

MARIPE J.

**IN THE HIGH COURT OF THE REPUBLIC OF BOTSWANA
HELD AT MAUN**

Case No. MAHMN-000075-22

In the matter between:

GQWIHABA RESOURCES (PTY) LTD

Applicant

And

MINISTER OF MINERALS AND ENERGY

1st Respondent

ATTORNEY GENERAL

2nd Respondent

FILING SHEET

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1. Respondents' Heads of Argument.

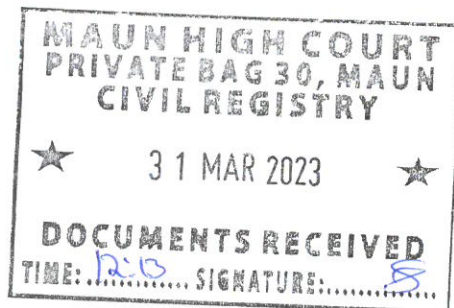
DATED AT MAUN ON THIS 30TH DAY OF MARCH 2023.



G.I. BEGANE

For/ Respondents
Attorney General's Chambers
Civil Litigation Division
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GABORONE



TO: REGISTRAR OF HIGH COURT

High Court
Private Bag 30

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AND TO: COLLINS CHILISA CONSULTANTS

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RESPONDENTS' HEADS OF ARGUMENT

BE PLEASED TO TAKE NOTICE that the Respondents file Heads of Argument upon which reliance shall be placed at the hearing of this application.

Ad Introduction

1. By Notice of Motion filed with the Honourable Court on the 22nd October 2022, the Applicant seeks a judicial review of the respondent's failure to renew its Prospecting License No. 020/2018.
2. The Respondents have opposed the application by arguing that the Applicant's Prospecting License's boundary encroaches into the Okavango Delta Heritage Site buffer zone, which is against the government deliberate decision to restrict prospecting and mining activities within the core and buffer zones of the delta, for protection of the World Heritage site against adverse impact on the outstanding universal value of the property.

3. It therefore is the Respondents' case that the delay to renew the Prospecting Licence No. 020/2018 is not illegal, unreasonable, irrational and arbitrary as alleged by the Applicant.
4. The Respondents aver on paragraph 13.9 of the Answering Affidavit that the Minister has not rejected the application for renewal of the Prospecting License in question. He is prepared to grant the renewal as long as the Applicant can meet the condition of realignment of the boundary of the area. Refer also to the contents of the letter labelled "**CCC 17**".
5. The Applicant has been reluctant to move their license from areas outside the buffer zone hence the delay to renew the Prospecting License.

Ad Issues Arising

6. The issue arising is whether the Applicant has made out a case for judicial review.

Judicial review

Kamuhanga v The Master of the High Court of Namibia (A 381/2010) [2013] NAHCMD 144 (30 May 2013)

"Judicial review has two aspects: First, it is concerned with ensuring that the duties imposed on decision-makers by law (which includes the Constitution) are carried out. A functionary who fails to carry out a duty imposed by law can be compelled by the High Court to carry it out. Secondly, judicial review is concerned with ensuring that an administrative decision is lawful, i.e. that powers are exercised only within their true limits. If a functionary acts outside the authority conferred by law, the High Court can quash his or her decision. This is the doctrine of ultra vires. If the decision is one that the decision-maker was authorised to make, the only question which can arise is whether

the decision is right or wrong. This involves a consideration of the merits of the decision.'

7. Amongst the leading cases on this subject is the English case of *Chief Constable of North Wales Police v Evans (1982) 3 All ER 141* wherein Lord Brightman at page 154 stated as follows;

"Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power."

See also *Autlwtse v Botswana Democratic Party and Others [2005] 1 BLR 230*;

Home Defenders Sporting Club v Botswana Football Association (2005) 1 BLR 400.

8. Lord Diplock as far as 1984 in *Council of Civil Servants Unions and Others v Minister for the Civil Service (1984) 3 ALL ER 935* at page 950 said;

"Judicial review has I think developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action are subject to control by judicial review. The first ground I would call illegality, the second irrationality and the third "procedural impropriety". That is not to say that further developments on a case by case basis may not in course of time add further grounds."

9. Lord Diplock's statement has been approved in this jurisdiction in many cases.

See;

Medical Rescue International Botswana Ltd v Attorney General of Botswana and Others MAHLB-0000605-05;

Attorney General v Kgalagadi Resources Development Company (Pty) Ltd (1995) BLR 234 (CA);

Good v Attorney General 92005) 2 BLR 337 (CA);

Raphethela v Attorney General (2003) 1 BLR 591.

10. In the Medical Rescue case, *supra* **Newman J** made reference to the citation of **Corbett J** in *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd 1988 (3) SA 132 at page 152* where the learned judge said;

“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 the statute and tenets of natural 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 misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones, or 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 aforesaid...Some of these grounds tend to overlap.”

11. In the case of *Arbi v Commissioner of Prisons and Another* (1992) BLR 246 (CA) at page 255 paragraphs C - H.

“Generally, our law is clear that our courts will not superimpose their own discretion upon that of an administrative body. However, it has been acknowledged that there are four situations when the Court will be justified to substitute the decision of the administrative authority with their decisions. These situations are as follows:

- i) Where the end result is in any event a foregone conclusion and it would be a waste of time to order the tribunal or functionary to reconsider the matter,*
- ii) Where further delay would cause unjustifiable prejudice to the applicant,*
- iii) Where the tribunal or functionary has exhibited bias or incompetence to such degree it would be unfair to require the applicant to submit to the same jurisdiction again and*
- iv) Where the court is in as good a position to make the decision itself.”*

Ad Illegality

12. It is common cause that in 2014, the Okavango Delta was declared a World Heritage Site by the United Nations Educational, Scientific and Cultural Organisation (UNESCO). By virtue of this status the Delta was subject to protection from activities that could compromise the property, including exploration and mining activities. When the Delta was nominated for registration as a world Heritage site, a buffer zone was established around the delta.

13. Contrary to the Applicant's assertion, the Minister's decision as contained in letter annexure "**CCC17**", was not a rejection to renew the license. The Minister simply advised as follows:

"I wish to reiterate my willingness to consider a renewal application as long as the area applied for falls outside the Okavango Delta buffer zone".

14. The Respondents expected the Applicant would cooperate and reach a compromise by satisfying the conditions laid out on page 2 of annexure "**CCC 17**".

15. Under no circumstances would the Minister have arrived at a different conclusion when the Applicant had not satisfied the conditions set.

16. It is respectfully submitted that the action of the Minister to not renew the Prospecting License under the given circumstances was not unlawful.

Ad Irrationality

17. According to paragraph 29 of the Answering Affidavit: *Gcwihaba Resources have agreed to voluntarily relinquish mineral concessions falling within the buffer zone of the Okavango World Heritage Property as evidenced by the recent application for renewal in 2021 in which they revised in their application, coordinates of boundaries of Prospecting Licences Nos. 021/2018 to 024/2018 to fall outside the buffer zone and consequently renewal of the licences was granted by the Minister on 30th November 2021.*

18. In view of the above it is submitted that the Minister has not misdirected himself with regards to prospecting in the buffer zone.

Ad Improper Purpose

19. The decision being challenged is contained in letter annexure **CCC 17**. It is respectfully submitted that nothing thereon suggests that the Minister has rejected the Applicant's application. The letter states in clear terms that the application could be considered on condition that certain conditions are satisfied.

Ad Disregard of Relevant Considerations

20. Paragraph 9 of the Founding Affidavit seeks to address the issue of the balance of convenience. It is our humble submission that in balancing the commercial interest of the applicant against the social and economic interests of the nation it is abundantly clear that the balance of convenience favours the 1st and 2nd respondents. The public interest demand that a natural gift like the Okavango Delta and its inhabitants should be jealously protected from any form of destruction. Whatever inconvenience that the applicant may suffer is of a financial nature and pales into insignificance compared to the economy of the country since the economy of Botswana is amongst others, tourism driven.

21. Hence we aver at paragraph 13.5 of the Answering Affidavit *that continuation of encroachment by Applicant's Prospecting License into the buffer zone of a World Heritage site exposes Botswana to risks of adverse publicity from International Environmental Pressure Groups, possible sanctions or boycotts as a result of possible perception that Botswana Government is flouting guidelines for protection of World Heritage Sites by continuing to license prospecting activities within the buffer zone without an approved Environmental Assessment Statement.*

22. We therefore humbly submit that whatever inconvenience that the applicant may suffer is one of a financial nature and pales into insignificance compared to the economical one the country enjoys over the Okavango delta.

Ad the Right to be heard

23. It is our humble submission that the Applicant was at all times afforded the right to be heard. See paragraphs 17 to 22 of the Answering Affidavit where it is averred that several engagements with the Applicant's representatives were made prior to the parties reaching a stalemate. See also the Minister's letter, Annexure **CCC 17**.

Ad Compensation

24. The damages sought by the Applicant are unreasonable and it is not clear what informs the claim. The Applicant has not held any mining rights so as to be in a position to claim the value of the mineral resources, since there was no guarantee mining rights will be granted over the area in question.

25. We respectfully submit that the claim lacks bases and should be struck out.

Court's Discretion

26. It is our humble submission that the court has a discretion to refuse the granting of the reliefs being sought even if all the requisites for the granting thereof have been established. In the instant case the Court has to weigh the commercial interest of the Applicant *vis-a vis* public or national and international interest, which the country enjoys over the Okavango delta. The applicant is exclusively focusing on its personal commercial interest. See paragraph 9 of the Founding Affidavit.

27. In the event that the court comes to the conclusion that the applicant has proved the requisites for a review it should refuse to grant the reliefs as they are purely based on personal interest which public or national and international interest far outweigh.

See: Knox D’Arcy Ltd v Others LN v Jameson & Others 1996 (4) SA 348 (AD)

28. In conclusion we pray that the application be dismissed with costs.

DATED AT MAUN THIS 30th DAY OF MARCH 2023.



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