CASE NO.: (P) A 220/2005

AUAS DIAMOND CO (PTY) LTD v MINISTER OF MINES AND ENERGY

MULLER, J.

30 November 2006

- Application for the review of the Minister's refusal to grant a second renewal of an exclusive prospecting licence (EPL) and ancillary relief (main application).
- Two points *in limine* taken by respondent:
  a) No cause of action and
  b) Unreasonable delay of the application for review.
- Court decided, with agreement by counsel, to only consider the points *in limine* at this stage and not the merits of the main application, as such a decision may be decisive in respect of the main application.
- *Kerry McNamara Architects Inc and Others v Minister of Works and Communication and Others* 2000 (1) NR at 2G-H.

Factual events

- With regard to the history of the matter there was a dispute from the beginning in respect of the shareholding of the applicant. Prins Shiimi and others were not regarded as shareholders by the applicant and this culminated in an (unopposed) application and order by this Court determining that he and the others were not shareholders of the applicant. However, in the meantime, a meeting of which, the constitutionality is disputed by the applicant, was held and Prins Shiimi and the others were confirmed as shareholders. A letter confirming the directors of the applicant, with Prins Shiimi as Chairman of the applicant were also discovered in terms of Rule 53(1)(b).
- The relevancy of this was that when the EPL was renewed for the first time, Prins Shiimi accepted it and the supplementary conditions contained therein on behalf of the applicant as its Chairman. The applicant itself attached this "acceptance" to it founding affidavit. No

other "acceptance" of the first renewal and its conditions has been submitted.

Legal and Legislative position

- Sections 48(4) to (6), 70, 71 and 72 of the Minerals (Prospecting and Mining Act, No 33 of 1992) referred to and discussed.
- In terms of s 71 an EPL is valid for 3 years. It can be renewed twice for two periods of 2 years each, i.e. the total validity is 7 years.
- S 48(5) provides for the applicant (any person who applies) to accept the conditions attached to the renewal of an EPL.
- S 48(6) in peremptory terms provides that the application "*shall lapse*" at the expiration of the period.
- In *Oudekraal Estate (Pty) Ltd v City of Cape Town and Others* 2006 (6) SA 573 (C) Davis J held that an application made after the period and deemed to have lapsed in terms of the relevant statutory provision did lapse and the subsequent granting thereof is a nullity. Nothing can be done in that regard.
- On its own papers the applicant denied that Prins Shiimi was authorised by the applicant to accept the first renewal and conditions attached thereto.
- Held that because there was not first renewal, of the EPL, the EPL expired after the first 3 years had expired. The application for the first renewal had lapsed in terms of the Act.
- Held that because there was no first renewal it is immaterial whether the respondent granted or refused the second renewal of the EPL.
- Held that despite any subsequent conduct by the applicant or the respondent, the application for the first renewal lapsed and was a nullity and could not be acted upon.
- Held that there cannot be a review of a matter not reviewable and that the first point *in limine* succeds.
- In the light of this decision it was not necessary to decide the second point *in limine*, namely unreasonable delay to bring the main application. However, in the context of the time-provisions of the Act, the launch of the application seems to be unreasonably late.

CASE NO.: (P) A 220/05

IN THE HIGH COURT OF NAMIBIA

In the matter between:

AUAS DIAMOND CO (PTY) LTD **APPLICANT**

and

MINISTER OF MINES AND ENERGY **RESPONDENT**

CORAM: **MULLER, J.**

Heard on: 09 November 2006

Delivered on: 30 November 2006

JUDGMENT

MULLER, J.: [1] This is an application brought by Notice of Motion supported by an affidavit deposed to by Mr Henry Ivan Hendricks. The Notice of Motion was later amended. The amended Notice of Motion reads as follows:

"1.1 Reviewing and setting aside the decision of respondent taken on or about 25 June 2003 published in the Government Gazette no 3019, to withdraw the area EPL 2495 (Block F) from any prospecting and mining activities;

1.2 Reviewing and setting aside the decision of the respondent taken or about 28 July 2003 not to renew the exclusive licence no 2495;

1.3 Granting a renewal for two years of the Exclusive Prospecting Licence 2495 to the applicant in regard to the area EPL 2495 (Block F) from date of Judgement;

1.4 Costs of the application;

1.5 Granting the applicant further or alternative relief.

TAKE FURTHER NOTICE that respondent is called upon:

2.1 To show cause why the decision referred to in 1.1 should not be reviewed and corrected or set aside;

2.2 To despatch, within fifteen days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside as referred to in 1.1 together with such reasons as he is by law required or desires to give or make, and to notify the applicant that he has done so;

2.3 To show cause why the decision referred to in 1.2 should not be reviewed and corrected or set aside;

2.4 To despatch, within fifteen days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside as referred to in 1.2 together with such reasons as he is by law required or desires to give or make, and to notify the applicant that he has done so."

The first request for review in paragraph 1.1 has been abandoned by the applicant and, save for costs that may have been incurred in respect thereof,

and which is not relevant at this stage, only the review in paragraph 1.2 of the amended Notice of Motion and ancillary relief is pursued with.

[2] When the application was heard Adv. W. Heath appeared for the applicant and Adv S Vivier for the respondent.

[3] Adv Vivier took two points *in limine,* which are set out in her heads of argument and because a success on any of these two points will render determination of the application unnecessary, I indicated to the legal practitioners that I intend to hear argument on the two points *in limine* and reserve judgment thereafter. Both counsel indicated their agreement with this procedure and only the two points *in limine* were argued by both counsel.

This was also the practice previously followed by this court in *Kerry McNamara Architects Inc and Others v Minister of Works and Communication and Others* 2000 (1) NR at 2G-H.

[4] Although the merits of this application for review are not relevant at this stage and were not argued, it is necessary to provide the background of this application in order to comprehend the points *in limine* taken by the respondent.

a) This matter concerns an exclusive prospecting licence 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;

b) The period that such an exclusive prospecting licence (EPL) is valid, is an initial period of three years and thereafter it can be renewed two successive periods, each not exceeding two years at a time. The EPL can only be renewed on two occasions, bringing the total period of an EPL to seven years according to section 71 (1) and (2) of the Minerals (Prospecting and Mining) Act, 33 of 1992, hereinafter called "the Act". It is not relevant in this matter that the Minister may review it for a third time;

c) The applicant applied for and was granted an EPL for a three year period from 3 November 1997 to 2 November 2000;

d) Subsequently the applicant applied for a renewal of the EPL from 2 November 2000 to 1 November 2002, which application was granted by the respondent and had to be accepted by the applicant, including the conditions attached to it;

e) This renewal was "purportedly" accepted by the applicant on 10 May 2001;

f) The first renewal is the basis of the first point *in limine;*

g) Application was made for a second renewal on 16 October 2002 by the applicant for the last two years of the EPL;

h) On 28 June 2003 the Respondent resolved not to grant the second renewal of the EPL and informed the applicant accordingly;

i) The applicant launched two applications to this Court, namely an application on 23 June 2005 against Prins Shiimi and 7 Others regarding the shareholding, or not, of certain persons, including Prins Shiimi, in case no. (P) A 192/2005 and this application on 8 August 2005 under case no. P (A) 220/2005 for the review of the decision of the respondent not to grant the second renewal of the EPL;

j) The application in case no. P (A) 192/2005 by the applicant against Prins Shiimi and seven others were not opposed and an order was made by this Court on 15 August 2005, ordering:

> "1. that the first to seventh respondents have not acquired any shareholding and that they are not entitled to shareholding in the first applicant company.
>
> 2. that the third and fourth respondents pay the costs of the application jointly and severally, the one paying and the other absolved.";

k) The present application was opposed with affidavits filed and the Rule 53(1)(b) documents discovered by the respondent. The entire file is voluminous and contains seven hundred and forty seven pages.

[5] The two points *in limine* are based on the facts which are common cause and which cannot be denied, as well as the applicable legislation, namely relevant provisions of the Act. These points *in limine* are:

(a) the applicant's failure to disclose a cause of action altogether; and

(b) the applicant's unreasonable delay in instituting the review proceedings.

I shall deal with these two points *in limine* in that order.

First Point *In Limine*/Failure to disclose cause of action

[6] Briefly put, the respondent's argument and the applicant's defence thereto entail the following:

The respondent avers that on the applicant's own allegations, as contained in the supporting affidavit and annexures to the review application, the first renewal of the EPL is invalid and consequently, no further or second renewal could be effected, which second renewal is the subject-matter of the application for review. This argument is based thereon that in terms of the Act, the grant of a renewal of an EPL has to be accepted by the holder thereof, and if not, it lapses. The first renewal was accepted by Prins Shiimi, who at that time signed the acceptance as Chairman of the applicant, but whose authority is denied by the applicant and who in terms of the Court order of 15 August 2005, referred to earlier herein, was not a shareholder of the applicant. The applicant's defence hereto is that the first renewal was granted by the respondent and his subsequent conduct was always that the

EPL was valid and was in fact renewed and all the parties acted accordingly. According to the applicant, the respondent acted thereon and eventually refused the application for the second renewal of the EPL, which is the subject-matter of prayer 1.2 of the application for review.

[7] The question arises that if such renewal was irregular and invalid in terms of the provisions of the Act, whether there could be any further renewal, despite the fact that all the parties might have been under the impression that the first renewal was in fact proper and regular. In this regard a closer look at the factual situation, as well as the legal position, is required.

[8] The following factual situation seems to have existed since the date of the first renewal of the EPL:

(a) from the documentation it appears that the prospecting programme remained the same and that no activities apparently took place during the first renewal period of two years;

(b) reports were submitted only up to 4 September 2000 and no further activities were reported beyond that date;

(c) in the applicant's initial application it indicated who the shareholders are and set out their names in the document attached thereto, namely eleven Namibian shareholders of which Prins Shiimi was one.

(d) when the applicant was notified by the respondent on 8 May 2001 that its application for the first renewal was granted, it was expressly indicated that the applicant is required to accept the terms and conditions of the renewal **within one month,** failing which the application would be deemed to have lapsed in terms of Section 48 (5) of the Act;

(e) the terms and conditions were then accepted by Prins Shiimi in his capacity as a duly authorised officer of the applicant on 10 May 2001, including acceptance of the supplementary terms and conditions referred to in that notice;

(f) in his replying affidavit the applicant denied that Prins Shiimi was ever authorised by the applicant or a legally constituted meeting of the applicant's shareholders or directors; and

(g) this Court held on 15 August 2005 that Prins Shiimi was not a shareholder of the applicant.

[10] The relevant parts of the following section of the Act are applicable to an EPL:

> "Section 1
>
> "exclusive prospecting licence" means an exclusive prospecting licence issued under section 70 and includes the renewal of any such licence."
>
> "mineral licence" means a reconnaissance licence, an exclusive prospecting licence, a mining licence or a mineral deposit retention licence and includes the renewal of any such licence."

Section 48 (Powers of the Minister in respect of Mineral licences)

"(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."

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 an EPL and expressly makes it subject to the provisions of section 48 (4) and (5).

Section 70

"(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."

Section 71

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

(a) for such period, not exceeding two years at a time, 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), subject to the other provisions of this Act -

(a) an exclusive prospecting licence shall not expire during a period during which an application for the renewal of such licence is being considered, until such application is refused or the application is

withdrawn or has lapsed, whichever occurs first or, if such application is granted, until such time as the exclusive prospecting licence is renewed in consequence of such application; or

(b) where an application is made by the holder of an exclusive prospecting licence for a mineral deposit retention licence of a mining licence in relation to an area of land which forms part of the prospecting area and in respect of any mineral or group of minerals to which such exclusive prospecting licence relates, such exclusive prospecting licence shall not expire in relation to such area of land and such mineral or group of minerals, until such application is refused or the application is withdrawn or has lapsed, whichever occurs first or, if such application is granted, until such time as the mineral deposit retention licence is issued in consequence of such application.

Section 72

"(1) Subsection 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 per cent 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 per cent 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."

[11] The legal position in respect of an irregular and unauthorised act has been the subject -matter of several decisions of our courts.

In *Oudekraal Estate (Pty) Ltd v City of Cape Town and Others* 2006 (6) SA 573 (C) Davis J (together Veldhuizen J concurring) had occasion to consider the effect of a deeming provision in an application launched to ia declare the leave granted by the Administrator of the Cape Province *intra vires* and of full force and effect, although such leave had been granted after the 12 months statutorily allowed therefore, had expired. That leave concerned the submission of a general plan to the Surveyor- General according to the powers of the Administrator in terms of the Township Ordinance, No 33 of 1934 of the Cape Province. S 19(3) of that Ordinance provides:

> *"Should the owner fail to submit the general plan, when necessary, the said diagram to the Surveyor-General with the period of 12 months or within such further period as may have been allowed by the Administrator, a grant of the application shall be deemed to have lapsed."*
>
> (My underlining)

In that case counsel for the applicant urged the court to read into that section certain provisions, that appeared in similar sections in similar provincial ordinances of other South African provinces which all contained a provision to the effect that the Administrators of those provinces may condone such failure. This submission was rejected by the Court and the Court confirmed that it had to rely on the power awarded to the Administrator by the statutory provision of that province, namely the said s 19(3) of the Cape Ordinance, which did not allow the possibility of condonation to be granted. In the final analysis, the Court's decision was that the application had lapsed and consequently no declaration could be made that the granting by the Administrator was *intra vires* and of full force and effect.

With reference to the decisions regarding finality of time periods in other cases Davis J said:

> "To the extent that there is a difference the Cape ordinance and those of the other provinces, it is clear that the latter implicitly recognised that, in the absence of an express power of condonation, the township application lapsed. In support for the proposition, that in the absence of a specific provision which authorities non-compliance to be condoned, the prescribed time-period was definitive, see *Landmark*

Investments (Pty) Ltd v Port Elizabeth Municipality 1968 (2) SA 698 (E); *S Bothma and Son Transport (Pty) Ltd v President of the Industrial Court and Others* 1998 (3) SA 335 (T) and *Port Elizabeth Divisional Council v Muller and Another* 1963 (1) SA 99."
(p 585G-H)

In conclusion Davis J said:

"For the reasons set out above, the grant of the application for a township approval on 17 September 1957 lapsed after 12 months without the submission of a general plan. Accordingly the approval which was eventually granted was a nullity.
The invalidity of the Administrator's actions cannot now be undone by the registration which appears in the Deeds Registry. It is permissible for respondents to raise the invalidity of the Administrator's actions as a defence to the application which has been brought by the applicant. The effect of the invalidity of the Administrator's actions is that applicant cannot rely on the registered township rights to justify the relief which it seeks from this Court.
For these reasons the application is dismissed with costs, ---"
(p 596G-I)

[12] Adv Viviers referred the Court to the contradiction between the allegation of the applicant's deponent in paragraph 9 of its founding affidavit and paragraph 12.5.2 of its replying affidavit. In the founding affidavit it was categorically stated that:

"The EPL was <u>duly renewed</u> on 8 May 2001. A copy thereof is attached as Annexure E."
[My underlining]

Annexure E referred to by the applicant is in fact the <u>acceptance</u> of the renewal signed by Prins Shiimi. This, she argues, contradicts the allegation in the applicant's replying affidavit where the authority of Prins Shiimi is

categorically denied. In paragraph 12.5.2 of the replying affidavit it is stated:

> "*Prins Shiimi was never authorised by a legally constituted meeting of shareholders and directors of the applicant.*"
> [My emphasis]

It was also pointed out that the applicant failed to refer to the meeting which was held in respondent's office on 5 April 2001 and the minutes of which indicated that Prins Shiimi was one of the shareholders. The minutes of this meeting, as well as a further confirmation of the directors indicating Prins Shiimi as Chairman of applicant's directors, was only discovered at a later stage and did not form part of the applicant's founding affidavit. It is also argued that the applicant did not subsequently protest against the agenda or the holding of the meeting or the minutes signed by Dr Saunderson, a director of the applicant. However, Ms Vivier's first point *in limine* makes it clear that it is the applicant's case that Mr Shiimi was not authorised to accept the terms and conditions of the first renewal as provided for in Section 48 (5) of the Act within the one month period with the result that the application for the first renewal has lapsed as Section 48 (6)(b) quoted above clearly indicates. With regard to the application for review of the second renewal, the argument of Ms Viviers is that it is clear from the Act that the two renewals run consecutively and that if there is no first renewal, there cannot be a second renewal. This means that if the application for the first

renewal has lapsed, there cannot be a second renewal at all. The EPL effectively died after expiry of the first 3 years.

[13] Advocate Heath's argument is based on what happened after the first renewal and in particular the conduct of the respondent or its officers. He relied on the several requests by the applicant to finalise this matter and the repeated mentioning of the dispute amongst the shareholders, which stood in the way of the granting of the second renewal. He denied that there was a valid meeting and relied on the unopposed application and decision by the Court to the effect that Prins Shiimi and the other persons were not shareholders of the applicant. He confirmed that Prins Shiimi never had any authority to act on behalf of the applicant. According to him the first renewal was never an issue between the parties and by his conduct the respondent condoned anything done subsequently. Therefore respondent cannot be heard on that issue. According to Advocate Heath, this issue was only raised now and he submits that the whole history contradicts that argument. He submitted that if Shiimi was confident that he was a shareholder, his failure to oppose that application contradicts it. He further submitted that if the Court in that application had decided that Shiimi was a shareholder, the case in this matter whould have been different.

[14] In the *Oudekraal-case*, *supra*, the Court decided that the granting of the Minister's approval after the expiry of the time resulted in a nullity. The

provisions of the Act in respect of time-period of a EPL (s 71), the renewal thereof (s 72), as well as the nature of an EPL (s 70) and the applicability of s 48(5) and (6) to an EPL make it even worse for the holder of an EPL than in the *Oudekraal-case*. Here it is not only the Minister's decision that is relevant to the consideration whether the licence had lapsed. It is the applicant's subsequent action, after being awarded the licence, that determines whether it (EPL) has lapsed or not in terms of s 48 (6). To comply with this an applicant has a month and if it does not accept the conditions attached to the licence, the application "*shall lapse"*. A further distinction is that the subsection does not contain a deeming provision, it is stated in peremptory terms – the application *"shall lapse*." To bring this closer to home, the application for renewal was granted by the Minister and the conditions attached to it in terms of s 48(4) had to be accepted by "the person concerned". That person can only be an authorised representative of the applicant. The applicant is a company and can only act through an authorised representative of the applicant company. That person cannot be any general worker or any employee of the company. The applicant made it unequivocally clear that Prins Shiimi was not authorised to act on its behalf and consequently to accept such conditions attached to the renewal. Nobody else on behalf of the applicant accepted the conditions. The applicant's denial of Prins Shiimi's authority was in direct response to the respondent's allegation in his answering affidavit referring to the acceptance of the conditions attached to the grant of the first renewal of the EPL in which the

respondent stated that he assumes that the internal shareholding problems of the applicant had now been sorted out and the respondent could therefore rely on this acceptance on behalf of the applicant. Surprisingly the applicant's response in its replying affidavit was a denial of Prins Shiimi's authority.

[15] The effect of this denial by the applicant is that on its own papers it did not accept the renewal and the conditions coupled to it. Consequently, the first renewal lapsed. The effect thereof is that the EPL, granted for 3 years, expired on 02 November 2000 and was not renewed. There cannot be any doubt that the second renewal is dependent on the first renewal of the EPL. The substance of the applicant's application for review is the respondent's refusal of the second renewal of the EPL. That 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. Similarly as in the *Oudekraal-case,* the applicant cannot rely on what occurred subsequently to justify the relief that it now seeks, i.e. to review what cannot be reviewed. It has become moot. (Burns – Administration Law – Third edition, paragraph 2.7, p 470).

[16] Consequently, the first point *in limine* must succed. It is not necessary to deal with the second point *in limine,* namely the delay in launching this application for review. Whether the application was brought immediately or

later does not matter – there was nothing to review. In any event, it does seem to me that the delay was unreasonable in the context of the time-period allowed for in the Act and even if the respondent would not have been successful on the first point *in limine,* the delay by the applicant to launch this application at the time it did would have made it impossible to give effect to, even if the applicant was successful with its review application. That would mean that the time-clock would have to be turned backwards to 2004 to allow for a renewal that would last only until the end of 2006.

[17] In the result, the first point *in limine* of the respondent succeeds and the application is dismissed with costs.

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MULLER, J

ON BEHALF OF THE APPLICANT	**Adv W Heath**
Instructed by:	**Theunissen, Louw & Partners**
ON BEHALF OF THE RESPONDENT	**Adv S Vivier**
Instructed by:	**Government Attorneys**