IN THE HIGH COURT OF LESOTHO
(COMMERCIAL DIVISION)

HELD AT MASERU **CIV/APN/404/2020**

In the matter between

REFELA DIAMONDS (PTY) LTD	**APPLICANT**
AND	
MINISTRY OF MINING	**1ST RESPONDENT**
MINISTER OF MINING	**2ND RESPONDENT**
COMMISSIONER OF MINES AND GEOLOGY – MR PHEELLO Q. TJATJA	**3RD RESPONDENT**
THE MINING BOARD	**4TH RESPONDENT**
SECRETARY OF THE MINING BOARD – MATHALEA LEROTHOLI	**5TH RESPONDENT**
FORMER CHAIRMAN OF THE MINING BOARD – THEMBA SOPENG	**6TH RESPONDENT**
ATTORNEY GENERAL	**7TH RESPONDENT**

JUDGEMENT

Neutral Citation: Refela Diamonds (Pty) Ltd v Ministry of Mining & 6 Others CIV/APN/404/2020 [2021] LSHC 104

CORAM: BANYANE J

HEARD: 10/02/20121

DELIVERED: 26/08/2021

Summary

Application for review of the Minister's decision declining an application for renewal of a prospecting licence-on grounds of unreasonableness, misinterpretation of the provisions of the Mines and Minerals Act of 2005 and legitimate expectation - the evidence presented does not establish improper excise of discretion - expectation arising from an undertaking made by the commissioner of Mines lacking statutory power to make same - application dismissed.

ANNOTATIONS

Cases cited

1. Otubanjo v Director of Immigration and Another LAC (2005-2006)336
2. Attorney General v His Majesty the King and Others (CC 02/2015)
3. Lebone Mofoka and Another v Minister of Labour and Others LAC/REV/07/2016
4. Minister of Local Government and Another v Moshoeshoe LAC (2009-2010)202
5. President of the Republic of South Africa & Others v South African Rugby Football Union & Others 2000 (1) SA 1 (CC)
6. Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council 1999(1) SA 374 (CC).
7. Corium (Pty) Ltd v Mybough Park Langebaan (Pty) Ltd 1995 (3) SA 51(C)
8. Minister of Public Works v Haffejee NO 1996 (3) SA 745
9. Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd & Another 1988(3) SA 132(AD)

10. Claude Neon Ltd v Germiston City Council and Another 1995(3) SA 710
11. Limpopo Legal Solutions and Another v Eskom Holdings Limited (1811/2016) ZALMPPHC/2017/1
12. MEC for Environmental Affairs and Development Planning v Clarion's CC 2013 (6) SA 235 (SCA)
13. Johannesburg CC v Administrator TVL & Moyofis 1971 (1) SA 87 (AD)
14. African Realty Trust v Johannesburg Municipality, 1906 T.H 179
15. Crown Mines Ltd v Commissioner for Island Revenue, 1922 AD 91
16. Standard Bank of Bophuthatswana Ltd v Reynolds NO 1995 (3) SA 74

Statutes

1. The Mines and Minerals Act No.4 of 2005

BANYANE J

Introduction

[1] This application pertains to refusal by the Minister of Mining to act in accordance with an advise given by the Mining Board to renew a prospecting licence pursuant to sections 24 of the Mines and Minerals Act No.4 of 2005 (hereinafter the Act) and redirecting the matter back to the mining board for reconsideration. It mainly raises issues whether the Minister in the exercise of his statutory discretion acted unreasonably and misinterpreted the relevant statutory provisions.

Background facts

[2] The facts that precipitated this application are largely common cause. They may be summarised as follows. The applicant is a company registered in terms of the Laws of Lesotho. It was issued a prospecting licence for diamond exploration at an area located at Maliba-Matso (Pipe 200) in the Botha-Bothe District. This was on the 12th October 2017 under licence number 2012/004. The licence period was 1 year and six (6) months commencing from the 12th October and ending on the 11th February 2019. Prior to expiration of this licence, the applicant sought and obtained a renewal. The life of its licence under the renewal was extended for a further period of 18 months commencing the 19th February 2019 and ending the 18th July 2020.

[3] In February 2020, the applicant sought a second renewal, thus a further extension of its licence period. In May 2020, the Mining Board, in its sitting, recommended the renewal. The Minister however declined to accede to the recommendation and rejected the application, principally on the basis that the law does not permit a second renewal, and that the applicant has exceeded the maximum period of three (3) years prescribed by the Act. He referred the matter to the board for reconsideration.

3.1 It is this refusal that prompted the applicant to approach the Court on urgent basis in November 2020 to seek review of the Minister's decision. The relief sought is couched as follows in the notice of motion:

a) The 1st to 4th Respondents shall not be interdicted from advertising and inviting the public for applications, admitting, entertaining, deliberating on and approving applications for prospecting, exploration or mining on the area coordinated and designated for prospecting to the Applicant under Prospecting Licences number 2012/004 and 02/2019 pending finalization of this matter.
b) The 1st to 6th Respondents shall not at once be ordered and directed to release the minutes and resolution of the Mining Board Sitting of the 14th day of May 2020 to the Applicant and to this Honourable Court pending finalization of this matter.
c) The decision of the 1st and 2nd respondents to reject Applicant's application for renewal of the prospecting licence made on the 11th May 2020 be reviewed and set aside.
d) The 1st and 2nd Respondents shall not be interdicted and enjoined to approve Applicant's application for renewal of the prospecting licence made on the 11th May 2020 and issue the Applicant with a new or renewed prospecting licence.
e) The 1st to 4th Respondents be interdicted and enjoined to negotiate, conclude and issue / award a mining lease in favour of the Applicant on the area coordinated and designated for prospecting to the Applicant under Prospecting Licences number 2012/004 and 02/2019.
f) The Respondents be ordered to pay costs of suit on attorney and client scale only in the event of opposition hereof.
g) Further and/or alternative relief.

3. That prayers 1 and 2 (a) & (b) operate with immediate effect as interim interdict.

3.2 A rule nisi, returnable on the 20th December 2020(later extended) was issued by Makara J as well as the temporary interdict sought.

[4] In the founding affidavit deposed to by Mr Mohapi Nica Khofu, the applicant's Managing Director, the following allegations emerge. He avers that in December 2018 when the applicant was performing its prospecting activities pursuant to its work programme, the Ministry of Tourism, Environment and Culture through its Department of Environment, and the Ministry of Water in agreement with Lesotho Highlands Development Authority (LHDA) interrupted its working programme and directed the applicant to relocate to an area different from the one on which it has been exploring from the beginning of the prospecting programme, albeit, within the licence area. Reasons advanced for interruption were that its proposed activities on the programme at the proximity to Maliba-matso river would possibly contaminate it as some chemicals would easily wash off into the river if the applicant was to proceed further with its programme.

[5] He avers that at this time, the applicant had already exposed the kimberlitic by excavation on that portion of site, constructed access roads, accommodation block, purchased processing plant for alluvial and kimberlitic and other operating machinery such as excavator, front loader, dump truck etc and that a discovery of the minerals had been made, prospected and ascertained.

[6] He avers that he reported this intervening event to the 3rd respondent and indicated the need to relocate to a different area within the prospecting licence area. For the applicant to relocate, it was necessary to re-survey the licence area and establish other kimberlite pipe(s), so he avers.

[7] The applicant was accordingly granted permission by the 3rd respondent to carry out the survey and relocate to another segment within the licence area and also guaranteed that its licence would be renewed.

[8] He tells the Court that new pipes were discovered during the re-survey; that these new pipes were located on arable lands. Subsequent to completion of the survey, meetings were held with the local authorities on the area on which discovery was made and the applicant was told to await harvest time before commencing any prospecting work. The applicant accordingly reported this to the Ministry of Mining.

[9] He avers that had it not been for this interruption, the applicant would have completed its prospecting work within the period initially agreed upon when it obtained its licence. And that the relocation resulted in a great fn xc vbjinancial loss and major set-back due the funds spent towards the exploration programme.

[10] He is of the view that; a) the Board considered the applicant's predicament hence recommended the second renewal and b) the minister's decision is indicative of the fact that he was not alive to the intervening event that disrupted the applicant's programme and caused undue or unreasonable delay.

[11] He concludes by saying that the decision of the Minister was not informed by reason nor logic because he failed to apply his mind to the issues pertaining to the delays, which the Mining Board had investigated, deliberated on and correctly applied its mind to in recommending the second renewal. And that he acted outside the purview of his powers by referring the matter back to the Board which was, according to him, functus officio on this issue.

[12] On the basis of these allegations, the applicant impugns the minister's decision principally on four grounds; namely, a) failure to apply his mind to the relevant factors pertaining to the interruptions; secondly; legitimate expectation which arose from the Commissioner of Mines'

assurance and undertaking that the licence would be renewed, c) ultra vires, and lastly; d) misinterpretation of the relevant provisions of the Act.

The respondents' case

[13] The respondents vigorously oppose this application. In an answering affidavit deposed by the Minister of mining, he refutes the applicant's allegations on unreasonableness, misinterpretation of the provisions of the Act, *ultra vires* and legitimate expectation.

[14] The essence of the respondents' case is that; a) the applicant has exceeded the 3 years period prescribed by the Act and has failed to provide any justification for renewal of its licence beyond this period; b) the applicant failed to carry out the prospecting activities within this period; c) failed to report discovery of minerals as required by law.

[15] With regard to the permission granted by the Commissioner of Mines pertaining to the carrying out of geo-physical survey, Geo Scanning remote sensing and magnetic survey over the licence area, he asserts that the Commissioner, in so writing the letter dated the 04th February 2018, acted beyond the scope of his statutory powers. A similar assertion is also made in respect of the undertaking made by the Commissioner to have the applicant's licence renewed. The Minister asserts that the Commissioner had no authority or right to make the commitment because the section 24(7) powers are exercisable by him. He asserts on this basis that the Commissioner acted *ultra vires* in making this commitment. He says a promise given contrary to statute does not give rise to legitimate expectation.

[16] The Minister further refutes the allegation that he was not alive to the LHDA issues when making the decision. He admits that the LHDA cautioned the applicant about the need to avoid contaminating Katse Dam. He however denies that it prevented the applicant from carrying out its

prospecting activities. He avers that the applicant failed to carry out activities within its three-year licence period and has failed to establish the time the LHDA issue took out of its licence period.

[17] He thus denies the applicant's allegations to the effect that at the time the Ministry of Environment intervened, minerals had been discovered. He says if this was true, the applicant could have reported the discovery since the holder of a prospecting licence is obligated by the Act to report any discovery to the Ministry. He adds that in 2019 when the applicant filed its report, no work had been done. He asserts on this basis that the applicant has not met the requirements of section 24(7) because no report showing that it made efforts to finalize prospecting activities has been supplied. He therefore denies any unreasonableness on his part.

[18] He denies that he misdirected himself and avers on the contrary that the board misdirected itself in recommending the second renewal because according to him, the law makes no provision for a second renewal of a licence and that in view of the statutory limitation of three years, the applicant must apply for a new prospecting licence instead of applying for relocation.

[19] He adds that the applicant was informed in no uncertain terms, through the letter dated the 25th August 2020 that the matter will be reverted to the Mining Board for reconsideration since the three year period allowable by the Act had expired and that instead of awaiting a final outcome after the next Board sitting, the applicant threatened to take legal action.

[20] He avers further that the applicant has failed to adhere to mandatory statutory provisions such as; a) annual submission of an audited report and statement of the expenses incurred under the licence, b) supply of sufficient information on its financial status, as well as other information relating to

the Company's directors and partners. This failure, he says, is a contravention of provisions of the Act including section 28(1). He adds that the applicant does not have an environment clearance report.

The parties' submissions

[21] The applicant's counsel attacked the Minister's decision on grounds that the Minister acted outside his statutory power by referring the matter back to the board while the latter was *functus officio* on the matter relating to the renewal.

[22] He contends that when the board recommended or advised the Minister to renew the licence on the 14th May 2020, it discharged its official function in terms of the Act, and could not therefore review, withdraw or revisit the decision. For this submission, he referred the Court to **Hoexter: Administrative Law in South Africa, p248.** He contends that the Act does not give the Minister power or jurisdiction to review the decisions of the Mining Board.

[23] He furthermore contends that the Board could only revisit the decision where it turned out that such decision was induced by fraud or it lacked jurisdiction in making same. He contends that the facts of this matter do not fall within these two exceptions.

[24] He further relied on **President of the Republic of South Africa & Others v South African Rugby Football Union & Others 2000(1) SA 1 (CC)** to submit that once the decision has been published and communicated to the addressee, then the board cannot revisit such a decision.

[25] With regard to the requirements for renewal of a prospecting licence, he contends that the application met the section 24(5) conditions: namely a) the applicant was not in default; b) the proposed work programme was

not inadequate. And that even if it was in default, the Minister was obligated to give notice to the applicant to remedy the default or amend its proposed work programme (as the case maybe) before rejecting the application. He submitted that this procedure under sections 24(6) was not followed by the Minister at all.

[26] He submitted that it is only under these limited circumstances that a prospecting licence renewal can be rejected and that nowhere in the Act is the Minister permitted to review or revert the matter back to the board for reconsideration. That he has only two options in the exercise of his discretion, to approve or reject the application, after following the procedure in section 24(6).

[27] He adds that the Minister cannot exercise power or perform a function beyond that conferred upon him by the empowering statute. For this submission, he cited the case of **Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council 1999(1) SA 374 (CC).**

[28] He submitted on this basis that an action performed without lawful authority is illegal or *ultra vires* and this means the Minister's decision was in effect final and amounted to a rejection of the applicant's application for renewal, hence his consistent reference to the statutory limit of three years in the answering affidavit.

[29] With regard to the alleged misinterpretation of the Act, he contends that the applicant qualified for renewal of the licence under section 24(4) and (5) and that the Minister ought to have renewed it instead of reviewing the decision of the board and stressing that the applicant had exhausted the 3 years maximum period for prospecting. He went further to say, had the Minister applied his mind to the matter and focused on relevant

considerations under sections 24(4) and (5), he could have renewed the applicant's licence.

29.1 He submitted that the Minister's failure to adhere to procedural requirements laid down in section 24(5) means that his decision is procedurally *ultra vires*. He relies on **Corium (Pty) Ltd v Mybough Park Langebaan (Pty) Ltd 1995 (3) SA 51 ©, Minister of Public Works v Haffejee NO 1996 (3) SA 745** to submit that the Minister's decision is therefore invalid.

29.2 He contends that in terms of section 24(1) read with 24(3) and 24(7), a person issued with a prospecting licence can apply for renewal at the lapse of the 2 years (initial period) and may apply for a further 1 year period and thereafter keep on applying for renewals at the lapse of the previous renewals if need be, so long as the total extended period does not exceed six years.

29.3 He contends further that the Minister acted unreasonably by failing to apply his mind to the matter before him, and incorrectly exercised his powers. He submitted further that failure to apply mind, as a ground for review covers instances such as where the decision maker failed to exercise the power properly. He relies on **Cora Hoaxter 2006 (p28)** in this regard.

29.4 He contends further that the Minister took irrelevant considerations into account in making the decision and that his decision is premised on a complete misinterpretation of the empowering statute and for this reason, it is invalid.

[30] He relied on **Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd & Another 1988(3) SA 132(A)** where grounds for judicial review were expounded, to submit that the decision is

so grossly unreasonable that no reasonable person would have arrived at the same decision given the same set of facts.

[31] He also addressed the legitimate expectation aspect of the case based on the undertaking made by the Commissioner of Mines.

[32] He cited the case of **Claude Neon Ltd v Germiston City Council & Another 1995 (3) SA 710 (WLD),** and other cases to submit that an express promise embodied in the Commissioner's letter dated the 10th March 2020 created a legitimate expectation that renewal of the licence would be considered.

[33] He contends that the 3rd respondent (the Commissioner) expressed his undertaking in unequivocal terms that the renewal was guaranteed.

[34] He finally submitted that the Minister must be estopped from denying liability under this undertaking/assurance. To put it differently, he must act in accordance with it.

[35] Mr Molati contended on behalf of the respondents that the Board's powers are limited to recommendations and it cannot promise or give an applicant for mining rights an expectation that the Minister will agree with the recommendation. He contended that the recommendation is not binding. Counsel contrasted the circumstances of this case to cases where an advice is binding. For this distinction, he cited the case of **Attorney General v His Majesty the King and Others (CC 02/2015) para 16-19.** He submitted that Minister is bound to adhere to the provisions of section 22(1) of the Mining and Minerals Act and not promises made by the Board contrary to the Law. He argues that only the Minister has power to approve, issue, renew, cancel or suspend a prospecting license, in terms of this provision.

[36] He contended further that the applicant cannot make a case for legitimate expectation based on a promise that has not been made by the repository of power i.e. the Minister. He cited the case of **Lebone Mofoka and Another v Minister of Labour and Others LAC/REV/07/2016** in support.

[37] He also referred me to the case of **Minister of Local Government and Another v Moshoeshoe LAC (2009-2010) 202** to submit that what is done contrary to law is not only of no effect but must be regarded as never having been done.

[38] With respect to the second relief sought, i.e compelling the Minister to renew the licence; counsel contended that; for a mandatory interdict to succeed, an applicant must prove all the requirements of a final interdict. For this submission, he referred me to the case of **Limpopo Legal Solutions and Another v Eskom Holdings Limited (1811/2016) ZALMPPHC/2017/1** (available on Saflii) and further that the remedy of mandamus, whose object is to compel an administrative organ to perform some or other statutory duty, is limited because administration cannot be compelled to do anything it is not obliged to do under the enabling statute.

[39] He finally contended that no case for unreasonableness has been made by the applicant. Relying on **MEC for Environmental Affairs and Development Planning v Clairison's CC 2013 (6) SA 235 (SCA)**, he submitted that;

a) The Court must only require the decision-maker to take relevant considerations into account and will not prescribe the weight that must be accorded to each consideration, for do so could constitute usurpation of the decision-maker's discretion.
b) When a functionary is entrusted with a discretion, the weight to be attached to particular factors or how far a particular factor affects the eventual determination of the issue, is a matter for the functionary

to decide, and so long as it acts in good faith (and reasonably and rationally), a Court of law cannot interfere.

Issues

[40] The main issues that arise for determination are whether the minister's decision is based on wrong interpretation of the Mines and Minerals Act of 2005, secondly whether he failed to take relevant considerations into account in making the decision, thirdly whether the Commissioner's undertaking on renewal gave rise to legitimate expectation that the applicant's licence would be renewed. I deal with them in turn.

Relevant statutory provisions

[41] To resolve the first issue whether the Minister misinterpreted the relevant provisions of the Act, it is necessary to refer in some detail to the provisions in the Act relating to validity of prospecting licences and renewals.

41.1 Section 22 of the Act empowers the Minister of Mining to approve, renew, cancel or suspend a prospecting licence.

41.2 The process through which applications are submitted and considered is contained in the preceding sections 20 and 21 of the Act. Applications for new issuances and renewals of prospecting licences are submitted to the Commissioner of Mines. The Mining Board then deliberates on the applications having regard to matters specified under section 21 of the Act. Following the deliberations, the Board then advises the Minister with respect to his exercise of power under section 22. The Minister's decision is then communicated to the applicant through the Board.

41.3 In terms of section 23, a prospecting licence shall be as specified in Form 13 of Schedule I and there shall be appended to the application, a work programme for the prospecting operations.

41.4 Section 24(1) deals with the life of a prospecting licence. It provides that a prospecting licence shall be valid for a period not exceeding two years from the date of issue or any such period as the applicant has sought, which period shall not exceed two years.

41.4.1 Subsection 2 deals with renewal of the licence. It provides;

> The holder of a prospecting licence, may at any time not later than three months before expiry of his licence, apply for renewal of his prospecting licence to the Board through the Commissioner by completing form A as specified in the first schedule.

41.4.2 In terms of section 24(3), a renewal shall be valid for a period not exceeding one year. An application for renewal made pursuant to subsection 2, shall in terms of section 24(4) be accompanied by;

> a) a report on prospecting so far carried out and the direct costs incurred thereby; and
>
> b) a proposed work programme to be carried out during the period of renewal and estimated costs thereof.

41.4.3 Section 24(5) provides for conditions for renewal. It reads;

> subject to this Act, the application made pursuant to this section shall be renewed if;
>
> a) The applicant is not in default; and
> b) The proposed work programme is adequate.

41.4.4 Section 24(6) reads;

> if the applicant is in default or the programme in inadequate, the Minister shall, with the advice of the Board-
>
> a) Give notice of default and call upon applicant to remedy the default before rejecting application for renewal under this section; or

b) Give applicant opportunity to make satisfactory amends to proposed work programme before rejecting application for renewal under this section.

41.5 Section 24(7) sets out conditions under which the Minister may grant the renewal period in excess one year stipulated under sub-section (3). It reads;

> Notwithstanding the provisions of sub-section (3), the Minister may renew a prospecting licence for a period in excess of a period specified in the application, where a discovery has been made and evaluation work has not been completed, despite proper efforts being made.

[42] It is now appropriate to make certain observations regarding the provisions quoted above regarding the life of a prospecting licence and circumstances under which the period prescribed under section 24(1) read with 24(3) is extendable.

[43] Section 24(1) provides that a prospecting licence shall be valid for a period of 2 years or a lesser period that may have been sought by an applicant. This provision must be read with the conditions of the licence which presuppose that the licensee would commence prospecting activities within three months from the date of issue of a licence and continuously prospect until completion of two years or a shorter period that may have been sought when the application was made. This period may further be extended pursuant to subsection 2, for a period stipulated under subsection 3, i.e. it must not exceed one-year.

43.1 My interpretation of these provisions is that although the aggregate period of three years under these two subsections is not immutable as explicitly stated under section 24(7), successive renewals after exhaustion of 1year renewal period are not permitted as suggested by Mr Lesenyeho. It seems to me that when the licensee seeks a renewal, he must specify

the period of extension sought and this must not exceed one year. Section 24(7) however allows the Minister to renew the licence in excess of a period sought per the renewal application.

[44] The object of this provision section is to extent the renewal period in excess of three years. Significantly however, this section prescribes circumstances or conditions under which the period may be extended.

[45] The minister in excising his discretion under section 24(7) is guided by considerations set out therein; namely; that there must have been discovery, and that evaluation work has not been completed despite proper efforts being made. I might add that the minister would only know of the discovery if such is reported within 14 days by the licensee.

[46] It is in the light of this understanding that I proceed to interrogate the other grounds for review; namely, failure to take relevant considerations into account in making the decision and legitimate expectation.

Failure to take relevant considerations into account

[47] In **Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another 1988(3) SA 132 (AD)** at 152; the grounds upon which the Supreme Court exercises its power of review at common were formulated by Corbett CJ at 152 A-E (in dealing with a decision of the President of the Johannesburg Stock Exchange);

> …Broadly, in order to establish review grounds, it must be shown that the president failed to apply his mind to the relevant issues in accordance with the behest of statutes and the tenants of justice… Such failure may be shown by proof, inter alia, that the decision was arrived at arbitrarily or capriciously or mala fide or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or that the president misconstrued the nature of the discretion conferred upon him and

took into account irrelevant considerations or ignored relevant ones, that the decision of the president was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter in the manner aforestated.

47.1 In **Johannesburg CC v Administrator TVL & Moyofis 1971 (1) SA 87 (AD) at 96**, the Court relied on the following passage in union steel corporation [South Africa] Ltd, 1928 AD 220;

> There is no authority that I know of, and none has been cited, for the proposition that a Court of Law will interfere with the exercise of a discretion on the mere ground of its unreasonableness. It is true the word is often used in the cases on the subject, but nowhere has it been held that unreasonableness is sufficient ground for interference; emphasis is always laid upon the necessity of the unreasonableness being so gross that something else can be inferred from it, either that it is "in explicable except on the assumption that of *mala fide* or ulterior motive" see **African Realty Trust v Johannesburg Municipality, 1906 T.H 179**, or that it amounts to proof that the person on which the discretion is conferred has not applied his mind to the matter. See **Crown Mines Ltd v Commissioner for Island Revenue, 1922 AD 91.**

[48] As stated earlier, the applicant's major complaint is that the minister failed to apply his mind to the cause of delay i.e the LHDA interruption. It was held in **Standard Bank of Bophuthatswana Ltd v Reynolds NO 1995 (3) SA 74 at 97** that where the decision is challenged on the ground that the decision-maker failed to take into account all the evidence and considerations relevant to the decision, the reviewing court will try to access the actual or potential importance and relevance of the factor overlooked.

[49] I proceed now to test the legitimacy of the Minister's decision against all the evidence presented.

[50] In support of the alleged interruption, the applicant attached to the founding affidavit certain documentary evidence. It includes; a letter from the Director of Environment S.M Damane, (more about this later) a letter from the Commissioner of Mines Mr. Tjatja in terms of which the applicant was authorised to carry out geo-physical survey, scanning, remote sensing on the area. The latter was apparently responding to the applicant's request for permission to survey pipe 200 within the licence area based on alleged possibility of discovery of a large previously unknown kimberlitic pipe within the licence area.

[51] It has also attached a report, apparently prepared on 02nd March 2019, titled; *report and request for new application for pipe 200 licence*. This report, brief as it is, was intended to apprise the Ministry about progress in prospecting activities since the issuance of the licence in November 2017. In this report, the applicant through its Director states that it had exposed kimberlitic by excavation on site, developed access roads etc. Further that the LHDA complained about its slam dam closer to Maliba-Mats'o river and had directed, by agreement with the Ministry of Water Affairs to relocate to a new site. It thus requested, through this report, permission to remove the mining plant and all infrastructure to Maliba-Mats'o. It also reported that consultations have been made with the chief of the area who directed it to wait for harvest time so that they can clear their crops from the area to which it ought to relocate. It finally requested permission to apply for a new prospecting licence.

[52] Another important document is a letter authored by the Commissioner of Mines on the 10th March 2020. This letter apparently responds the applicant's letter (I assume report referred to above). The Commissioner acknowledges the challenges set out by the applicant and the need to abide by the LHDA request. He authorised the applicant to relocate as requested. He also assured the applicant that a renewal of its licence would be made pursuant to section 24(7) on account of the delays

to its prospecting programme. It finally gives the applicant a green light to proceed with its works knowing that its application for a second renewal would be favourably considered.

[53] The applicant, on the strength of this promise filed an application for a second renewal in May 2020.

[54] A close and careful examination of the applicant's documentary evidence reveals inconsistencies and uncertainties regarding the alleged interruption of its prospecting activities and the work done thus far. The applicant claims that when the Ministry of Environment interrupted it, it had already started its prospecting operations, (a fact which is denied by the Minister hence his assertion that the applicant carried out no activities and ought under the circumstances, to apply for a new licence). It is appropriate to assess the importance of these documents and whether they were not considered by the Minister. I start with the LHDA complaint.

[55] It is not immediately clear from the director's affidavit whether the LHDA complaint and directive for relocation was written or oral. The only document attached in support of the interruption allegations is the letter penned by Director of Environmental Affairs in the Ministry of Environment. The applicant asserts that this letter from the Ministry of Environment formed the basis for its request to relocate to a new segment within the licence area.

55.1 This correspondence was apparently made on the 14th December, though the year is not ascertainable from the copy supplied. According to the applicant's founding affidavit however, the "interruption" occurred in December 2018, a period of one year and a few months after the grant of its licence in 2017.

[56] This letter raises certain concerns pertaining to environmental impact of the applicant's mining activities contained in the applicant's work programme. The issues on which the Ministry [of Environmental Affairs] sought clarity from the applicant's project brief, which according to the author did not give detailed information on some of the main components of the project, include the following;

a) Alternatives to the proposed mine activities such as extraction methods, transportation route and location of processing plant and camp site.
b) Final disposal or management of accumulated solid waste from the waste loins, skips, she-bins and canteen.
c) Considering the close proximity of the proposed activities to the river, it is not clear where some of the infrastructure such as sediment pods, oxidation ponds etc will be located in relation to the proposed space (distance and capacity infrastructure) and their impacts on the river.
d) Clear method for management of combustible material, regard being had to contradictory statements supplied.
e) Nitrates management in relation to the Maliba-Matso river (that might be washed off by the rain).
f) Management of safety measures of possible pollution impacts of ferrosilicon during the transportation, use and storage etc as it is known to have harmful effects on humans.

[57] It is noteworthy that there are certain obligations imposed on the licence holder by the Act which are embodied in the prospecting licence. One significant obligation relevant in the determination of the ground for review under scrutiny is that a licensee's work programme must make proper provisions for environmental protection. This is provided for in section 21(c) of the Act. The conditions of the licence relating to protection of the environment are spelled out in the appendix to the licence.

[58] It is perhaps useful to quote two salient conditions of the licence. Condition 25 reads as follows;

The licensee shall in respect of all its operations and activities, comply with the provision of any legislation concerning safely and environmental measures in the mining industry.

[59] Condition 26 reads;

The licensee agrees to develop, in consultation with the Ministry of Tourism, Environment and Culture (or similar environmental authority) an appropriate environmental protection plan taking into account the nature and scope of its exploration operations.

[60] In the light of these conditions, the first question that must be answered is whether the ministry's involvement amounts to an interruption of the applicant's work programme.

[61] Upon scrutiny, this letter reveals that the Ministry engaged the applicant and sought clarity on the issues earlier stated. Importantly, the applicant has not supplied its response to these concerns nor the outcome of the correspondence between itself and this Ministry. He thus relies on his *ipse dixit* that he was directed to relocate.

[62] Regard being had to the obligations set out above, it is clear in my considered view that the Ministry's engagement cannot be properly termed interruption; instead, it is a mandatory and preliminary inquiry undertaken before the actual mining / prospecting operations could ensue. This inquiry, as I understand, is in line with the obligations of a licensee embodied in the prospecting licence.

[63] I may add that from the scanty facts supplied by the applicant on his involvement with the Ministry of Environment, it is not concludable that the delay in its prospecting activities is attributable to this Ministry. On the contrary, the letter suggests that the applicant failed to make a clear work programme with the necessary details on environmental protection.

[64] I must also comment on the prospecting activities done thus far and the contradictions apparent from the applicant's case. It will be recalled that the prospecting licence was issued in November 2017 and the applicant claims that in December 2018, he was amid his prospecting activities when he was interrupted by the Ministry of Environment. I have noted that a licensee is obliged to commence prospecting operations within three (3) months. It is doubtable from the wording of the letter from the Ministry of Environment that the said Ministry engaged the applicant after commencement of its prospecting operations.

[65] Another important observation is in relation to the dates on which the applicant was allegedly interrupted and the dates on which it was authorised to relocate. The applicant as stated above alleges that he was interrupted in December 2018 and consequently authorised to relocate. It must be observed however that the Commissioner's letter allegedly authorising him to relocate (as pleaded by applicant) was authored in February 2018. Logic dictates that the Ministry of Environment engaged the applicant in December 2017, a period within which it was expected to commence its operations. The applicant is clearly being economic with the truth in alleging that it was interrupted in December 2018 because the Commissioner could not in February 2018 authorise relocation when the cause for such move had not even occurred.

[66] It cannot therefore be correct in my view, for the applicant to allege that the Ministry interrupted its prospecting operations when none had begun.

[67] I proceed next to discuss the progress report attached. It appears e*x facie* that it was prepared in March 2019. This report was received by the Commissioner on the 02nd March 2020. This is evident from the date stamp for the Commissioner's office. The latter date corresponds which the

date on which the document was signed by the Director of the applicant (at the end of the report).

[68] It is clear in my view that the report on progress was only filed towards the end of the licence period, that is, during the renewal period.

[69] I must also mention that this report lacks specificity on dates of activities stated therein. The relevance of dates is that the applicant had to establish that discovery had been made and it had made proper efforts to complete evaluation work contemplated under section 24(7). General statements are made on the nature of the work done i.e. excavations, construction of access roads, accommodation blocks etc. It is simply recorded that during 2019, magnetic surveys were done. It also does not disclose when; a) the survey started nor when it was completed, or; b) the consultations with the chief of the area on which the newly identified site is, were made and finalized.

[70] Furthermore there is no suggestion from the annexures attached, as to when discovery of minerals was made because if it had been made, it ought to have been reported to the Commissioner within 14 days, in terms of section 28(C) of the Act.

[71] All things considered, I conclude that the applicant has failed to provide sufficient factual basis to establish that its failure to prospect within 3 years was attributable to the LHDA or the Ministry of Environmental Affairs.

[72] If this be the evidence presented before the Minister for his decision, I am not satisfied that the applicant has established that the Minister failed to excise his discretion properly or failed to take into account the outlined factors.

Legitimate expectation

[73] The other leg of the applicant's complaint is based on legitimate expectation. The applicant claims his entitlement to a further renewal on grounds that the Commissioner of Mines assured renewal of its licence.

73.1 The respondents conversely contend that the Commissioner does not have power or authority to make undertakings on renewal because approval of renewals is the prerogative of the Minister.

[74] For the proposition that the undertaking by the Commissioner gave rise to legitimate expectation, the applicant's counsel referred the Court to **Claude Neon Ltd v Germiston City Council and Another** (supra).

74.1 In this case Zulman J, in reaching the decision, reasoned that it was within the province of the official in question to give such an undertaking. Notably he stressed that absence of authority was not pleaded. The case therefore offers no assistance to the applicant because in the instant case absence of authority is clearly pleaded.

[75] It is established that an expectation would be legitimate where; a) the representation underlying the expectation is clear, unambiguous and devoid of relevant qualification; b) the expectation is reasonable; c) the representation has been made by the decision-maker; d)the representation is one which is competent and lawful for the decision-maker to make without which the reliance cannot be legitimate. See **Otubanjo v Director of Immigration and Another LAC (2005-2006) 336 at 341 B-D.**

[76] On the proper interpretation of the letter forming the basis for legitimate expectation, the Commissioner refers to the section 24(7) powers excisable by the Minister. The Commissioner's authority to make an undertaking regarding powers exercisable by the Minister is beyond the

scope of his functions. I accordingly consider that the attack on the Minister's decision based on legitimate expectation must also fail.

Conclusion

[77] On the evidence presented, the applicant has failed to demonstrate the factual and legal basis for his assertion that successive renewals are permissible. Even if I am wrong in my interpretation that a second renewal application may not be made; section 24(7) explicitly provides the criteria or circumstances under which the power to extend the three years may be exercised. This means the excise of discretion is circumscribed by this provision and limited to the grounds set forth thereunder. The applicant has failed to establish that it satisfied the requirements of this section. It is also not concludable from the documentary evidence supplied that the Minister failed to apply his mind or take into account considerations relevant to the decision. His refusal to renew the licence is therefore not liable to be reviewed and set aside. In the circumstances, the rule must be discharged, and application be dismissed.

Order

[78] In the result, the rule is discharged, and the application is dismissed with costs.

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P. BANYANE
JUDGE

For Applicant: Advocate Lesenyeho
For Respondents: Advocate Molati