IN THE HIGH COURT OF LESOTHO

(Commercial Court Division)

HELD AT MASERU **CCA/0047/2021**

In the matter between:

RESKOL DIAMOND (Pty) Ltd **APPLICANT**

And

MINISTER OF MINING **1ST RESPONDENT**

P.S MINISTRY OF MINING **2ND RESPONDENT**

THE SECRETARY MINING BOARD **3RD RESPONDENT**

THE COMMISSIONER OF MINES **4TH**

RESPONDENT

ATTORNEY GENERAL **5TH**

RESPONDENT

Neutral Citation: RESKOL DIAMOND v MINISTER OF MINING and 4 others [2022] LSHC 222 Comm. (09 September 2022)

JUDGMENT

CORAM: MATHABA J

HEARD ON: 28th April 2022

DELIVERED ON: 9th September 2022

Summary

Application – Review of Minister's decision declining renewal of a mining lease under section 36 (5) of the Mines and Minerals Act No.4 of 2005 -Applicant not invoking rule 50 (4) of High Court Rules 1980, but raising further grounds of review in its replying affidavit – Minister's discretionary powers under section 36 (5) circumscribed – Section 44 negotiations intended for parties to agree terms and conditions of new mining agreement – No need to enter into negotiations if the applicant does not meet the requirements for renewal under section 36 (5) – Application dismissed

STATUTES

Mines and Mineral Act No. 4 of 2005

High Court Rules 1980

CASES

LESOTHO

Letsie-Rabotsoa v Principal Secretary Ministry of Communications and Technology (CIV/APN/126/2014) 2021 LSHC 28

Thuto Ntšekhe v Public Service Tribunal C of A (CIV) 11/2019 [2019] LSCA 39

Lesotho National Wool & Mohair Growers Association v Minister of Agriculture, Food and Security (CIV/APN/184/18) [2018] LSHC 28

SOUTH AFRICA

Airports Company South Africa v Big Five Duty Free (Pty) Limited and Others [2018] ZACC 33; 2019 (2) BCLR 165 (CC); 2019 (5) SA 1 (CC)

Cool Ideas 1186 CC v Hubbard and Another [2014] ZACC 16; 2014 (4) SA 474 (CC)

C & M Fastners CC v Buffalo City Metropolitan Municipality (1371/2017) [2019] ZAECGHC 22

Esau and Others v Minister of Co-Operative Governance and Traditional Affairs and Others [2021] 2 ALL SA 357 (SCA)

Jicama 17 (Pty) Ltd v West Coast District Municipality 2006 (1) SA 116 (C)

Johannesburg Consolidated Investment Co Ltd v Johannesburg Town Council 1903 TS 111

Motloung and Another v The Sheriff, Pretoria East and Others (Case no 1394/18) [2020] ZASCA 25 (26 March 2020)

Natal Joint Municipal Pension Fund v Endumeni Municipality [2012] ZASCA 13; 2012 (4) SA 2

OudeKraal Estate (Pty) Ltd v City of Cape Town 2004 (6) SA 222 (SCA)

Radebe v Minister of Law and Order and Another 1987 (1) SA 586

Shidiack v Union Government 1912 AD 642

UNITED KINGDOM

Chief Constable of the North Wales Police v Evans [1982] UKHL 10 [1982] WLR 1155

INTRODUCTION:

[1] On the 16th June 2021 the applicant herein *('Reskol')* brought an urgent application challenging the decision of the 1st respondent *('the Minister')* not to renew its mining lease that was due to expire on the 4th July 2021. In essence, Reskol seeks to interdict the respondents from executing the decision not to renew the mining lease, and from awarding any mining lease in respect

of the mine in issue ('the Part A application), pending the review of that decision ('the Part B application').

[2] On the 1st July 2021 my brother Makara J granted Reskol the order it sought in terms of Part A incorporating a rule *nisi* returnable on the 3rd August 2021. Subsequently, the parties appeared before Court to extend the rule to enable them to plead. The matter was eventually allocated to me on the 10th November 2021 and argued on the 28th April 2022.

BACKGROUND:

[3] Reskol is a limited liability company duly registered under the laws of Lesotho. The respondents are cited in their official capacity as holders of offices responsible for mining operations in Lesotho. It is common cause that Reskol was issued with a mining lease and entered into a mining agreement with the respondents on the 4th July 2011 for a period of 10 years expiring on the 4th July 2021.

[4] In terms of the mining agreement between the parties, mining had to be undertaken in stages, stage 1 being preproduction and stage 2 being commercial production. Stage 1 was to take eighteen months from the date of

signature of the agreement[1]. In terms of the agreement preproduction mining "means the installation of Infrastructure and such Plant and Equipment necessary to mine and process kimberlite in the Production Area during Stage 1 at a rate of not less than 100 (one hundred) metric tons per hour and the conduct of such operations". It is not disputed that Reskol completed stage 1 in September 2018.

[5] Commencement of stage 2, commercial production, was to occur six months after completion of stage 1. Reskol should have started with this stage during or around April 2019, but it did not[2].

[6] Reskol did not commence the mining activities immediately after the agreement was concluded and having been faced with this predicament, it requested an extension of the mining lease on 3rd September 2012 due to delays. The extension was not granted.

[7] The delays were caused by a court interdict obtained against Reskol by former operators of the mine on the 30th September 2011. The order was set aside on the 17th April 2013. During the existence of the court interdict, on 12 July 2012, the Ministry of Mines suspended all mining activities in Lesotho for reasons that are not apparent from the record. The suspension was

[1] Pleadings – page 50 and 82
[2] Pleadings – page 52

uplifted in June 2013. A period of twenty-one months was lost as a result of the interdict and the suspension[3].

[8] The suspension was imposed again in June 2015. Certain outstanding community issues in relation to relocation of houses and graves which were within the designated mining area had not been addressed, hence the government effected the suspension. The issues were addressed and completed in April 2016. Reskol commenced with mining operations in October 2016 approximately 6 years after the mining lease was granted[4]. Reskol has not explained why it did not commence the operations immediately the suspension was lifted.

[9] On 3rd September 2018 Reskol wrote a letter to the Minister advising him that phase 1 of the project was going to be completed by September 2018 as well as appraising the Minister of the status of the mining operations and the challenges that needed to be addressed to enable Reskol to plan for phase 2 of the project. Reskol advised the Minister of a real possibility to place the operations on care and maintenance from as early as October 2018 until the challenges were addressed. It further sought a meeting with the Minister to discuss the way forward.

[3] Pleadings – page 50
[4] Pleadings – page 14

[10] On 26th November 2018[5] the 4th respondent, *('the Commissioner')* sent a letter of non-compliance to Reskol identifying the following incidences of non-compliance with the mining agreement:

10.1 failure to submit audited financial statements to the Minister and the Commissioner contrary to clauses 18 (b) and (c);

10.2 putting the mine under care and maintenance without giving a report clarifying the status of the project pursuant to clauses 18(d) and 18(e); and

10.3 failure to settle outstanding surface rentals arrears at the rate of US$10,000.00 contrary to clause 21 (a) and (b).

Reskol responded to the letter on the 3rd December 2018. It attached proof of payment in its response letter and explained the activities it was undertaking in preparation to phase 2 of the project. It further explained that audited financial statements were given to the directors appointed to represent the government.

[11] On the 2nd July 2020 Reskol applied for renewal of its mining lease. Subsequent to follow up by Reskol on its application, the Minister conversed on the 24th March 2021 advising Reskol that its application for

[5] Though the letter is mentioned in the founding affidavit, Reskol did not file it of record, it has been filed by the respondents and its correct date is the 23rd November 2018 not the 26th November 2018 as it is alleged in the founding affidavit.

renewal has been declined. The reason for non-renewal was motivated by slow progress made by Reskol for the past ten years in implementing the approved mining operations programme. The Minister was of the view that Reskol had not satisfied the provisions of section 36(5)(a)(b) and (c) of the Mines and Minerals Act No.4 of 2005 *('the Act')*.

[12] Reskol then issued a letter to the Minister on the 31st March 2021 citing non-compliance by the respondents with section 44(1) of the Act in that there were no negotiations held in good faith before the decision not to renew its mining lease was reached. It also indicated that at no stage over the past ten years did the respondents inform Reskol of its failure to adhere to the terms of the mining agreement.

[13] The Minister respondent to this letter on the 8th April 2021 reiterating the decision not to renew the mining lease as well as dealing with issues that were raised by Reskol in its letter. In particular, the Minister indicated that the Mining Board could not engage Reskol in negotiations envisaged by section 44(1) of the Act as its mining lease was not going to be renewed.

[14] On the 21st May 2021 Reskol wrote to the Minister seeking particulars of the alleged non – compliance with the mining lease agreement and

the Act. The Minister responded on the 11th June 2021 providing the particulars of non-compliance which included the following:

14.1 non-compliance "with the prescribed production timelines and quantities, thus affecting the efficiency of the operations and contributing to wasteful mining practices";

14.2 non-compliance "with the requirements for renewal of mining lease as the applicant was in default due to not meeting the maintenance of continuous operations in the year of renewal"; and

14.3 Suspension of mining operations without authorisation prior to the application for renewal.

[15] To ensure that productivity is maximised, the mining agreement prescribes targets and performance standards relevant to production for each of the stages[6]. Again, the mine must have "been operating its Plant and Equipment at not less than an average rate of 66.66% (sixty six point sixty six percent) of its design capacity for 6 (six) consecutive months directly prior to the 10th

[6] Pleadings – Annexure Mining 3 page 70 clause 2 (d) and (e) and page 72 clause 2(o)

(tenth) anniversary of the date of this Agreement[7];". Clearly the Minister's complaint was that Reskol failed to meet the targets and performance standards.

[16] Following exchange of letters, some of which are annexed to the answering and replying affidavits and after the meeting between Reskol and the 2nd respondent *('the Principal Secretary')*, Reskol resolved to institute the instant application when it became clear that the Minister remained firm not to renew the mining lease. Reskol also declared a dispute in terms of the mining agreement which makes provision for arbitration.

APPLICANT'S CASE:

[17] Reskol's case is basically that this Court should review and set aside the decision of the Minister to decline the renewal of its mining lease. The basis of review is that the refusal was procedurally and substantively defective and consequently prejudicial and therefore is bound to be reviewed and set aside.

[18] This contention is based on the reasoning that the refusal did not comply and conform with the principles of natural justice in that no specific

[7] Pleadings – Annexure Mining 3 page 79 clause 6 (c)

reasons were provided for such a refusal. Reskol submits that non-renewal by the Minister is unjustified. In this regard Reskol canvases the requirements for renewal of a mining lease in its founding affidavit as they are tabulated in sections 36 and 44 of the Act and claims that it met them.

[19] The other ground contended by Reskol is that the decision to decline renewal was flawed, irregular and unjust and cannot be sustained in that the Minister failed to enter into negotiations in good faith as enjoined by section 44(1) of the Act. Reskol asserts that the Minister failed to take into consideration the legacy issues and the devastating COVID - 19 pandemic impact on all sectors of the economy including mining sector. Failure by the Minister to take into considerations these issues smacks of unreasonableness which is a concomitant of bad faith contrary to his obligations under the Act, so contends Reskol.

[20] Reskol further alleges that application of section 44 is not conditional upon compliance with section 36(1) – (5) (a) – (c). It asserts that the implication by the respondents that section 44 is conditional upon compliance with section 36(1) is an irregularity, unfair and unlawful and is therefore amenable to review.

RESPONDENTS' CASE:

[21] It is the respondents' case that Reskol has breached the mining agreement in that it did not perform in accordance with its stipulations. For instance, the respondents allege that Reskol was in default of its obligations and violated clause 8 by failing to complete stage 1 within the period of 18 months. They further contend that Reskol failed to comply with clause 8(c), 8(d) and 8 (e) of the mining agreement.

[22] The respondents reject Reskol's explanation that it failed to commence operations timeously due to delays caused by the suspension of mining operations and the interdict or that the mining activities do not commence as soon as the mining lease is issued. They argue that Reskol knew before signing the mining agreement that it would have to align itself with the submitted workplan and programme of mining operations.

[23] They contend further that the interference caused by the court interdict and suspension of mining operations took a period of 21 months, but that it took Reskol 5 years to complete stage 1 contrary to the mining agreement. The agreement required stage 1 to be completed within 18 months

from date of its signature and registration of the mining lease. Consequently, so the argument goes, Reskol ‘s contention that it failed to conduct mining operations within the prescribed time frames due to reasons advanced is devoid of merit and falls to be dismissed.

[24] Regarding the second suspension of the mining operations the respondents assert that Reskol became aware when it did Environmental Impact Assessment *(‘the EIA’)* that it had an obligation to relocate houses and graves. The mining operations were suspended because Reskol had failed to perform the obligation, so explain the respondents.

[25] The respondents deny that Reskol stopped operating due to total lockdown that was implemented as a result of COVID - 19 pandemic. Their contention is that Reskol stopped operating on or around October 2018, thus it had long ceased operating by the time lockdown was proclaimed.

[26] The respondents dispute that the letter addressed to Reskol dated the 8th April 2021 did not specify transgressions by Reskol or reasons for non-renewal. They contend that the letter is clear that clause 6(c) and (g) of the lease agreement had not been complied with and that the letter was specific that clause 36(5)(d) cannot be invoked without first ascertaining compliance with

section 36(5)(a), (b) and (c) of the Act. They submit that section 44 could not apply.

[27] Lastly the respondents submit that it will not be in the interest of justice that Reskol ’s mining lease be renewed; that the decision not to renew the mining lease was lawful and just for the reasons advanced.

ISSUES FOR DETERMINATION:

[28] The question that is raised in this is application is whether the Minister’s decision is reviewable on the following three grounds raised by Reskol that the Minister failed to:

28.1 provide reasons for his decision not to renew the mining lease;

28.2 apply section 44(1) of the Act or conflated it with section 36; and

28.3 take into considerations the legacy issues and COVID – 19 pandemic.

[29] Should the Court not find for Reskol, the interlocutory relief which it obtained will automatically fall by the wayside because it was granted pending finalisation of this application.

THE LAW & APPLICABLE PRINCIPLES:

[30] Section 36 of the Act provides that –

> "(5) The Minister may approve an application for renewal if satisfied that –
>
> (a) the applicant is not in default;
>
> (b) the development of the mining area has proceeded with reasonable diligence;
>
> (c) the proposed programme of mining operations will ensure the most efficient and beneficial use of the mineral resources in the mining area; and
>
> (d) in the case of an application for renewal of a licence to mine diamonds, agreement has been reached following negotiations under section 44".

[31] Section 44, referred to in section 36(d) reads as follows**:**

> "(1) Notwithstanding the provisions of this Act, the Board [Mining Board] shall initiate negotiations with an applicant, in good faith, on an application for the issue, renewal, transfer or amendment of a mineral concession for diamonds, covering all technical, financial and commercial aspects of the proposed project, including the Government participation".
>
> (2) "Upon successful conclusion of the negotiations under subsection (1), the Minister may issue a lease and agreement reflecting the terms and conditions"

[**32**] The review relates to the exercise of the powers in section 36 (5). Review proceedings are governed by rule 50 of the High Court Rules of 1980. The rule sets out the powers of this Court to review the administrative decisions. Rule 50(2) provides that review proceedings shall be by way of notice of motion setting out the decisions to be reviewed which shall be supported by an affidavit setting out the facts and the circumstances upon which the applicant relies to have the proceedings set aside or corrected.

[33] Unless reviewed and set aside, a purportedly irregular or invalid administrative decision produces legally effective consequences. **OudeKraal Estate (Pty) Ltd v City of Cape Town** 2004 (6) SA 222 (SCA) @242

paragraph A – B; **Letsie-Rabotsoa v Principal Secretary Ministry of Communications and Technology** (CIV/APN/126/2014) 2021 LSHC 28 at paragraph 14.

[34] The institution of review proceedings under rule 50 triggers provision of the record of proceedings relevant to the impugned decision. The record contains all the relevant information relating to the impugned decision. *See***: Thuto Ntšekhe v Public Service Tribunal** C of A (CIV) 11/2019 para 19. This means that whatever information underlies the impugned decision must be provided and not only the minutes of the meeting as it has been done in *casu*. I will come back to the issue of record later in this judgment.

[**35**] A court that is approached to review an administrative action does not have a free hand to interfere in the administrative process, its powers are limited. As Lord Brightman stated in **Chief Constable of the North Wales Police v Evans** [1982] UKHL 10 [1982] WLR 1155, judicial review is concerned, not with the decision, but with the decision-making process. The Court stated that judicial review is not intended to take away from authorities the powers and discretions properly vested in them by law and substitute the courts as decision making bodies. Rather it is intended to see that the relevant authorities use their powers in a proper manner.

[36] In stressing the point that the function of reviewing court is to vet the challenged decisions for its regularity and not its wisdom, the court in **Esau and Others v Minister of Co-Operative Governance and Traditional Affairs and Others** [2021] 2 ALL SA 357 (SCA) para 7 quoted with approval the following passage by Laws J in *R v Somerset County Council, ex parte Fewings and Others*,[1995] 1 ALL ER 513 (QB) at 515 d – g:

> "Although judicial review is an area of the law which is increasingly, and rightly, exposed to a good deal of media publicity, one of its most important characteristics is not, I think, generally very clearly understood. It is that, in most cases, the judicial review court is not concerned with the merits of the decision under review. The court does not ask itself the question, "Is this decision right or wrong?" Far less does the judge ask himself whether he would himself have arrived at the decision in question. It is, however, of great importance that this should be understood, especially where the subject matter of the case excites fierce controversy, the clash of wholly irreconcilable but deeply held views, and acrimonious, but principled, debate. In such a case, it is essential that those who espouse either side of the argument should understand beyond any possibility of doubt that the task of the court, and the judgment at which it arrives, have nothing to do with the question, "Which view is the better one?" Otherwise, justice would not be seen to be done: those who support the losing party might believe that the judge has decided the case as he has because he agrees with their opponents. That would be very damaging to the imperative of public confidence in an impartial court. The only question

for the judge is whether the decision taken by the body under review was one which it was legally permitted to take in the way that it did".

[37] Innes CJ in **Johannesburg Consolidated Investment Co Ltd v Johannesburg Town Council** 1903 TS 111 at 115 said the following in dealing with the grounds of review:

> "Whenever a public body has a duty imposed on it by statute, and disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of the duty, this Court may be asked to review the proceedings complained of and set aside or correct them."

[37] Again, the court in **Shidiack v Union Government** 1912 AD 642 at page 651 to 652 formulated the grounds of review as follows:

> "There are circumstances in which interference would be possible and right. If for instance such an officer had acted mala fide or from ulterior and improper motives, if he had not applied his mind to the matter or exercised his discretion at all, or if he had disregarded the express provisions of a statute - in such cases the Court might grant relief. But it would be unable to interfere with a due and honest exercise of discretion, even if it considered the decision inequitable or wrong."

[**38**] In **Radebe v Minister of Law and Order and Another** 1987 (1) SA 586 at 595 Goldstone J referred to the judgment of the Full Court of the Transvaal Provincial Division in *Northwest Townships (Pty) Ltd v The Administrator, Transvaal, and Another 1975 (4) SA 1 (T) at 8C-G* delivered by Colman J. The judgment sets out the basis upon which a Supreme Court exercises its inherent power of review as follows:

> "It is well settled that when, by statute, a public official has been vested with jurisdiction to decide a matter affecting members of the public in the light of his own opinion of the relevant facts, or in the exercise of his own discretion, a Court is not entitled to interfere with that decision merely because it considers it to be wrong, or even if, in its view, the decision was an unreasonable one.
>
> Of the many cases which discuss and apply the rules of administrative law relating to the right of the Courts to overrule quasi-judicial or administrative decisions, a number were cited to us. I do not think, however, that I need go beyond the terms in which the relevant principle was formulated by Stratford JA in Union Government v Union Steel Corporation (South Africa) Ltd 1928 AD 220 at 237, a formulation which has been reiterated on many occasions since. A fairly recent application of it by the Appellate Division is to be found in The Administrator, Transvaal, and The First Investments (Pty) Ltd v Johannesburg City Council 1971 (1) SA 56 (A) at 80. What the learned Judge of Appeal said was that interference on the grounds of unreasonableness was justified only if the unreasonableness was so gross that there could be inferred

from it, mala fides or ulterior motive, or a failure by the person vested with the discretion to apply his mind to the matter. The last-mentioned possibility has been held, in other English and South African cases, to include capriciousness, a failure, on the part of the person enjoined to make the decision, to appreciate the nature and limits of the discretion to be exercised, a failure to direct his thoughts to the relevant data or the relevant principles, reliance on irrelevant considerations, an arbitrary approach, and an application of wrong principles."

[39] One of the complaints is that the Minister did not act with good faith. Good faith is an element of the principle of legality. It implicates impartiality, fairness and transparency. On the other hand, bad faith does not necessarily require dishonesty. However, it includes the wrongful use of power even if an official is not proved to have been dishonest. *See*: **C & M Fastners CC v Buffalo City Metropolitan Municipality** (1371/2017) [2019] ZAECGHC 22 (14 March 2019) at paragraph 67. In the context of administrative powers good faith means for legitimate reasons contrary to the natural sense of the words, they impute no moral obliquity. See W. Wade and Christopher Forsyth 1994 7th ed at page 439.

[40] The matter also revolves around interpretation of section 36 and section 44 of the Act. In interpreting statutory provisions and determining the intention of the legislature, it is indispensable that all the provisions should be read together. The intention here would be to have a comprehensive and

systematic appreciation towards its holistic perception. **Lesotho National Wool & Mohair Growers Association v Minister of Agriculture, Food and Security** (CIV/APN/184/18) [2018] LSHC 28 (12 June 2018);

[**41**] The court in **Natal Joint Municipal Pension Fund v Endumeni Municipality** [2012] ZASCA 13; 2012 (4) SA 2 at page 13-15 paragraphs 17 and 18 stated that:

> '… the general rule is that the words used in a statute are to be given their ordinary grammatical meaning unless they lead to absurdity. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production.'

[**42**] The approach in **Natal Joint Municipal Pension Fund**, *supra*, was confirmed by the Constitutional Court of South Africa in **Airports Company South Africa v Big Five Duty Free (Pty) Limited and Others** [2018] ZACC

33; 2019 (2) BCLR 165 (CC); 2019 (5) SA 1 (CC) para 29. Similarly, in the case of **Cool Ideas 1186 CC v Hubbard and Another** [2014] ZACC 16; 2014 (4) SA 474 (CC) para 28 the court succinctly summarized interpretation of statutes in the following manner:

> "A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely: (a) that statutory provisions should always be interpreted purposively; (b) the relevant statutory provision must be properly contextualised; and (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a) above."

[43] As part of the interpretive exercise, the apparent purpose to which a provision is directed must be considered and a 'purposive approach' adopted. *See*: **Motloung and Another v The Sheriff, Pretoria East and Others** (Case no 1394/18) [2020] ZASCA 25 (26 March 2020) at para 26.

DISCUSSIONS:

[44] Inasmuch as the Court is vested with the power to review the proceedings of all administrative bodies; a point of departure should always be the empowering statute. Thus, an application for review of an administrative decision ought to be considered in light of the law regulating administrative decision- maker.

[45] I now turn to consider the grounds of review in light of the applicable legal principles. Reskol's review is, amongst others, premised on the principles of natural justice, it being asserted that the Minister did not provide reasons underlying his decision not to renew the mining lease agreement. I cannot do otherwise than find that there is no merit in this contention. The Minister's letter of the 24th March 2021 communicating the decision not to renew the mining lease provides reasons for such a decision. In his letter the Minister states that –

> "After consideration of progress made for the past ten years, on the mining operations programme that was approved in accordance with the Mines and Minerals Act and your mining lease agreement, and your reasons for non – adherence, we remain unconvinced that it is in the best public interest to grand you more chance to develop Kolo mine.

> Further to this, having gone through your submitted reports, I believe your application does not satisfy the provisions of section 36(5)(a) (b) and (c) of the Act".[8]

[46] In addition**,** the Minister explained further in his letter dated the 11th June 2021 in what respect Reskol violated its obligations relevant to the Act and the mining agreement[9]. He clarified that Reskol failed to meet the "prescribed production timelines and quantities" and "the minimum maintenance of continuous operations in the year of renewal" as well as suspending mining operations without authorisation. The Minister seriously disputes that Reskol developed the mining area with reasonable diligence and that the mining operations are efficient and of beneficial use. Contrary to Reskol's assertion that it was not in default, the Minister maintains that Reskol was in default because it did not adhere to the mining operations programme. It bears repeating that the first ground of review that the Minister failed to give reasons for his decision and that this 'smacks of arbitrariness hence should be reviewed' falls to be dismissed. The Minister provided reasons for his decision as well as clarifications where same were sought by Reskol.

[47] The second ground of review that the Minister failed to enter into negotiations in good faith as enjoined by section 44(1) of the Act in that he

[8] Pleadings – Annexure A page 23
[9] Pleadings – Annexure C page27

failed to take into account legacy issues and COVID – 19 pandemic impact, thereby acting in bad faith and contrary to his obligations under the Act, also has to fail. Reskol applied for renewal of its mining lease agreement per its letter dated the 2nd July 2020 filed of record[10].

[48] I am convinced that at the time it made its application, Reskol was also aware that it had not performed as expected in terms of the mining agreement. In the covering letter to its application, Reskol stated that "In the application we have briefly set out the reasons for the delays over the period". There would have been no reason for Reskol to account for the delay if it had performed accordingly. Only the covering letter has been filed of record and not the application. As a result, the Court is not able to see if the reasons for the delays captured in the application still related to legacy and COVID -19 pandemic related issues. Be that it may, in his response letter dated the 24th March 2021, the Minister is clear that he considered progress made for the past ten years on the mining programme and reasons for non – adherence.

[49] It follows that the Minister considered whatever reasons were provided in the application for non – adherence to the mining programme. The legacy issues alluded to in the founding affidavit entails relocations of households and graves. Before it made its recommendation to the Minister not

[10]Pleadings – Annexure F page 32

to renew the mining lease, the Board considered these issues in its sitting of the 18th March 2021[11]. In its view, it is Reskol which should have attended to the legacy issues, but it failed inasmuch as it "did not relocate 12 households affected by the mine…despite being afforded a chance to relocate while at the same time continuing with mining operations" and "…it failed to resource identification and removal of all graves in the area, this lead to continuous intersection of bones during mining".

[50] Reskol did EIA and it knew it had obligation to remove houses and graves. The mining operations had to be suspended when Reskol was not discharging its obligations, so asserts the Principal Secretary[12]. It is only at the replying stage that Reskol argues that it only knew the extent of the works to be engaged and its modalities when it received EIA report a long time after signing the mining agreement[13]. Reskol does not provide a date when it received the report or the exact period that it had to wait for the EIA report from the date it signed the mining agreement. Most tellingly, it is again at the replying stage that Reskol seeks to shift the blame to the government and community for not fulfilling its obligations in relation to legacy issues.

[11] Pleadings – Annexure Mining 6 page 111
[12] Pleadings – page 51
[13] Pleadings – page 129

[51] Reskol received the record of proceedings underlying the impugned decision on the 21st July 2021.[14] The record is in a form of Board minutes and is not accompanied by underlying reports that were considered and informed the decision not to renew. However, the minutes are detailed and it is clear which factors were considered by the Board in relation to the legacy issues. That notwithstanding, Reskol did not exercise its right under rule 50(4) to amend the notice of motion or supplement its founding affidavit.

[52] Reskol was aware of the procedural right to amend its notice of motion and supplement is founding affidavit[15]. Had Reskol invoked rule 50(4) it would have been able to supplement its founding affidavit and tell this Court exactly which factors in relation to the legacy issues were not considered instead of sneaking new issues in the replying affidavit. Again, beyond the grounds for review that are canvased in the founding affidavit, there are further grounds of review that emerge in the replying affidavit to which I will not devote this judgment. It is trite and requires no authority that in motion proceedings a party must stand or fall by its founding affidavit.

[53] I now need to consider the correctness of the allegation that the Minister did not consider the negative impact of Covid – 19 on the mining operations. Indeed, this factor does not appear to have been considered looking

[14] Heads of Argument filed for Applicant – page 2
[15] Pleadings – page 21

at the minutes of the Board. But that is not the end of the enquiry. In its covering letter regarding renewal of the lease, COVID – 19 is not mentioned as one of the factors that affected the operations of the mine. I am not sure if it is reflected as such in the application itself.

[54] Mostly importantly, the respondents strongly argue that at the time that national lockdown was proclaimed in March 2020, Reskol had already put the mine under care and maintenance and could not even commence with stage 2, commercial production, in April 2019[16]. As a result, so the argument goes, Reskol cannot use COVID – 19 as an excuse for non – performance. I readily give credence to the respondents' argument for two reasons. Firstly, as early as the 3rd September 2018, Reskol wrote a letter informing the Minister that "the operations will have to be placed on care and maintenance from as early as October 2018…". [17]. Secondly, Reskol does not deny that the mine was already under care and maintenance when lockdown was proclaimed as a result of which it could not even commence with stage 2 in April 2019[18].

[55] In my view, Reskol is disingenuous in accusing the Minister of not having considered the impacts of COVID – 19. It clearly wants to hide behind COVID – 19 for non – adherence to the mining programme. At the time

[16] Pleadings – page 52
[17] Pleadings – Annexure E page 31. See also the letter from the Commissioner of Mines dated the 26th November 2018 to Reskol where the issue of putting the mine under care and maintenance is also raised.
[18] Pleadings – page 12 where Reskol addresses para 18 of respondents' answering affidavit.

COVID – 19 lockdown was proclaimed the mine was already under care and maintenance. This is exactly the Minister's contention in his letter which Reskol claims to have received on the 27th May 2021[19]. According to Reskol, the letter is dated the 24th May 2021. I cannot see the date clearly for the reasons that follow.

[56] The letter has two pages. However, except for the letterhead, handwritten date on which the letter was received and what appears to be reference and the date on which the letter was written, the first page is blank. The first sentence of the second page is incomplete as it emanates from the blank page. Be that as it may, I can still make sense of the Minister's contention from the remaining content in the second page of the letter.

[57] The file is voluminous and I only realised this shocking anomaly as I was preparing the judgment and with no opportunity to call for the original letter or ask Mr. *Mpaka*, Counsel for Reskol, what happened to the content in the first page. It could be there is a genuine explanation. Be that as it may, these being review proceedings, of material importance is the impugned decision and the reasons thereof as communicated by the Minister to Reskol in his letter dated the 24th March 2021. The Minister would ordinarily not be allowed to supplement the reasons for his decisions. *See*: **Jicama 17 (Pty) Ltd v West**

[19] Pleadings – page 12

Coast District Municipality 2006 (1) SA 116 (C) para 11. However, the principle is not inflexible as it has to yield to the principle legality[20].

[58] I consider the argument that "conditioning application of section 44 on the fulfilment of the requirements of section 36 is a warped application of the law". In my view, section 44 does not introduce performance assessment framework. It is not a mechanism through which the Board assesses the holder of a mining lease to see how he performed against the mining agreement. Rather, negotiations which the Board must initiate in good faith in terms of section 44(1) relate to the proposed project, in particular, they must cover "technical, financial and commercial aspects of the *proposed project*, including the Government participation" into the proposed project. Looking at the provision contextually as well as the purpose of subsection (2), it is obvious that negotiations provided for in this section are those intended for the parties to agree on the terms and conditions of a new mining agreement covering the aspects in subsection (1).

[59] The application for renewal of a mining lease agreement is made to the Board in terms of section 36(2) of the Act. The discretion to approve the application or not is that of the Minister in terms of section 36(5). Therefore, the

[20] Hendrik Diederick Pieterse N.O and another v Lephalale Local Municipality Case No. 79281/2014 para 45

scheme of the Act is clear that once the application is lodged, the Board must consider it and make recommendations to the Minister.

[60] In my view, if the Board, based on the material before it, is convinced that the applicant does not meet the requirements for renewal of the mining lease, it would be futile to enter into negotiations envisaged in section 44(1). Even if the Board were to enter into negotiations and agree terms and conditions with the applicant, that will not *per se*, entitle the applicant to renewal as long as other conditions for renewal are not met.

[61] I disagree with the submission made on behalf of Reskol that the respondents should have first considered section 36(d). Section 36(d) is not the only consideration. In terms of section 36(5) there are four requirements or factors which must be met for the Minister to exercise his discretion whether to approve the renewal or not. The Minister's discretionary powers in terms of this section are circumscribed because he "may approve the application for renewal *if* satisfied" of the four factors or requirements which are conjunctive. The requirements are joined by the term "and". Therefore, they must all be met or fulfilled for the Minister to grant his approval.

[62] The minutes of the Mining Board filed of record are elaborate on issues that were considered, and which militated against the renewal of the

mining lease agreement. What permeates the minutes as well as correspondence between the parties filed of record is the issue of non – performance by Reskol in terms of the mining lease agreement and the Act.

DISPOSITION:

[63] It is common cause that the lease was for ten years but that the mine only operated for two years, from 2016 to 2018, after which Reskol decided to put it under care and maintenance. The delay caused by the interdict and the suspension only accounts for 21 months. Reskol did not complete stage 1, preproduction mining, within eighteen months from the date of signature of the mining lease agreement. Again, Reskol put the mine under care and maintenance purportedly in preparation for stage 2, commercial production. According to the respondents such preparatory work was not undertaken as a result of which the mine never reached commercial production stage as expected[21].

[21] Pleadings – Annexure Mining 6 pages 110 to 111.

[64] The scheme of Act, in particular section 36, is to promote compliance with mining agreements and the Act, as well as ensuring that once allocated, a mining area is developed with reasonable diligence. It is to ensure efficiency in mining operations and beneficial use of mineral resources. Section 39 (1) of the Act amongst others places an obligation to a holder of mining lease to "commence production on or before the date referred to in the programme of mining operations as the date by which he intends to work for profit."

[65] The Minister decided not to renew the mining lease because Reskol was in default as it had failed to implement the mining programme in line with its mining agreement. Default in terms of the Act means "breach of mineral concession or any provision of this Act or relevant law". In terms of section 3(2) of the Act the "Minister shall ensure, in the public interest, that the mineral resources are investigated and exploited in the most efficient, beneficial and timely manner."

[67] In my view, the process followed by the Minister in arriving at his decision not to renew the mining lease agreement cannot be faulted. There is no evidence or factors placed of record to substantiate allegations of arbitrariness or bad faith on the part of the Minister. The allegation that there are factors that he did not take into consideration failed the test. The contention that the

respondents misapplied or conflated the provisions of section 44 and 36 is also devoid of merit. In the result, all the three grounds of review fall to be dismissed. Equally, there is no justification for a declaratory order or an order of mandamus which Reskol is seeking.

COSTS

[65] There is no reason why the costs should not follow the result

THE ORDER:

[66] In the circumstances the application is dismissed with costs**.**

_____

A.R. MATHABA J

Judge of the High Court

For the Applicant: Mr. T. Mpaka

For Respondents: Mr. T.E Mohloki