CASE NO. (P) A 16/2007

IN THE HIGH COURT OF NAMIBIA

In the matter between:

BLACK RANGE MINING (PTY) LTD APPLICANT

and

THE MINISTER OF MINES & ENERGY 1ST RESPONDENT

ANCASH INVESTMENTS (PTY) LTD 2nd RESPONDENT

CORAM: MANYARARA, A.J.

Heard on: 06 - 08 April 2009

Delivered on: 12 June 2009

JUDGMENT

MANYARARA, A.J.: [1] This is an application to review a decision of the Minister of Mines and Energy. The application was launched on 1 February 2007 by Erongo Nuclear Explorations (Pty) Ltd (Erongo) as first applicant and Black Range Mining (Pty) Ltd as the second applicant. Mr. Odendaal SC with him Mr. Totemeyer appeared for the applicants, Mr. Corbett for the first respondent and Mr. De Bourbon SC with him Mr. Barnard for the second respondent. However, Mr. De Bourbon limited his appearance to the hearing of

the application to strike out filed by the second respondent (hereinafter referred to as "Ancash"). In the application, Ancash sought to strike out certain material from the papers filed by Christiaan Lilongeni Ranga Haikali, the managing director of Erongo. Judgment was reserved and was delivered on the first day.

[2] The first group of the matter sought to be struck consisted of duplications of documents annexed to the affidavit of Haikali. This was indeed so and such documents were struck for that reason. The second group consisted of matter enumerated by Ancash as *inter alia* speculative opinion evidence, scandalous, vexatious and defamatory matter, inadmissible hearsay and irrelevant and new matter not pleaded in the founding affidavit filed by Haikali. The court found that the allegation was proved and there is no purpose in canvassing the reasons as these are satisfactorily covered by the record of the hearing to which reference should be made. The court concluded that the application should be allowed with costs on the attorney and client scale, including the costs of two instructed counsel and that was the order made.

[3] In the rest of this judgment I shall refer to the first respondent as "the Minister".

[4] The history of the matter may be summarized as follows:

1. Black Range Mining (Pty) Ltd (hereinafter referred to as "the applicant") has been the holder of 4 Exclusive Prospecting Licences (EPLs) issued under the Minerals (Prospecting and Mining) Act 33 of 1992 (the Act) as from the year 2000. The licences entitled the applicant to explore for base and rare minerals, industrial minerals, precious metals and precious stones only but not to explore for nuclear

fuels. The applicant has since abandoned 2 of the EPLs but that will not affect the outcome of this matter.

2. On 23 October 2006 the Minister awarded EPLs to explore for nuclear fuels (uranium EPLs) to Ancash over the same geographical area covered by the applicant's EPLs. This followed the refusal of an application by the erstwhile first applicant in these proceedings, (Erongo), for EPLs to explore for uranium in that area.

3. The Minister's decision was allowed to stand and not taken on review. Nor was it suggested that, in making the decision, the Minister was not entitled to view the actions of Reefton NL, the ultimate holding company of Erongo and the applicant, as sufficient ground for refusing the application.

4. The application to review the Minister's decision was launched by Erongo as the first applicant and the applicant as the second applicant on 1 February 2007. However, on 17 October 2007 Erongo

withdrew from the proceedings and abandoned all relief sought by it in the review application.

5. The applicant persisted with the application without amending the original notice of motion and declined an invitation by Ancash to amend the notice of motion "for purposes of properly reflecting the relief sought" as Mr. Barnard submitted. Mr. Odendaal referred Mr. Barnard to the heads of argument filed by the applicant on

11 March 2009 as a sufficient source of information apprising Ancash of the nature of the relief sought. The said relief calls upon the respondents to show cause why –

"1. The Exclusive Prospecting Licenses number 3632, 3635, 3636 and 3637 purportedly granted by first respondent to second respondent under the Act on or about October 2006 not should not be

1.1 declared in conflict with the Constitution of Namibia.

1.2 Declared ultra vires the powers of first respondent.

and (the Minister's decision) is accordingly null and void, alternatively be reviewed and set aside in terms of Rule 53(1).

2. Ordering the respondents to pay the costs of this application jointly and severally, the one paying the other to be absolved."

6. However, so strongly was the rejection of the invitation to amend the notice felt that a formal application for an order compelling compliance was made. The application was opposed. Mr. Corbett, for his part, submitted that but for a minor reservation on the sufficiency of an affidavit filed in the review application, he had no

objection to continuation of the proceedings on the basis of what the applicant contended was relevant.

7. After hearing argument, the application was dismissed with costs, including the costs of two instructed counsel. Again, the reasons will not be canvassed separately as they are sufficiently covered by the record of the relevant hearing to which reference should be made.

[5] Prior to the institution of the review application, the applicant had applied for rights to explore for uranium to be included in its EPLs. The application was refused on the ground that the EPLs had been abused by illegal exploration for uranium in the area on the basis of which Reefton NL had announced to the outside world that it had made a "new discovery" of uranium in its EPL areas, which was untrue because the existence of uranium in such areas had been known and publicly documented since 1970. As already mentioned, Reefton NL, an Australian based company, was the ultimate holding company of the applicant.

[6] Mr. Barnard has raised a number of issues *in limine* and the first such issue was unreasonable delay in bringing the review application. He submitted that the refusal of the application for the uranium EPLs occurred on 25 August 2006 and from such date the applicant (and Erongo) would or should have known that the Minister was at liberty to receive fresh applications for the uranium EPLs from any third party and to consider and award the same to

such parties. In any event, so Mr. Barnard continued, the information was published in the Minister's Register and the applicants should have checked the document, which would have alerted them to the application by Ancash. However, it transpired that the Register was not up to date anyway and this effectively buried Mr. Barnard's contention on the point.

[7] Mr. Barnard further contended that the applicants had wasted their time by addressing a letter to the Minister, threatening legal action if he failed to give an undertaking not to award the uranium EPLs to any third party by 7 November 2006 and then allowing the deadline to come and go without such action being instituted when the undertaking was not given as demanded.

[8] The applicants' explanation for the delay in launching the review application is that the first intimation that the Minister had awarded the uranium EPLs to Ancash occurred on 7

December 2006 when it learnt of the identity of the recipient of the EPLs. This occurred in the wake of several events which included an exchange of correspondence with the Minister on the matter during September and October 2006.

[9] It should be pointed out at this stage that Mr. Barnard actually misconstrued the letter to which he referred as a threat to sue the Minister. The portion of the letter he quoted reads as follows:

> *"Given our client's firm intention to legally challenge your decision contained in annexure "A" hereto, our client requires that you shall undertake not to issue exclusive prospecting licences in respect of any of the areas applied for by our*
>
> *client, for the prospecting and/or exploration of the Nuclear Fuel Minerals Group, until such time as the review has finally been determined.*
>
> *Should you refuse to give an undertaking as sought in paragraph 9 above, our client would suffer irreparable harm if such rights were awarded to third parties and they would have no other option but to approach the high Court of Namibia on an urgent basis.* ***Should such an undertaking not be forthcoming by latest 7 November 2006 our client shall accept that you are not prepared to give such an undertaking.****"*

[10] It will be seen that the letter does not threaten action if the undertaking was not forthcoming by 7 November 2006; rather the letter merely warned that, in the event of failure to give the undertaking, the applicant shall accept "that you are not prepared to give such an undertaking" and resort to litigation, which is markedly different from the meaning which Mr. Barnard attributed to the letter. Thus viewed, the point raised by Mr Barnard is colourless and may be safely disregarded.

[11] In the interim, the applicant had purported to appeal against the Minister's decision and it had not helped matters that the Mining Commissioner stated that, in terms of the Act, the

Minister "is entitled to revisit a decision made by him." It was conceded that the Mining Commissioner's statement was incorrect as the Act does not provide for such an appeal. Thereafter, a letter dated 21 November 2006 was received from the Minister the essential portion of which stated merely that "other applications were considered."

[12] A further reason given for the delay in the preparation and launching of the review application was the interruption caused to the process by the Christmas recess.

[13] It is convenient to consider at this stage Mr. Barnard's second point *in limine* in support of his contention that the delay *in casu* in launching the review application operates against the intention of the Act for optimal exploration for minerals in a manner as "would serve the development of the mineral resources of Namibia" and, for that reason, causes prejudice to applicants for competing rights. He cited *Otjozonda Mining (Pty) Ltd v The Minister of Mines and Energy and Another* 2007 (2) NR 469 (Hc) in support of his argument. The argument relates directly to the submission made by Mr. Odendaal as follows:

> *"In any event, no prejudice ensued for the affected party being second respondent, since it is common cause between applicant and second respondent that the latter had not yet commenced with its prospecting activities on the 4 EPLs awarded to it at the time when the review application was launched. The issue of prejudice (or the absence thereof) is a relevant consideration in determining the delay – challenge. (Namibia Grape Growers and Exporters v Ministry of Mines 2004 NR 194 (Sc), 214H – I").*

[14] My view is that *Otjozonda* does not assist either the applicant or the respondent *in casu*. My respectful interpretation of the judgment read as whole is that the fact that Ancash had not

commenced its prospecting activities is neither here nor there but that an applicant in a review application should not

be allowed "to hold the whole mining industry hostage simply by filing an unmeritorious application." At 473F. Put another way, whether or not a review application had been unreasonably delayed is a factual enquiry which depends on the surrounding circumstances and regard should also be had to the time required to take all reasonable steps prior to and in order to initiate the litigation. See *Radebe v Government of the Republic of South Africa and Others* 1995 (3) SA 787 (N) at 798 I – 799E and the authorities referred to in the judgment.

[15] It is agreed that the court has a discretion to condone an unreasonable delay but only upon a proper application giving a full explanation for the delay. See *Disposable Medial Products v Tender Board of Namibia* 1997 NR 129 (Hc) at 132 and the cases referred to by the judgment.

[16] I do not find dilatoriness in the launching of the review application but, at worst, extra caution not to launch the application without first appealing to the Minister not to lose sight of the applicant's interest in securing uranium EPLs over its area. Hence the exchange of correspondence with the Minister on the matter and the futile attempt to launch an incompetent appeal without knowing whether any competing applications for the EPLs in question had been made or the identity of competing applications, if any, and these are allegations which have not been effectively disputed. Accordingly, I find that the explanation given for the delay in launching the review application satisfies the principles enunciated by the authorities for granting condonation. It is also my view that, in the context of the explanation given in this matter, it was not

necessary for a formal condonation application to be made as Mr. Barnard argued. Therefore, his first and second points *in limine* must fail and are dismissed.

[17] The third issue *in limine* raised by Mr. Barnard was that the application must fail because the applicants approached the court with "unclean hands." The principle has its origin in English law and has been firmly entrenched as part of Namibian law. It is a defence whose purpose is to deny relief to those litigants whose conduct lacks probity or honesty or is tainted with moral obloquy." *Associated Newspapers of Zimbabwe (Pty) Ltd v Minister of Information and Publicity in the President"s Office and Others* 2004 (2) SA 602 (ZS) at 608H. It will be seen that the defence is not limited only to instances where a litigant has involved himself in acts of "fraud, dishonesty or *mala fides"* as Mr. Odendaal appeared to suggest.

[18] While not conceding the point, Mr. Odendaal submitted in the first place that the onus rested on the respondents as the party raising the defence to raise or plead the defence in their founding papers. However, Herbstein & Van Winsen, the Civil Practice of the Supreme Court of South Africa 4th ed enunciates the following principle at p368 –

> *"If legal points are set forth in the application, the applicant is not confined to them but may advance any further legal basis for the application that may arise from the stated facts. A party is entitled to make any legal contention open to him on the facts as they appear on the affidavits, and the court may decide an application on a point of law that arises out of the alleged facts even if the applicant has not relied on it in his application."*

[19] To my mind, the principle accords with the decisions of the courts. See *Associated Newspapers, supra, Simmons NO v Gilbert Hamer and Co K Ltd* 1963 (1) SA 897(N) and *Allen v Van Rensburg* 1963 (1) SA 505 (AD) at 501. Accordingly, Mr. Barnard's contention must be upheld and applied to the present matter.

[20] Mr. Odendaal submitted in the second place that even if the applicant was caught by the unclean hands principle, which was not admitted, a litigant may purge itself of that defect, akin to purging oneself of contempt of court, and this was precisely the position in which the applicant was when it launched the review application. See *Soller v Soller* 2001 (1) SA 570 (C) at 573 D-G. In *casu* while it is true that in the failed application for uranium EPLs both the applicant and Erongo were closely associated with Reefton NL in a relationship of which the Minister strongly disapproved, the admitted fact that the Minister in fact renewed the applicant's existing EPLs after the launching of the review application defeats the contention that the applicant came to court with "unclean hands" and that puts the disputed issue at an end.

[21] This brings me to the grounds relied upon for review of the Minister's decision. The first such ground is that the decision was tainted by bias. It appears from the papers filed by the applicants that the allegation was confused with the concept of unequal treatment of the parties. However, despite the present review application, the Minister agreed to the extension of the EPLs held by the applicant which had nothing to do with exploration for

uranium. It is submitted on the Minister's behalf that he is entitled to apply different considerations to his decisions relating to granting or refusing applications for exploration of strategic nuclear fields. Therefore, it is impossible to infer bias from the Minister's exercise of his discretion in this matter and the allegation of bias must be dismissed.

[22] The second ground for review can be disposed of shortly as follows. It is alleged that Ancash or those making the application on Ancash's behalf plagiarized the failed application for uranium EPLs made by Erongo and the applicant. The short answer is that plagiarism, if any, cannot be a ground for reviewing the Minister's decision as it is not his function to scour applications for plagiarism. All that section 68(c) of the Act requires of him is that he should be

aware or made aware of the location and extent of the area to which EPL applications relate and of the farm(s) affected by such applications and, in my view, it must be assumed that there was compliance with the provision.

[23] The third and crucial ground for review is alleged non-compliance with section 69(2)(g) of the Act. The section provides as follows:

> *"Notwithstanding the provisions of subsection (1), (which do not arise herein) the Minister shall not grant an application by any person for an exclusive prospective licence-*
>
> > *(g) In respect of any prospecting area or retention area in relation to a mineral or group of minerals other than the mineral or group of minerals to which the exclusive prospecting licence or mineral deposit retention licence issued in respect of such areas relates, respectively, unless –*
> >
> > (i) *such person has given notice in writing, not later than on the date on which such application is made, to the holder of the exclusive prospecting licence or mineral deposit retention licence to which such prospecting area or retention area, as the case may be, relates of his or her application or intended application, as the case may be, for such exclusive prospecting licence and has provided the Minister of proof in writing of having done so*
> >
> > *(ii) the Minister has afforded the holder referred to in subparagraph (i) a reasonable opportunity to make representations in relation to such application.*
> >
> > *(iii) the Minister deems it, with due regard to representations made in terms of subparagraph (ii), if any, desirable in the interests of the development of the mineral resources of Namibia, to grant such licence and*
> >
> > *(iv) the Minister is on reasonable grounds satisfied that prospecting operations carried on by virtue of such licence will not detrimentally affect the rights of any holder of an exclusive prospecting licence or a mineral deposit retention licence, as the case may be, in respect of any such area."*

[24] It will be seen that the provision is mandatory and Ancash admittedly failed to comply therewith. Not deterred thereby, Mr. Barnard contended that there was substantial compliance with the provision on the following bases –

1. The applicant became aware of Ancash's application in sufficient time to make representations to the Minister.
2. The Minister was aware of the rights of the applicant and he considered Ancash's application against the background of such knowledge on his part.

3. In the circumstances any "technical" non-compliance with the provision would not have defeated its objectives and would not constitute a reviewable irregularity on the part of the Minister.

There is no substance in the contentions.

[25] Firstly, the respondents have not been able to dispute the allegation that the applicant was to all intents and purposes deliberately kept in the dark (as the saying goes) on Ancash's application and were denied access to the information by the respondents' admitted non-compliance with section 69(2)(g) of the Act. Therefore, the applicant could not possibly have been aware of the application.

[26] Secondly, the Minister could not be aware of the applicant's rights without been informed of Ancash's application.

[27] Finally, the clear object of section 69(2)(g) as submitted by Mr. Odendaal may be summarized as follows:

"1. In terms of section 69(2)(g) of the Act, it was a statutory pre-requisite (and an indispensable jurisdictional fact) for a valid decision by first respondent to grant the EPLs to second respondent that-

1.1 Second respondent was obliged to give the applicant notice in writing of its intended application and

1.2 First respondent had to be satisfied that such notice was given, hence the requirement that written proof of such notice should be supplied to first respondent….

2. It is noteworthy that second respondent has not met the challenge regarding a non-compliance with section 69(2)(g) of the Act. This, in the

circumstances, should be construed as an admission of non-compliance with the provision by second respondent…..

3. The failure to comply with section 69(2)(g) constitutes non-compliance with the audi alteram partem rule.

4. Inherent to fair and reasonable administrative decisions is the application of the rules of natural justice and the audi alteram partem –rule. The audi alteram partem rule has been constitutionally entrenched in Articles 12 and 18 of the Constitution. Article 18 of the Constitution requires reasonable decision-making on a procedural as well as a substantial level.
Aonin Fishing v Minister of Fisheries and Marine Resources, 1998 NR 147(HC), 150 G-H…..

5. The duty to act fairly is concerned only with the manner in which decisions are taken. It does not relate to whether the decision itself is fair or not. Procedurally fair administrative action is therefore required, irrespective of the merits of the decision. See Administrator Transvaal v Zenzile, (1991(1) SA 21(A), 37D)"

[28] The submissions are unassailable. The suggestion made by Mr. Barnard is untenable as it would clearly defeat the objects submitted by Mr. Odendaal and Mr. Corbett was well advised not to pursue the point. The provision leaves no room for presuming substantial compliance therewith. The undeniable fact *in casu* is that non-compliance deprived the applicant of the

opportunity of accessing Ancash's application to enable the applicant to make relevant representations to the Minister and also raise the issue of plagiarism in its proper context.

[29] It also follows that the review application is not academic as Mr. Barnard suggested because the applicant is the holder of EPLs in the area and for that

reason mandatory compliance with the mandatory provisions of the Act by the Minister was "an indispensable jurisdictional fact" as Mr. Odendaal submitted.

[30] Accordingly, the application must succeed and I need not consider the rest of the argument advanced by counsel in the matter. In the result, the following order is made:

1. The application is allowed in terms of paragraph 3.1 of the notice of motion.

2. The respondents shall pay the applicants costs jointly and severally, the one paying the other to be absolved, including the costs of two instructed counsel.

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MANYARARA, AJ

ON BEHALF OF THE APPLICANT	Adv. Odendaal, S.C
	Assisted by: Adv. Totemeyer
Instructed by:	Koep & Partners
ON BEHALF OF THE 1ST RESPONDENT	Adv. Corbett
Instructed by:	Government Attorney
ON BEHALF OF TE 2nd RESPONDENT	Adv. Barnard
Instructed by:	Diekmann Associates