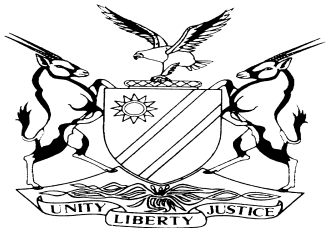


REPORTABLE

CASE NO.: [P] A 04/2007

SUMMARY

IN THE HIGH COURT OF NAMIBIA

In the matter between:

PURITY MANGANESE (PTY) LTD **APPLICANT**

and

MINISTER OF MINES AND ENERGY **FIRST RESPONDENT**

MINING COMMISSIONER **SECOND RESPONDENT**

OTJISONDU MINING (PTY) LTD **THIRD RESPONDENT**

CASE NO.: [P] A 03/2007

In the matter between:

GLOBAL INDUSTRIAL DEVELOPMENT (PTY) LTD **APPLICANT**

and

MINISTER OF MINES AND ENERGY **FIRST RESPONDENT**

MINING COMMISSIONER **SECOND RESPONDENT**

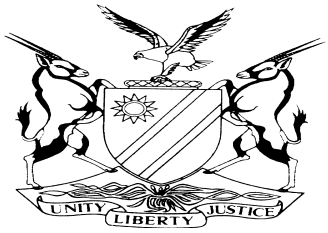
MULLER, J.

19 January 2009

- Applicants in both Purity and Global applications applied for a review of the Minister of Mines and Energy (first respondent's) decisions to refuse the renewal of an EPL, to grant

a number of EPLs and to grant (in the Purity matter an EPL to the third respondent. (EPL = exclusive prospecting licence).

- Court only entertaining arguments in respect of the applicants' delay in instituting review proceedings in both matters.
- Applicants counsel considered that if Court finds that the delay by Purity is unreasonable and its application should fail, Global's application must also fail.
- Law in respect of delays approved and restated:
    - First step is to determine whether delay was unreasonable in the circumstances of this case. Court has no discretion.
    - Second step: if the delay is unreasonable, the Court has a discretion to condone it if a satisfactory explanation for the delay is given.
    - *(Disposable Medical Products v Tender Board of Namibia* 1997 NR 129 (HC) at 132E; *Radebe v Government of the Republic of South Africa & others* 1995(3) SA 787 (N) at 798G-799E); *Kruger v TransNamib (Air Namibia) and Others* 1996 NR 168 (SC); *Namibia Grape Growers and Exporters v The Minister of Mines and Energy* 2002 NR 328 (SC) at 341F-I; *Christine Paulus & 3 Others v The SWAPO Party and 7 Others,* unreported judgment delivered by Swanepoel AJ on 13 November 2008 in Case No A 144/2007, para [30], p 17).
- Prejudice not the only reason for the existence of a delay. *Harnaker v The Minister of Interior* 1965(1) SA 372 (C); *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit Kaapstad* 1978(1) SA (A).
- **Held:** That the delay in the Purity matter was unreasonable in the scope and object of the Act.
- **Held:** Explanations for delays only contained in one paragraph in each application. Such explanations not satisfactory to exercise Court's discretion to condone the delays.
- **Result:** Both applications dismissed with costs.



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and

MINISTER OF MINES AND ENERGY **FIRST RESPONDENT**

MINING COMMISSIONER **SECOND RESPONDENT**

CORAM: **MULLER, J**

Heard on: **17 November 2008**

Delivered on: 19 January 2009

JUDGMENT

MULLER, J.: [1] When the hearing of these two applications commenced, I indicated to all the counsel that I want to hear submissions only on the "delay" aspect and not any other points or the merits. All counsel agreed thereto. The reason for taking this course was because several other points *in limine* were taken, which have to be determined before the applications in both matters on the merits could proceed.

[2] The applicants in both applications were represented by Mr AJ Freund, SC, assisted by Mr Bava, the first and the second respondents by Mr Corbett and the third respondent (only in the Purity application) by Mr Barnard. All counsel were in agreement that the delay issue be argued first and consequently submissions were advanced only on that issue during the first day that this application was set down. I shall hereinafter deal with the submissions addressed to the Court in this regard. I shall refer to the applicants as *"Purity"* and *"Global,"* respectively. The third respondent is only involved in the *Purity* matter. To a large extent the relevant issues in both Purity and Global matters are similar, but where they differ, they will be dealt separately.

[3] The relevant Act is the Minerals (Prospecting and Mining) Act, No 33 of 1992, which will be referred to hereinafter as the "Act". I shall further herein refer to the relevant exclusive prospecting licences as *EPL's* together with the relevant numbers and a *ML* means a mining licence.

[4] In order to understand the situation, it is necessary to refer briefly to the background of both the Purity and Global applications:

a) Purity, *inter alia*, mines manganese under mining licence ML 35/2004, which was renewed on 05 September 2004 and expires on 04 September 2014;

b) Purity allegedly also performs exploration activities for which it had an exclusive prospecting licence, EPL 2916 for a specific area and it applied for a renewal thereof, but the renewal was refused on 15 February 2006;

c) Purity also applied to be issued a new exclusive prospecting licence, EPL 2942, which application was similarly refused on 15 February 2006;

d) Purity further applied to be issued another exclusive prospecting licence, EPL 3318, which was also refused on 10 April 2006;

e) On 13 May 2006 the first respondent granted an exclusive prospecting licence, EPL 3456, to the third respondent over a portion of an area covered by Purity's (expired) EPL 2916;

f) It is in dispute whether the application for the above-mentioned renewal and issuing of EPLs by Purity were made on 19 November 2004 or 05 January 2005, but that dispute is not relevant and to the issue of delay presently under consideration by this Court;

g) In respect of the refusal by the first respondent to renew EPL 2916 and to issue new exclusive prospecting licences with regard to the applications EPL 2942 and EPL 3318, as well as the granting of EPL 3456 to third respondent, Purity launched an application for review thereof by this Court on 15 December 2006, which application was served on 18 December 2006 on the respondents;

h) Global explores sites to determine whether minerals are present in such quantities that are enough to warrant the mining thereof,

i) Global has the same director, Dr Bonai, and the same management as Purity;

j) Global applied for the following six exclusive prospecting licences during March 2005, namely EPLs 3312, 3313, 3314, 3315, 3316 and 3317, which were all refused first respondent on 26 February 2006;

k) On 18 December 2006 Global launched an application for review by this Court in respect of the refusal of the above-mentioned EPLs, which application was also served on the respondents on 18 December 2006;

l) No reasons were provided by the first or second respondents for the refusal of any of the above-mentioned applications;

m) On 27 and 28 February 2006 letters were addressed on behalf of Purity and Global, respectively, to first and second respondents requesting, *inter alia*, the reasons for the rejecting of the applications, but no reply was received to any of these letters;

n) On 14 March 2006 a meeting was held between the representatives of both applicants, the Deputy Minister, Permanent Secretary, Mining Commissioner and Director Mines;

o) The applicants in the Purity and Global matters submitted agendas for this meeting on behalf of both applicants;

p) At that meeting the first and second respondents provided reasons for rejection the above-mentioned applications in respect of both Purity and Global, which reasons included the following (mainly in respect of Purity):

i) the track record of Purity;

ii) the non-payment by Purity of farmers' royalties and Nampower for electricity;

iii) the fact that no professional people were in charge of the mining operations;

iv) failure of Purity to submit mining plans despite being requested to do;

v) payment of employees below the poverty line;

vi) the fact that Purity's EPL 2916 was land blocking;

vii) that no mining activity is taking in place in the area covered by Purity's mining licence, ML 35/2004;

viii) the failure of Purity to build a smelter; and

ix) that no determination is made of the mineral resource.

q) An employee of both applicants, Mr Adriaan du Toit, held minutes of the meeting and both applicants annexed copies of those minutes to their applications;

r) Purity was given three months to remedy or rectify the alleged problems at that meeting and second respondent undertook to visit the mine to ascertain Purity's performance;

s) At that meeting the Deputy Minister also stated that the letters written on behalf of Purity on 27 February 2006 and Global on 28 February 2007 undermine the integrity of his department, cause an embarrassment to them and further denied that first respondent is obliged to provide the answers and reasons requested in those letters;

t) Pursuant to the meeting of 14 March 2006 the second respondent attended the exploration mining sites of Purity on 26 April 2006 and certain questions were posed to the mining manager;

u) On 24 May 2006 Purity received a rejection letter based on second respondent's findings during his visit to the mine in which letter it is stated that Purity's "appeal" was considered, but not upheld, or although Purity denies to have filed any such appeal;

v) Several other letters were written and a meeting was held 21 June 2006 with the Deputy Minister.

(The dates of the refusal of the applications for EPLs or the renewal of EPL 2916 are the dates when the applicants were informed thereof.)

[5] Mr Corbett, on behalf of first and second respondents, who took the delay issue as a point *in limine*, commenced with his submissions. Mr Barnard, on behalf of the third respondent, supported Mr Corbett's arguments and made further submissions in respect of the Purity application. Thereafter Mr Freund, on behalf of Purity and Global, argued and Mr Corbett and Mr Barnard replied. Mr Freund conceded at the outset of his argument that if the application of Purity should fail on this ground, then Global must also fail. Consequently, more emphasis were placed during argument on the Purity matter.

[6] Mr Corbett submitted that the applicants has not brought the applications within a reasonable time and has in any event not provided any cogent explanation for their prevarication. According to Mr Corbett the dates, as set out above, indicate that there was an unreasonable delay by the applicants to bring their respective applications for review of the decisions of the first respondent. He referred to what occurred since the applicants had been notified in writing of the first respondent's refusals, which followed the same line in respect of both applicants, namely requests for reasons and the meeting held on 14 March 2006, at which occasion reasons were provided for the refusal of the applications. In respect of Purity, there were further communications and letters, as well as a final meeting on 21 June 2006. With the regard to the Global matter, nothing further occurred after the meeting of 14 March 2006. With regard to EPL 2916 the review application was brought 10 months after the initial decision of the first respondent and almost 7 months

after the "appeal" decision. With regard to EPL 2942, the application was also brought nearly 10 month later and in respect of the EPL 3318 the application was brought almost 8 months after being informed of the Minister's decision to refuse the application.

In respect of EPL 3456, the awarding of a prospecting licence to the third respondent, there was a delay of more than 6 months before the application was launched. With regard to all the Global applications, the review application was brought more than 9 months after the refusal to grant these applications by the first respondent and more than 8 months after the reasons were provided. Mr Corbett referred to several authorities in respect of the issue of an unreasonable delay which may cause prejudice to the respondents and the fact that no satisfactory explanation for the delay had been provided by the applicants. Consequently, the respondents submitted that the applications were not brought within the reasonable time and that this delay did cause prejudice to them and for that the reason the applications should be dismissed with costs.

[7] As mentioned before, Mr Freund conceded that if the Purity application should fail on this ground, the Global application should also fail. Mr Freund further submitted that the applicants should not be penalised for bringing the applications at the end of 2006, because everything was done by the applicants to achieve an amicable solution and that the applicants did not want to antagonise the Ministry in any way. As I understand it, the applicants attitude were to attempt to solve these disputes in an amicable way without roughing any feathers at the Ministry, but only when it became clear by October/November 2006 that they did not have any other choice, they then prepared and launched these applications. Mr Freund also cautioned the Court not to rely on the specific time periods that were considered as unreasonable by other Courts and submitted that the respondents failed to rely on prejudice caused by such delays.

[8] I am alive thereto that each case should be dealt on its own merits and with regard to its own circumstances, namely that what might be regarded as unreasonable delay in one matter, may be reasonable in another. It is thus necessary to consider the nature and circumstances of each matter and then determine whether the delay in bringing a review application might be unreasonable and may cause prejudice to the respondents.

[9] Purity has a mining licence, namely ML 35/2006. It also had an exclusive prospecting mining licence, namely EPL 2916 and applied for other prospecting licences. Global also applied for six such prospecting licences. With the exception of EPL 2318 on 10 April 2006, all these applications were refused already in February 2006.

Applicable Law

[10] It is common cause that the Court has a discretion to condone a delay in instituting proceedings. However, this will be seldom done if the delay causes prejudice to the respondents. In this Court Stydom JP (as he then was) confirmed the applicable principles and the approach of the Court in the case of *Disposable Medical Products v Tender Board of Namibia* 1997 NR 129 HC at 132E as set out in the decision of Booysen J in *Radebe v Government of the Republic of South Africa and Others* 1995 (3) SA 787 N, reported at 798G to 799E as follows:

> *"…the court has first to determine whether a reasonable time has elapsed prior to the institution of the proceedings, or to put it differently, whether there has been a unreasonable delay on the part of the applicant. Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit Kaapstad* 1978(1) SA 13 (A) at 42A; *Setsokosane v Busdiens (Edms) Bpk v Voorsitter Nasionale Vervoer Kommisie en 'n Ander* 1986(2) SA 57 (A) at 86B to D).

> *In deciding whether a reasonable time has elapsed, a Court does not exercise a discretion. The inquiry is a factual one, that is, whether the period which has elapsed was, in the light of all the circumstances, reasonable or unreasonable. (Wolgroeiers Afslaers case, supra, at 426C-D; Sekotsane's case at 86E)*
>
> *If the court had to arrive at the conclusion that there has been an unreasonable delay, the Court exercises a discretion as to whether the unreasonable delay should be condoned. What a reasonable time is, is of course dependent upon the circumstances of each case.*
>
> *When considering what the reasonable time is to launch proceedings, one has to have regard to the reasonable time required to take all reasonable steps prior to and in order to initiate the review proceedings."*

*(*Also *Kruger v TransNamib Limited (Air Namibia) and Others* 1996 NR 168 (SC); *Namibia Grape Growers and Exporters v The Minister of Mines and Energy* 2002 NR 328 to 341 F-I; *Christine Paulus and 3 Others v The SWAPO Party and 7 Others,* an unreported judgment, delivered by Swanepoel AJ, on 13 November 2008 in Case No [P] A 144/2007, at paragraph [30], page 17).

[11] In [28] and [29] at 157 in the case of *Lion Match Co Ltd v Paper Printing Wood and Allied Workers Union* 2001(4) SA 149 (SCA), Farlam JA found that the delay was unreasonable in a matter of the dismissal of employees and a delay of the employer to launch a review application within 5 months. In respect of the explanation of the delay, the Appeal Court Judge said the following in [32] on page 158 of the report:

> *[32] Failing an explanation for the delay in mounting an attack on the validity of the application I consider the delay was unreasonable in the circumstances and that no basis for condoning it has been advanced. It follows that the appellant lost its right to complain of the alleged invalidity of the application which was in a sense 'validated' thereby; cf* ***Harnaker v The Minister of the Interior****, 1965(1) SA 372 (C), at 381A-C."*

[12] In *Scott and Others v Hanekom and Others* 1980(3) 1182 (CPD) Marais AJ (as he then was) held that the period within which the review proceedings were brought formed

no part of the applicants cause of action because the delay of six months was not so gross in nature that it called for an explanation in the founding affidavit.

[13] Miller JA in the minority judgment in the case of *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit Kaapstad* 1978(1) SA (A) at 41B relied on what Corbett J (as he then was) stated in the *Harnaker* case to be the *raison d'etre* of the rule that a review under the common law in terms of the Courts' inherent jurisdiction does not prescribe specific time limits. In respect of the Court's power to refuse to entertain a review brought after an unreasonable delay, Miller JA concluded that Corbett J did not mean to say that real prejudice is a prerequisite for the Court to exercise such power. He points out that Corbett J acknowledged that because "*undue and unreasonable delay…may cause prejudice the Courts exercises such power themselves by refusing to review a matter"*. Miller JA says that the possibility of prejudice is not the only reason for the existence of the delay rule. According to the learned judge it may be against the administration of justice and the public interest to allow the setting aside of decisions after an unreasonable time has elapsed, because it is desirable to obtain finality. (See also *Sampson v SA Railways & Harbours* 1933 CPD 335 at 338)

[14] In the *Disposable Medical Products* case, supra, this Court held that in deciding whether there had been an unreasonable delay before institution of the review proceedings, each case must be judged on its own facts and circumstances and what may be unreasonable in one case may not be so in another instances and vice versa. The Court further held that two main principles are applicable, namely in the first instance whether the delay caused prejudice to the other party, and secondly, that there must be finality to proceedings. The Court also stated that although it had the discretion to condone a delay,

it will seldom, if ever, be prepared to do so if the delay causes prejudice. In that case the awarding of tenders were involved and the Court refused to condone the delay of 3 months before instituting review proceedings in respect of one of the tenders.

[15] The delay in the *Kruger vs TransNamib* case, *supra,* was approximately two years and in the *Namibia Grape Growers* case, *supra*, it was more than 20 months. In the *Christine Paulus* matter, *supra*, the application was brought nine months after the decision the parties wanted to be reviewed, was taken. In the *Kruger vs TransNamib* and *Christine Paulus* matters, the Court refused to condone the delay, but did so in the *Namibia Grape Grower* case.

Was there an unreasonable delay?

[16] The only paragraph in the founding affidavit of the Purity application which deals with the reasons for the delay is paragraph 108 in which the deponent stated the following:

> "*108. The Applicant submits that the reasons for the delay in bringing this application appear from what is set out supra. It is submitted that it is clear that the delays caused were due to the fact that the Applicant and the First and Second Respondents were attempting to resolve the matter and in particular the Applicant was waiting for the First and Second Respondents to revert to it regarding the meeting of the 14 March 2006 and to further provide reasons for the rejection of the EPL's instead of verbal conjecture. Applicant also attempted to get copies of application EPL 3318 but with no success."*

Except for the last sentence if paragraph 171 of the Global application, the same deponent virtually repeats what he stated in paragraph 108 of the Purity founding affidavit, quoted above.

[17] It is apparent that the same deponent in both applications in paragraphs 108 and 171, respectively, concedes that there was a delay and refers to the reasons for the delay which appear from the application. The deponent of both founding affidavits went further to provide three such reasons, namely that:

a) the delay (in each case) was due to the fact that the applicant, and first and second respondents were attempting to resolve the matter;

b) the applicant (in each case) was waiting for first and second respondents to revert to it regarding the meeting of 14 March 2006 in order to provide further reasons for the rejection of the EPLs; and

c) in respect of the Purity application, that the applicant unsuccessfully attempted obtain copies of the EPL 3318 application.

[18] The first leg of the above-mentioned approach to be followed in the *Radebe and Disposable Medical Products* cases, have consequently already partly been conceded, namely that **there were delays** on the part of the applicants to launch the applications. The only decision that the Court has to make and for which does not have a discretion, is whether the delays to bring these applications were **reasonable.** As stated in *Radebe's* case, that is a factual enquiry, namely to consider whether the period that has elapsed was, in the light of all the relevant circumstances, reasonable or unreasonable. Only if the Court should decide that the delay was unreasonable, it has a discretion to condone such an unreasonable delay.

[19] Purity should have applied for review of the decisions by first respondent to refuse the applications in respect of EPLs 2916, 2942 and 3318 within a reasonable time after it became aware of the first respondent's decision. However, the applicants in the Purity and Global matters followed the route to request certain particulars, including reasons for the refusal of the EPLs from the first and second respondents, whereafter a meeting was held on 14 March 2006, at which occasion reasons for refusal were provided. Both applicants could thereafter have commenced with legal action to have the refusals of the EPLs reviewed. They did not. It is common cause that they were provided with the reasons for the refusals already on 14 March 2006 and both applicants relied on their own minutes in this regard.

[20] The Global application could have been brought shortly after the meeting of 14 March 2006, but was only launched and served on 18 December 2006, approximately 9 months later.

[21] Purity embarked on a process of further communications and negotiations, but after the meeting of 21 June 2006 it should have been very clear to Purity that it has reached end of the road in respect of amicably persuading the first respondent to grant the EPLs that were originally refused. At that stage Purity's "appeal" had already been rejected by the first respondent. Despite this, Purity still argues that it did not want to antagonise the Minister and continued to keep the line of communication open until they realised towards the end of 2006 that it will have to resort to legal action and launch an application for review of the first respondent's decisions. I cannot agree with Mr Freund's submission that because of this attitude to attempt to solve the issue amicably not to antagonise the Minster, it was reasonable to wait so long until the applicants eventually

launched both applications for review of the Minister's decisions. The facts point in the opposite direction. Based on Purity and Global's own minutes of the meeting of 14 March 2006, the respondents and representatives of the Ministry already then made it abundantly clear that they had reasons, rightly or wrongly, for refusing to grant the EPLs applied for by both Purity and Global. It appears to me that these reasons do not to leave scope for any further negotiations. On behalf of Global that was the apparently the end of the matter, but on behalf of Purity, further communications and other attempts proceeded despite the clear indication expressed on behalf of the Ministry at the meeting of 14 March 2006 that

[22] Furthermore, the applicants' legal representatives, *Hofmeyr Herbstein and Ginwala Inc* wrote a letter on 17 June 2006, noting the upholding of the Minister's decision to refuse EPL 2916 and referring to other occurrences. After demanding to be furnished with further information on or before 30 June 2006, Purity's legal representatives stated the following on page 4 of that letter:

> *We are also instructed to demand, as we hereby do, that you are to suspend the operations of the licence granted to Montreal Investments, under EPL 3456.*
> *Should you fail to comply with the aforesaid, we are instructed to approach the High Court for an order compelling you to furnish with the aforesaid information and interdicting the operations of the exclusive prospecting licence in favour of Montreal Investments to claim any damages suffered by our client form you.*
> *We do no believe that this would be necessary at this stage and looking forward to hear from you before 30 June 2006."*

This letter was attached to the founding affidavit. It is common cause that the respondents did not provide the information "demanded" by the Purity's legal advisers by 30 June 2006. The *tenor* of that letter, disclosed in particular in the paragraphs quoted,

undoubtedly does not leave any scope for an inference that there can be successful negotiations in respect of the first respondent's refusal to grant the EPLs after the deadline of 30 June 2006. The battle lines had clearly been drawn and Purity and its legal advisers should have realised at the latest on 30 June 2006 that an application to review the decisions of the first respondent was unavoidable and their only option. Nevertheless they waited 5 months more before commencing legal proceedings.

[23] The Act provides for an application for a non-exclusive prospecting licence, to be made to the Commissioner (s 21) and which is valid for 12 months. Such a licence gives the right to the holder to peg claims. (S 25). The Act further provides for other licences, e.g mining licences, reconnaissance licences, etc. Part X of the Act provides for "exclusive prospecting licences" and sets out the rights of the holder of such a licence in detail in s 67; what the application for an EPL shall contain in s 68; the powers and duties of the Minister (s 69); the issue thereof (s 70); the duration thereof (s 71); and the renewal of an EPL (s 72). There are also further strict provisions regarding EPL's in the remainder of the sections in Part X of the Act.

[24] It is evident from the applications of both Purity in respect of EPL 2942 and EPL 3318, and Global in respect of EPLs 3312-3317 (6), and the particular applications for such EPL's, that:

a) applications were made for exclusive prospecting licences;

b) to the Minister

"Exclusive" clearly means that the rights granted to the holder of such a licence exclude any other prospecting licence. It is not a non-exclusive prospecting licence (provided for in the Act) and no mention is made in any of Purity or Globals applications that they applied for, ever held or were in any way interested in such a licence. They applied for exclusive prospecting licences, subject to the strict provisions relating to the granting thereof and time periods contained in Part X of the Act.

[25] It is further evident that the scope and object of the Act is to provide for regulated prospecting and mining of minerals within Namibia and the rights provided to applicants under the Act have to be complied with. Specific time periods are provided for the validity of such licences which may be renewed. The Minister contains strict control, not only in respect of the granting of exclusive prospecting licences, but also in respect of the renewal thereof. He must of course act reasonable within the scheme of the Act the object thereof. In the relative short periods that such licences are valid, it would be unreasonable to wait several months before a decision of the Minister is taken on review in this Court. An EPL is valid for 3 years when it is granted for the first time (section 71 (1)(a)) and for 2 years upon renewal (section 71(1)(b)). A period of anything more than 3 months before instituting review proceedings would in my opinion be an unreasonable long delay. (*Otjozondu Mining (Pty) Ltd v The Minister of Mines and Energy* 2007(2) NR 469 (HC) where Heathcote AJ dealt with the object of the Act in [10], p 472E-F)

[26] Mr Freund also submitted that the respondents did not allege that they were prejudiced by Purity's or Global's delays in bringing the applications for review. This statement can only relate to the third respondent who filed an answering affidavit, although late but without opposition to its application for condonation of that late filing.

The first and second respondents did not file answering affidavits in time and only did so at the much later stage. First and second respondents applied for condonation for the late filing of their answering affidavits, but that application is opposed by Purity and has not been heard yet. However, nothing prevented the first and second respondents, and third respondent for that matter, to argue the issue of delay as a point *in limine* without filing any answering affidavit on the merits. The Court could even *mero moto* take this point and required submissions thereon. In *Disposable Medical Products v Tender Board of Namibia, supra,* the following is stated in this regard on page 133H-I:

> *Concerning tender A 174/1996 Mr Smuts argued that the point of unreasonableness was not taken by the respondents on the documents and that the applicant therefore did not have the opportunity to deal with and to give the Court an explanations. However, Mr Frank pointed that the Court could raise this question mero moto even where the parties agreed not to take such a point."*

The Court refused to condone the unreasonable delay in launching the proceedings.

[27] Although prejudice is of course an important consideration in respect of deciding whether there was undue and unreasonable delay by the applicants before instituting review proceedings, it is not the only consideration as Miller JA pointed out in the *Wolgroeier Afslaers* case. I agree with that observation, as Corbett J did in the *Harnaker* case. The scheme and object of the Act require that a finality should be reached soon.

[28] In my view the prejudice for the respondents and other persons or institutions interested in obtaining exploration rights are obvious. The Act and the object thereof, as referred to earlier herein, require that there should be finality within a reasonable period and it cannot be expected of the Minister of Mines and Energy to wait for months for his

decisions to be taken on review. How long should he wait for a possible review to be instituted before he can grant another application for an EPL over same area? In my opinion a delay of nearly six months after 30 June 2006, (at the latest) in respect of Purity, is unreasonable to launch an application for review of the decisions that it was already aware of in March 2006. As Mr Freund correctly conceded there is not really an argument in respect of the Global application if the Purity application is considered unreasonable in respect of the delay issue. Consequently, on the factual evaluation of the evidence before me and to which I referred to earlier herein, the first decision which I have to make and for which there is no provision for exercising a discretion, is that the period that elapsed was unreasonable in the circumstances.

Should the Court exercise its discretion in favour of Purity and Global?

[29] As was pointed out by the respondents, no application for condonation for the unreasonable delay is before the Court. Neither was any explanation provided upon which this Court may exercise its discretion in favour of Purity and Global.

[30] Mr Freund relies on the *Scott* decision, while Counsel for all the respondents rely on the *Lion Match* decision. In respect of considering what explanation is offered in respect of a delay, I feel more comfortable to rely on what the South African Appeal Court said in this regard in *the Lion Match* decision in the words quoted earlier herein.

[31] I have already referred to paragraphs 108 and 171 of the founding affidavits of the Purity and Global applications. As far as the contents of these paragraphs can be construed as providing explanations for the delays in bringing both applications, I do not agree with those explanations. I have already referred to the points that these respective

paragraphs purportedly make. In respect of the further "explanation" by Purity in paragraph 108, namely that it also unsuccessfully attempted to get copies of the application of EPL 3318, I do not regard it as explaining why such an unreasonable delay occurred before the application by Purity was brought. In any event, by launching a review application in terms of Rule 53 of the High Court Rules, an applicant can obtain all the documents in the possession of the decision-maker. This is in fact also a further reason advanced by the respondents' counsel why it is incomprehensible that the applicants (Purity and Global) did not bring the applications immediately to benefit from Rule 53.

[32] Mr Freund also relied on the large financial loss that Mr Bonai would suffer in the light of his alleged huge financial investments in Namibia, if Purity and Global would be unsuccessful with their respective applications. I must confess that I am at total loss to understand this argument. Purity has a mining licence, namely ML 35/2004, which was renewed and is valid until 2014. Purity can continue to mine and if it complies with the provisions of the Act, it would suffer no loss. The present applications are for EPLs and it appears from Purity's and Global's own minutes of the meeting of 14 March 2006 that the reasons for not granting the EPLs are based on Purity's performance in respect of its mining operations. It seems to me that Purity's (and Global's) future is in the hands of Mr Bonai and his directors and employees.

[33] In the circumstances and in the absence of cogent explanations for the delay in bringing the review applications, I am not prepared to exercise my discretion in favour of the applicants (Purity and Global) for their unreasonable delay as set out earlier herein. Both applications will consequently be dismissed.

Costs

[34] The submission in respect of the delay issue lasted one day. Although Mr Barnard was only involved in the Purity application on behalf of the third respondent, he did provide heads of argument on this issue and made oral submissions. In fact, the third respondent filed an answering affidavit and took a point *in limine* in respect of the delay issue. Furthermore, submissions were mainly advanced in respect of Purity application. Mr Barnard was in attendance the entire day and also made certain submissions in reply. Consequently, in awarding costs against the applicants, I shall not make any differentiation between the Purity and Global matters.

[35] In the result, the applications of the applicant Purity and the applicant Global are dismissed with costs.

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MULLER, J

On behalf of the Applicants:	**Adv. A. J. Freund, SC**
Assisted by:	**Adv. A. Bava**
Instructed:	**HD Bossau & Co**
On behalf of 1st and 2nd Respondents:	**Adv. AW Corbett**
Instructed By:	**Government Attorneys**
On behalf of the 3rd Respondent:	**Adv. P Barnard**
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