
- (c) . . .

shall be made to the Minister in such form as may be determined by the Commissioner and shall be accompanied by such application fee and such licence fee as may be payable in respect the licence period or first licence period, as the case may be, of such licence as may be determined under section 123.

(2) ...'

[19] Section 48 deals with the powers of the Minister in respect of applications for mineral licences and reads in part as follows:

'(1) ...

(2) In order to enable the Minister to consider any application referred to in section 47 the Minister may-

(a) cause such investigations to be made or undertaken as the Minister may in his or her discretion deem necessary;

(b) require the person concerned by notice in writing-

(i) to carry out or cause to be carried out such environmental impact studies as may be specified in the notice;

(ii) to furnish the Minister within such period as may be specified in such notice with such proposals, by way of alteration to or in addition to proposals set out in the application, as may be so specified.

(3) In considering any application referred to in section 47 and the terms and conditions subject to which such application may be granted, the Minister shall take into account the need to conserve and protect the natural resources in, on or under the land to which the application relates and in, on or under adjoining or neighbouring land.

(4) If the Minister is, after having considered an application referred to in section 47, prepared to grant the application subject to certain terms and conditions, he or she shall direct that notice be given to the person concerned in which the terms and conditions, in addition to the terms and conditions referred to in section 50, are set out on which he or she is prepared to grant such application.

(5) The person referred to in subsection (4) may, within one month as from the date of that notice or such further period as the Minister may on good cause shown allow in writing, agree in writing to accept such terms and conditions or such other terms and conditions as may be agreed upon.

(6) If the person making an application referred to in section 47 fails-

(a) to comply with the requirements of any notice referred to in subsection (1) or (2)(b); or

(b) to agree as contemplated in subsection (5), within the period specified in such notice or such further period as the Minister may on good cause shown allow in writing, the application in question shall lapse on the expiration of such period.' (Emphasis supplied.)

[20] Section 49 makes provision for the Minister to enter into agreements, before a mineral licence is issued, incorporating the terms and conditions agreed upon as provided in subsecs (4) and (5) of s 48. Section 67 provides for the rights of a holder of an EPL. Section 68 deals with the application for an EPL. Section 69 provides for the powers of the Minister to grant EPL applications. It expressly makes the grant of such applications subject to ss 48(4) and (5) and 49.

[21] Section 70 deals with the issuing of an EPL and provides as follows:

'(1) Subject to subsections (4) and (5) of section 48, the Minister shall, upon the granting of an application for an exclusive prospecting licence, direct the Commissioner to issue to the person who applied for such licence, an exclusive prospecting licence on such terms and conditions as may be agreed upon as provided in the said subsections.

(2) The provisions of section 62 shall apply *mutatis mutandis* in relation to an exclusive prospecting licence.'

[22] Section 71 deals with the duration of an EPL and provides:

'(1) Subject to the provisions of this Act, an exclusive prospecting licence shall be valid –

(a) for such period, not exceeding three years, as may be determined by the Minister at the time of the granting of such licence; and

(b) for such further periods, not exceeding two years at a time, as may be determined by the Minister at the time of the renewal of such licence as from the date on which such licence would have expired if an application for its renewal had not been made.

(2) An exclusive prospecting licence shall not be renewed on more than two occasions, unless the Minister deems it desirable in the interests of the development of the mineral resources of Namibia that an exclusive prospecting licence be renewed in any particular case on a third or subsequent occasion.

(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) . . . '

[23] Lastly, s 72 deals with applications for renewal of an EPL and provides that:

(1) Subject to the provisions of subsection (2) of this section, the provisions of section 68 shall apply *mutatis mutandis* in relation to an application for the renewal of an exclusive prospecting licence.

(2) An application for the renewal of an exclusive prospecting licence shall-

(a) be made not later than 90 days before the date on which such licence will expire if it is not renewed or such later date, but not later than such expiry date, as the Minister may on good cause shown allow;

(b) not be made-

(i) in the case of a first application for the renewal of such licence, in respect of any land greater in extent than 75 percent of the prospecting area in respect of which such licence has been issued; or

(ii) in the case of any other application for the renewal of such licence, in respect of any land greater in extent than 50 percent of the prospecting area existing at the date of such application without the approval of the Minister, granted in the interest of the development of the mineral resources of Namibia and on good cause shown by the holder of the exclusive prospecting licence in question; and

(c) be accompanied by a report in duplicate containing the particulars contemplated in section 76(1)(e) prepared in respect of the immediately preceding period of the currency of such exclusive prospecting licence.

(3) Subject to the provisions of subsection (1), the Minister shall not grant an application for the renewal of an exclusive prospecting licence, unless the Minister is on reasonable grounds satisfied with the manner in which the programme of prospecting operations have been carried on or the expenditure expended in respect of such operations.

(4) The Minister shall not refuse to grant an application for the renewal of an exclusive prospecting licence-

- (a) if the holder of such licence-
 - (i) has complied with all the terms and conditions of such licence;
 - (ii) has complied with the proposed programme of prospecting operations; and
 - (iii) has expended the expenditure in respect of such operations as in accordance with the terms of such mineral agreement;

- (b) if the Minister is on reasonable grounds satisfied-
 - (i) with the proposed programme of prospecting operations or the proposed expenditure to be expended in respect of such operations;

 - (ii) that the person concerned has the technical and financial resources to carry on such prospecting operations;

- (c) on the grounds thereof that such holder has contravened or failed to comply with any provision of this Act or any term and condition of such licence, unless the Minister has by notice in writing informed such holder of his or her intention to so refuse such application-
 - (i) setting out particulars of the contravention or failure in question; and

 - (ii) requiring such holder to make representations to the Minister in relation to such contravention or failure or to remedy such contravention or failure on or before a date specified in such notice,

and such holder has failed to so remedy such contravention or failure or make representations.'

[24] There are also provisions within the Act dealing with the obligations of a holder of an EPL, including the periodic submission of a report of activities by such holder. In light of the legal framework above, a question that arises is: What is the

effect of non-compliance with the provisions requiring acceptance of the terms and conditions imposed by the Minister in respect of an application of a renewal of an EPL?

Compliance with statutory provisions

[25] It is imperative to deal with the effect of non-compliance with legislative provisions, especially peremptory ones. The general principle governing non-compliance with statutory provisions was spelt out by the South African Appellate Division in *Schierhout v Minister of Justice*⁵ in which Innes CJ said the following:

'It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no force or effect. . . . And the disregard of a peremptory provision in a statute is *fatal to the validity* of the proceedings affected.'
(Emphasis added).

[26] It appears that in the absence of an express provision within a statute, not all non-compliances with statutory provisions will necessarily invalidate such an act. It all depends on the intention of the Legislature. Where there is no express invalidation, the intention of the Legislature must be sought from the words used and the subject matter of the rule.⁶ However, in this particular case there is express invalidation and it is therefore not necessary to ascertain the intention of the Legislature from the surrounding facts or the language of the legislation.

[27] The EPL in question was valid for the first three years in terms of s 71(1)(a) of the Act. The Minister was prepared to renew the EPL for the first time. On 8 May

⁵ 1926 AD 99 at 109. See also *Scott & others v Hanekom & others* 1980 (3) SA 1182 (C) at 1200 where the court emphasised the importance of compliance with regulations, albeit relating to the publicising of an election.

⁶ *Messenger of the Magistrate's Court, Durban v Pillay* 1952 (3) SA 678 (A).

2001, the Mining Commissioner addressed a notice of the Minister's preparedness to renew the licence to the Directors of the appellant. The Directors' attention was pertinently drawn to s 48(6), which, as noted above, provides that if the person making an application fails to accept the terms and conditions within one month from the date of the notice, the application 'shall lapse'. On 10 May 2001, Prins Shiimi, in his capacity as 'the duly authorised officer' and 'Chairman' of the appellant signed the acceptance of the supplementary terms as well as conditions on behalf of the appellant.

[28] As pointed out above, the duration of an EPL is dealt with under s 71 of the Act. Applications for renewal of an EPL are dealt with under s 72. Provided that an EPL is being considered for renewal, it may not expire unless it has lapsed or has been rejected as provided under s 71(3)(a).

[29] Section 48 confers on the Minister defined powers in relation to EPL applications. The Minister may accept an application which may be subject to the imposition, by way of a notice, of terms and conditions. As already noted, such terms must be accepted within one month by the 'person concerned'. The acceptance of the terms and conditions involves the corresponding communication of such acceptance to the Mining Commissioner. Failure by the person concerned to comply with the requirements of the notice under s 48(1) or (2)(b) or to agree to the terms and conditions within the stipulated time frame results in the lapsing of the application in question on the expiration of such period. The provision is not merely directive; it is couched in peremptory terms.

[30] As previously noted, the Mining Commissioner wrote a letter on 8 May 2001 to the appellant notifying it of the Minister's preparedness to renew the EPL. The notice had important legal significance. In the first place, it brought to the appellant's attention the provisions of s 48(4) of the Act. Secondly, it informed the appellant of the provisions of s 48(5) and the time limits for accepting the terms and conditions. Thirdly, the letter made it clear that the renewal was 'subject to' the appellant accepting the terms and conditions.

[31] The terms and conditions attached to any EPL are as important as any other clauses of the agreement that the Minister may enter into with an applicant pursuant to s 49. As previously noted, s 70(1) read with s 48 of the Act provide in unequivocal terms that the terms and conditions attached to any grant of an EPL must not only be accepted, but such acceptance must be communicated within 30 days. Failure by the applicant to comply with s 48 attracts the effect of s 48(6), namely the lapsing of the application. Understood in this context, therefore, the renewal of the EPL would only become valid upon acceptance of the terms and conditions contained in the notice.

[32] Equally significant is the person who accepts the terms and conditions under s 48(5). The Act uses the phrase 'person concerned' without defining its meaning. When applied in the context of the Act and the provisions relating to EPL applications and their renewal, 'person concerned' denotes an authorised representative of the company or juristic person seeking a prospecting licence. His or her functions relate primarily to the execution of certain duties, including entering into contractual agreements on behalf of the company. As correctly pointed out by

the High Court, the 'concerned person' cannot be any general worker of the company. This is due to the legal consequences that flow from his or her actions in relation to the company. The 'person concerned' binds the company.

[33] The appellant, in its heads of argument, was adamant that Prins Shiimi was not authorised to act on behalf of the company. In fact, it pointed out that it was clueless as to how he came to be the company's 'duly authorised officer'. The 'duly authorised officer' is the 'person concerned' within the Act. The effect of the renunciation of Prins Shiimi's authority to act on behalf of the appellant is that he was not the 'concerned person' as envisaged by the Act. The net effect of such repudiation is that the communication of the purported acceptance of the terms and conditions by Prins Shiimi was not done on behalf of the appellant, which ultimately means that the appellant did not accept the grant of the first renewal and the terms and conditions attached to such grant as required by the peremptory provisions of the Act. The High Court was undoubtedly correct in so holding.

Can the 'purported renewal' be said to be valid due to the conduct of the parties?

[34] Having concluded that the terms and conditions were not validly accepted on behalf of the appellant in terms of the Act (hence the lapsing of the application), can it be said that due to the conduct of the Minister and his officials, the purported renewal was nevertheless valid? As mentioned in footnote 2 above, the *Oudekraal* matter was appealed against and the South African Supreme Court of Appeal came to a conclusion different from Davis J's dicta relied upon by the High Court on the question whether or not rights can be validly obtained as a consequence of non-compliance with legislation.

[35] It is thus necessary to examine more closely whether the facts of this case fall neatly within the principles established in *Oudekraal*. In the *Oudekraal* case, the appellant company had bought undeveloped land in 1965 from its predecessor in title. The land in question had been secured and approved for the development of a township in terms of the Townships Ordinance 33 of 1934 (the Ordinance). In 1996, the appellant submitted an application for the approval of an engineering services plan to the relevant local authority. The local authority responded that the plan could not be approved because the development rights had lapsed. This finding was based on the alleged non-compliance with time limits for submission of a general plan of the proposed township to the Surveyor-General and lodgement of the approved general plan with the Registrar of Deeds.

[36] The Supreme Court of Appeal declined to decide the question whether the extensions of time granted by the Administrator were *intra vires*. It reasoned that the initial approval of the land as a township had been *ultra vires* in that the Administrator had not been informed, or had alternatively failed to take into account, that religious and cultural sites of particular significance to a sector of the Cape Town community existed on the land. In dealing with the Administrator's invalid decision and its consequences, the court said the following in para 26:

'For those reasons it is clear, in our view, that the Administrator's permission was unlawful and invalid at the outset. Whether he thereafter also exceeded his powers in granting extensions for the lodgement of the general plan thus takes the matter no further. But the question that arises is what consequences follow from the conclusion that the Administrator acted unlawfully. Is the permission that was granted by the Administrator simply to be disregarded as if it had never existed? In other words, was

the Cape Metropolitan Council entitled to disregard the Administrator's approval and all its consequences merely because it believed that they were invalid provided that its belief was correct? In our view it was not. Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern state would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.⁷

[37] The appellant argued, in the context of the present appeal, that the validity of the application for the second renewal cannot be challenged through what amounts to a collateral challenge similar to what occurred in the *Oudekraal* case. It was contended that the Minister cannot 'hide behind the allegation of invalidity of a previous act of his own in order to escape the impropriety of its actions in the present instance'. Relying on a dictum in *Oudekraal*, counsel for the appellant, submitted that the Minister cannot justify a refusal on its part to perform a public duty by relying on the invalidity of the originating administrative act. Instead, the Minister is required to take action to have the administrative act in question set aside.

[38] Counsel for the Minister on the other hand, countered that the Minister is not hiding behind an allegation of invalidity of a previous act of his own as argued by the appellant. The challenge to the appellant's standing to seek the review of the Minister's decision was based on appellant's own version reflected in its founding and replying affidavits. The contention is that the appellant disclosed no exigible right to the relief sought, in that on its own version of the events, the appellant failed to

⁷ See also *Rally for Development and Progress & others v Electoral Commission of Namibia & others* 2010 (2) NR 487 (SC) paras 51-52.

disclose that it had a legal standing in seeking the relief in the notice of motion. According to counsel, the acceptance of the terms and conditions by the appellant within 30 days of the notice is a condition precedent to the coming into existence of the EPL.

Analysis

[39] In my view, it is not necessary to declare any administrative act unlawful, void or a nullity for the purposes of establishing whether the appellant had disclosed an exigible right to the relief sought and thus has the legal standing in the review proceedings. Other than his decision to grant the first renewal subject to the acceptance of the terms and conditions, there is no evidence that the Minister performed any other administrative act. As already noted, the decision to grant the first renewal application was subject to the provisions of s 48(5) which requires that an applicant for a mineral licence or its renewal should agree, in writing, within one month from the date of the notice to accept the terms and conditions set out in the notice. I agree with counsel for the Minister that a court cannot unquestionably give effect to an invalid administrative act, where the court is called upon to determine not the validity of the act or decision, but the rights of a party to litigate, where these rights are affected by the administrative act in question. In this respect, it was observed, rightly in my respectful view, by Jones J in *Majola v Ibhayi City Council* 1990 (3) SA 540 (E) at 542F-G that:

'It is quite another thing to say that the courts must unquestionably give effect to an invalid administrative action or decision when they are called upon to determine, not the validity of the administrative action or decision *per se*, but the rights and obligations of the parties to litigation where those rights or obligations are affected by the administrative action or decision. In these circumstances, it is in my opinion

competent for the courts to enquire into the validity or otherwise of an administrative decision.’

[40] It is to be noted that the dicta in *Majola v Ibhayi City Council* were made in a different context and were a response to the contention by the City Council that the magistrate’s court did not have the power to decide on administrative action or decision. It seems to me nevertheless that the principle established in *Majola*, that where a court is called upon to determine the rights of a party to litigate, and not the validity of the administrative action or decision as such, a court cannot unquestionably give effect to an invalid administrative decision giving rise to the proceedings, is of application to the facts of this case. The reasoning in the *Majola* case is in consonance with the views of Professor Baxter⁸ on the matter who in the course of the discussion of the question of whether magistrates’ courts have the power to review the validity of administrative action, points out that:

‘A distinction should again be drawn between the jurisdiction of the courts to review the legality or validity of administrative actions and their jurisdiction to award remedies in order to provide redress against unlawful conduct. . . .’

[41] It is clear from the papers that the Minister’s defence is that as a matter of fact and law, the issuing of the licence was conditional upon the valid acceptance of the conditions. The appellant accepted that the first renewal application should never have been granted because of the non-compliance with the provisions of s 48(5), but contended that it was entitled to review the refusal of the second application for renewal. The appellant sought to justify this somewhat contradictory stance as follows:

⁸ L Baxter *Administrative Law* (1984) at 754.

'Our first application for renewal of our licence has lapsed, but since the respondent [the Minister], while labouring under a misapprehension of the true facts (only revealed in our replying affidavit), renewed our licence, we are entitled to review the respondent's decision to refuse our second application for renewal.'

[42] As the application for first renewal should never have been granted for want of compliance with the provisions of s 48(5), the appellant cannot rely, for the purpose of determining whether it has an enforceable right in the review proceedings, on the contention that it had received a valid renewal of the licence. On the appellant's own version of events, it never accepted the terms and conditions of the first renewal. There is no allegation that the appellant, within a period of one month or at any other period, ratified the acceptance by Prins Shiimi of the terms and conditions imposed by the Minister. In the absence of the valid acceptance of the terms and conditions, it seems to me that the appellant has lost the right to rely on the first renewal as ground for the review of the decision refusing the second renewal. The court below was entirely correct in observing that the second renewal was dependent on the first renewal and that the second renewal could never have been granted or refused because the EPL had already expired and was not legally renewed.

[43] Moreover, the current case is distinguishable from the cases relied upon by the appellant, including the *Oudekraal* matter. In *Oudekraal*, the applicant sought declaratory orders, declaring amongst others, that the extensions granted by the Administrator were *intra vires* and that the subsequent steps involved in the establishment and approval of the township were all *intra vires* and of full force and effect. The High Court found that the Administrator's extensions of time were invalid and exercised its discretion to allow the collateral challenge taking into account also

the finding that the original application had not been properly considered. As previously noted, the Supreme Court of Appeal took a different view and found that the initial application of the town planning scheme had not been properly considered and that no approval should have been granted in the first place. The appellant in the present proceedings sought to review the Minister's refusal to grant it a second renewal and prayed for an order granting it a renewal of its licence for two years 'from the date of the judgment'. It came to light for the first time in the review proceedings that the application for the first renewal had lapsed, by operation of law, when the terms and conditions imposed by the Minister had not been accepted. It is clear that the court in the review proceedings was not called upon to determine the validity of an administrative act, as was the case in the *Oudekraal* matter, but to enforce what the appellant argued was entitled to, namely a second renewal. The appellant had known fully that the first renewal was not done in terms of the Act. Notwithstanding such knowledge, it sought to rely on the actions of Prins Shiimi while at the same time denouncing his capacity to act on its behalf.

[44] The first renewal lapsed by operation of law in terms of s 48(6). The second renewal would have been based on the validity of the first renewal. The effect of the lapsing of the first renewal is that no second renewal could occur. The first renewal application having had lapsed, the appellant thus retained no residual rights to apply for the second renewal. In any event, it is apparent from the record that the appellant submitted the same progress reports of its prospecting activities. The first report under the EPL and the second report under the first 'renewal' are identical. The only differences shown relate to the costs incurred. The geological reports submitted between 13 July 1999 and 4 September 2000 indicate that the appellant was still

busy with the 'geological and seismic mapping and interpretation'. In short, there is evidence (which was not challenged) to support the notion that the appellant did not do much under the first purported renewal of the EPL.

[45] As the issue of 'when' the renewal took place is not necessary to decide in the present case, there is thus no need to deal with the dispute regarding the renewal dates. In light of this conclusion, the first point of attack on appeal must inevitably fail.

Second point *in limine*

[46] The second preliminary point relates to the delay in launching the review application. The High Court saw no point in deciding the point. It, however, pointed out that whether the application was brought immediately or later did not matter as there was nothing to review. The appellant persisted with this point on appeal. In my respectful opinion, the view of the High Court that there was nothing to review is correct. Without a valid first renewal of the EPL, there was thus nothing to review.

[47] In any event, the delay appears to be unreasonable and it would be difficult to implement the court order had the appellant been successful. It would mean, as the High Court pointed out, turning the clock backwards to 2004 to allow for a renewal that would have lasted only until the end of 2006. For all these reasons, the second ground cannot succeed either. The appeal ought therefore to be dismissed.

Costs

[48] There are no good reasons why the costs should not follow the result. It will accordingly be so ordered.

Order

[49] The following order is thus made:

1. The appeal is dismissed with costs, such costs to include the costs of one instructed and one instructing counsel.

SHIVUTE CJ

STRYDOM AJA

APPEARANCES

APPELLANT:

F Smuts

Instructed by Theunissen, Louw & Partners

RESPONDENT:

S Vivier

Instructed by the Government Attorney